

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6758 OF 2012

Umesh Maruti Morbale
And Ors

...Petitioners

Versus

Vishnu Bhau Surange
And Ors

...Respondents

....

Mr.Tushar Sonawane, Advocate for the Petitioners.

....

CORAM : R. G. KETKAR, J.

DATE : 10th FEBRUARY, 2017

P.C.

1. Heard Mr.Tushar Sonawane, learned Counsel for the petitioners, at length. Rule. None appears for the respondents, though duly served.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 4.5.2012 passed by the learned Civil Judge, Junior Division, Ajara in Civil Misc. Application No.6/2011. By that order, the learned trial Judge rejected the application filed by the petitioners for condoning the delay.

3. Smt.Hausabai Ganpati alias Babaji Jadhav along with

Maruti Morbale instituted R.C.S. No.85/1995 against the respondents, hereinafter referred to as the 'defendants' for declaration that the properties described in paragraph-1 of the plaint are owned by the plaintiff No.1 and for perpetual injunction restraining the defendants from causing obstruction to the plaintiffs' possession. Plaintiff No.2 Maruti was murdered on 27.5.1996. No steps were taken for bringing L.Rs of plaintiff No.2 Maruti on record. The suit stood abated qua plaintiff No.2 on 13.6.1997. Ultimately the suit was dismissed in default on 6.8.1997.

4. The petitioners herein filed application for restoration on the ground that after murder of plaintiff No.2, they have abandoned the village to save their life because of fear to their life. They could not apply to the Court for restoration of the suit. Plaintiff No.1 Hausabai had executed Will in their favour. She died on 1.11.2004. The plaintiffs, therefore, took out application for restoration of the suit as also application for condonation of delay of 13 years 6 months and 25 days in filing the application. By the impugned order, the learned trial Judge has rejected the application.

5. In support of this Petition, Mr. Sonawane has invited my attention to the application filed by the petitioners for condoning the delay. He submitted that at the time of death of plaintiff No.2, they were minors and because of fear to their life they left the village. Plaintiff No.1 had executed Will on 5.2.2002 in their favour. She died on 1.11.2004. Copy of the Will was handed over by one Ananda Sagar to them on 25.12.2010. After getting information of the suit, they made application for certified copies on 14.2.2011. The certified copies were received on 2.3.2011 and the present application is filed on 31.3.2011.

6. He submitted that the respondents did not contest the application in the trial Court and the application was decided exparte. He submitted that on 5.9.2012, this Court issued notice to the respondents. Petitioner No.1 Umesh was murdered on 17.10.2012. He relied upon the decision of Apex Court in the case of ***N. Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123*** to contend that the primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that the parties

do not resort to dilatory tactics, but seek their remedy promptly. He submitted that the length of delay is no matter, acceptability of the explanation is the only criterion. He submitted that in the facts and circumstances of the present case, though there is delay of 13 years 6 months and 25 days, the learned trial Judge should have allowed the application more so when the respondent did not contest the application.

7. I have considered the submissions advanced by Mr.Sonawane. I have also perused the material on record. Office remark dated 15.11.2016 shows that respondents No.1 and 2 are duly served. However, none appears on their behalf. Even in the trial Court, respondents No.1 and 2 did not appear. Application for condonation of delay was heard exparte. For the reasons stated in the application for condonation of delay as also having regard to the fact that pending the Petition, petitioner No.1 Umesh was murdered on 1.7.2012, it cannot be said that the reasons mentioned in the application that the petitioners left the village on account of fear of their life can be said to be frivolous reason. Said reason is in fact substantiated as during pendency of the petition petitioner No.1 was murdered. In view of the decision of Apex Court in **N.Balakrishnan (supra)** the

delay deserves to be condoned. Hence, the following order :

- i] Impugned order is set aside. Civil Misc. Application No.6/2011 for condonation of delay stands allowed and the delay is condoned. The learned trial Judge will proceed to decide the application for restoration of the suit after issuing notices to the respondents.
- ii] Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)