

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11415 OF 2015

1. Puja D/o Ram Jadhav
Age : 16 years, Occu: Education,
2. Pratiksha D/o Ram Jadhav
Age : 13 years, Occu: Education,
3. Rutuja D/o Ram Jadhav
Age : 11 years, Occu: Education,
4. Asha D/o Ram Jadhav
Age : 8 years, Occu: Education,
5. Seetabai w/o Ram Jadhav
Age : 35 years, Occu: Household
and Agriculture,

All R/o Kininaware Tq. Ausa Dist. Latur
petitioners no. 1 to 4 are minor
under Guardianship of petitioner No. 5
and petitioner no. 5 given Power of Attorney
to Arjun s/o Bhairavnath Suryanshi
Age 40 years, Occu: Agri,
R/o Shiur Tq. & Dist. Latur.

...Petitioners

Versus

1. Ram s/o Sampati Jadhav
Age 40 years, Occu: Nil,
R/o Kininaware Tq. Ausa
Dist. Latur.
2. Shalubai w/o Sitaram Gaikwad
Age 57 years, Occu: Business & Household
R/o as above.

3. Sitaram S/o Yashwant Gaikwad
Age : 60 years, Occu: Agri,
R/o as above. ...Respondents
...

Mr. M. L. Dharashive, Advocate for petitioners
Mr. Sachin Deshmukh, Advocate for respondents
no. 2 and 3.
...

[CORAM: SUNIL P. DESHMUKH, J.]
Date: 15th June, 2017

ORAL JUDGMENT:

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.
2. Writ petitioners challenge order dated 9th September, 2015 passed by Joint civil judge, junior division, AUSA on exhibit-44 in civil miscellaneous application no. 40 of 2011, seeking condonation of delay in presenting application for restoration of regular civil suit no. 276 of 2007, which had been dismissed-in-default on 21st September, 2010. Since that date, eight months' delay has been caused to lodge application for restoration of suit.
3. It transpires on hearing that, it is petitioner no. 5, who

has been at the helm of affairs of litigation, and due to medical problem, she was referred to take treatment at Mumbai and Pune and as such, she was unable to attend the court, and that could not keep track of developments of the proceedings, as such, delay has been caused which is neither deliberate nor intentional. Additionally, it appears that, witnesses had not been examined. While considering application for condonation of delay, learned judge had been swayed by consideration that original certificate had not been placed on record and photocopy of medical certificate has been produced without permission to lead secondary evidence, it is inadmissible evidence. It is in this context, the application was turned down and rejected on the background that the suit had been instituted in 2007 by petitioners for partition and separate possession, which had been dismissed-in-default on 21st September, 2010.

4. It also appears that, unsound health condition of petitioner no. 5, is the matter which has been reason given for delay in making application for restoration after dismissal of suit in default. In support of the same, petitioner had given some material in the form of photocopy of the medical certificate and some documents.

Although respondents have resisted delay condonation, yet, facts and circumstances are not that no material had been produced on record on behalf of petitioner no. 5. May be is deficient prosecution of suit, yet, request for condonation of delay the same would not be a relevant consideration. The events, occurrences and scenario, calls for attention. While considering delay condonation application, guidelines appearing under the judgments of the Supreme Court particularly those in the case of *Collector, Land Acquisition, Anantnag V/s. Ms. Katiji and others* reported in AIR 1987 SC 1353, and in the case of *Esha Bhattacharjee V/s. Managing Committee of Raghunathpur Nafar Academy and others* reported in (2013) 12 Supreme Court Cases 649 may have to be taken into account. Additionally, it may not have on account of petitioner having any particular delay.

5. Learned counsel Mr. Deshmukh appearing for respondents no. 2 and 3, purports to oppose, however, is not in a position to counter veracity of reasons causing delay.

6. As such, taking overall view, it would be expedient to

consider the request made in exhibit-44 in civil miscellaneous application no. 40 of 2011 in regular civil suit no. 276 of 2007, and grant the same.

7. In view of aforesaid, writ petition is allowed in terms of prayer clause (B) and stands disposed of.

8. Rule is made absolute accordingly.

[SUNIL P. DESHMUKH, J.]

vdk