

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 12325 OF 2015

BHAUSAHEB RANGNATH THANGE
VERSUS
UMRAOSING DEOCHAND GUJAR DIED THROUGH LRS RUPABAI
UMRAOSING GUJAR AND OTHERS

...
Advocate for the Petitioner : Shri Kulkarni Mukul S..
Advocate for Respondent 3 : Shri C.R.Deshpande.
...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 04th October, 2017

Per Court:

1 The Petitioner is aggrieved by the order dated 29.08.2015 passed by the Appellate Court by which Miscellaneous Civil Appeal No.70/2013 has been rejected. Consequentially, the orders of the Trial Court dated 19.06.2012 dismissing the suit in default under Order 17 Rule 2 of the Code of Civil Procedure and dated 18.11.2013 refusing to condone the delay of 83 days in filing the restoration application, have been sustained.

2 Respondent Nos.1, 2, 4 and 5, despite service of court notice, have not appeared in this matter.

3 I have heard the learned Advocates for the respective sides at length.

4 Shri Deshpande, learned Advocate for Respondent No.3, submits that since the Trial Court has dismissed the suit under Order 17 Rule 2, the Miscellaneous Civil Appeal filed by the Petitioner under Order 43 Rule 1 was not maintainable. He submits that Order 17 Rule 2 is not mentioned under Order 43 Rule 1 and hence, in the absence of any order falling within the categories under Rule 1 of Order 43, the Miscellaneous Civil Appeal was untenable.

5 Shri Kulkarni, learned Advocate for the Petitioner, submits that once the order was passed by the Trial Court dismissing the suit in default under Order 17 Rule 2, it automatically would refer to Order 9 and especially Rule 8 of Order 9 of the Code of Civil Procedure. The order of "Dismissed in Default" (DID) under Order 17 Rule 2 would be referable to Order 9 Rule 8 and hence, the Miscellaneous Civil Appeal was maintainable.

6 I find that Order 17 Rule 2 enables the Court to dismiss or dispose of the suit on the failure of the parties in attending the proceedings, under any of the modes prescribed under Order 9. This would, therefore, indicate that an order passed under Order 17 Rule 2 dismissing the suit in default, would be deemed to be an order passed under any of the modes under Order 9.

7 On referring to Order 9, it is apparent from Rule 8 that where the Defendant appears and the Plaintiff does not appear when the suit is

called on for hearing, the Court would make an order and dismiss the suit, unless the Defendant admits the claim made by the Plaintiff. Rule 9 under Order 9 would prohibit the Plaintiff from instituting a fresh suit. However, as a consequence of the order being deemed to have been passed under any of the modes under Order 9, Order 43 Rule 1 (c) providing for an appeal against an order under Rule 9 of Order 9 rejecting an application, would be challengeable by way of filing an appeal.

8 Under Rule 9 of Order 9, while prohibiting the Plaintiff from instituting a fresh suit when a suit is wholly or partly dismissed under Rule 8, it is provided that he would apply for an order to set aside the dismissal and if he satisfies the court of a sufficient cause for non appearing, the court could set aside the order of dismissal.

9 In the instant case, such an application moved by the Petitioner before the Trial Court for seeking setting aside of the DID order is deemed to be under Order 9 Rule 9. This would bring the case of the Petitioner under Order 43 Rule 1 (c) since he is challenging the order passed by the Trial Court under Order 9 Rule 9 refusing to condone the delay on the ground that the reasons cited are not satisfactory. The Miscellaneous Civil Appeal filed by the Petitioner before the Appellate Court was, therefore, maintainable.

10 The learned Advocate for Respondent No.3 has strenuously defended the impugned order of the Appellate Court by which the appeal

of the Petitioner/ Plaintiff was dismissed and the refusal of the Trial Court to condone the delay of 83 days was sustained.

11 It is trite that unless laches are attributable to the conduct of the Applicant and if it is noticed that the delay caused was with oblique or ulterior motive, the application for condonation of delay would not be entertained. However, if such attributes are not made with reference to the conduct of the Applicant, the court is obliged to consider whether, the refusal to condone the delay would render a litigant remedy-less.

12 In the instant case, the delay of 83 days can neither be termed as being deliberate or inordinate. The Honourable Supreme Court in the matters of *Collector, Land Acquisition, Anantnag v/s Mst.Katiji*, **AIR 1987 SC 1353** and *Esha Bhattacharjee v/s Managing Committee of Raghunathpur Nafar Academy*, **(2013) 12 SCC 649**, has held that a pragmatic approach is to be adopted while condoning the delay rather than taking a pedantic view.

13 Considering the above and on scrutinizing the impugned order of the Appellate Court, it is obvious that the Appellate Court has travelled beyond the issue of condonation of delay and rather than taking a pragmatic approach, has refused to condone the delay on the ground that sufficient reasons are not cited. The impugned order is, therefore, perverse and erroneous.

14 In the light of the above, this Writ Petition is allowed. The

impugned order dated 29.08.2015 is quashed and set aside. Miscellaneous Civil Appeal No.70/2013 stands allowed and delay of 83 days caused by the Petitioner in filing the application for restoration is, therefore, condoned. Consequentially, Civil Miscellaneous Application No.255/2012 filed by the Petitioner before the Trial Court seeking condonation of delay of 83 days stands allowed and the order of the Trial Court dated 18.11.2013 is quashed and set aside.

15 Needless to state the Trial Court would now consider the restoration application of the Petitioner/ Plaintiff filed against the order dated 19.06.2012, on it's own merits.

kps

(RAVINDRA V. GHUGE, J.)