

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.3909 OF 2015

Shri. Ashok Manilal Shaha Petitioners
(deceased) thru' LRs Purnima
Ashok Shaha & Ors.

Vs.

Shri. Ravikumar Rajaram Kamble Respondents
& Ors.

Mr. Girish R. Agrawal for the Petitioners.
Mr. Vaibhav P. Patankar for Respondent No. 6.

Coram : Smt. Sadhana S. Jadhav, J.
Date : 6th December, 2017

P.C.:

1 Heard. Rule. Rule made returnable forthwith by
consent of the parties. None appears for respondent nos. 1 to 5,
although notices are served.

2 The petitioners herein question the correctness of the order dated 6th December 2014 passed by 4th Joint Civil Judge, Senior Division, Nashik, thereby rejecting the application seeking condonation of delay in filing the restoration application. The petitioners herein were the plaintiffs in Regular Civil Suit No. 628 of 2002 seeking injunction. The application filed below Exhibit 5 was decided on 11th February 2005. The parties and their advocate had remained absent and hence, by the judgment and order dated 24th July, 2007, the suit was decided by the learned Judge. The suit was dismissed for non-prosecution.

3 An application for restoration of suit was filed on 4th January 2012. It is pertinent to note that it was not mentioned in the said application that the said application was filed under Section 5 of Limitation Act. Neither, it was mentioned that the application is filed under Order 9, Rule 13 nor Section 5 of the Limitation Act was mentioned. With the permission of the court, the said amendment was carried out on 26th June 2014, wherein with the permission of the court, it was stated that the application is under Section 5 of the Limitation Act. The delay was of 4 years and 5 months for filing the application seeking restoration.

4 Perused the application seeking condonation of the delay. It is stated in the said application that the application below Exhibit 5 was granted on 11th February 2005. It is also stated that the plaintiffs were regularly meeting the advocate and that on 11th December, 2011, the defendant no. 6 had measured the lands. The plaintiffs i.e. the present petitioners have then met the advocate on 12th December, 2011 and had checked the diary of the advocate. It had then transpired that the suit has been dismissed on 24th July 2007. It was specifically contended that there is a delay since there was negligence on the part of the advocate representing the petitioners. The application seeking restoration was filed alongwith an application seeking condonation of delay on 4th January 2012. The provisions under which the application was filed were mentioned after 2 years and 6 months i.e. on 26th June 2014. The learned counsel for the petitioners has argued the matter at length and has drawn attention of this court to the Roznama of the said suit. Perusal of the Roznama shows that the suit was filed on 29th

December, 2002. The application below Exhibit 5 is allowed on 11th February 2005. The Roznama shows the various dates on which the plaintiffs and their advocate remained absent and therefore the matter was adjourned.

5 It is further pertinent to note that the learned court has rightly observed that the issues were framed on 11th March 2005. The adjournment applications were filed on behalf of the plaintiffs below Exhibit 25 and 26. The plaintiffs had chosen to remain absent for more than 20 dates. The learned court has rightly observed that in the application seeking condonation of delay, the plaintiffs have not examined advocate, Shri. Jadhav, who was representing them and therefore it cannot be held that there was negligence on the part of the advocate. Since, no reasons were assigned for condonation of delay, the application was rightly rejected on 6th December 2014.

6 The learned counsel for the petitioners has vehemently argued that the court ought to have taken a lenient view. He has prayed for leniency at this stage. The learned counsel for the petitioners submits that by virtue of Order 9, Rule 4, the plaintiffs can file fresh civil suit on same cause of action, however, that may entail multiplicity of the proceedings.

7 It was incumbent upon the plaintiffs to assign plausible explanation for the inordinate delay in filing the restoration application. However, except blaming the advocate, no other reasons were assigned. The court cannot assume that there was negligence on the part of the advocate. It is, in these circumstances

that the petition deserves to be dismissed. However, the petitioners would be at liberty to file appropriate proceedings, which may be decided in accordance with law.

(*Smt. Sadhana S. Jadhav*, J)