

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

WRIT PETITION NO.5626 OF 2015

Shri Shankar Shivappa Davane & Anr.	...Petitioners
vs.	
Smt. Akkatai Soma Kamble & Ors.	...Respondents

Mr. Amit B. Borkar for the Petitioners.	
None for the Respondents.	

CORAM : SMT. SADHANA S. JADHAV, J.
DATE : 22nd November, 2017

P.C.:

. Heard. Rule. Rule is made returnable forthwith. None appears for the Respondents although served.

2. The Petitioners herein happen to be the original Defendant Nos.1 and 2 in Regular Civil Suit No.75/2005. The suit was filed for partition and possession. The suit was decreed by judgment and order dated 29/2/2008. The Defendants were held to be entitled to 1/8th share in the suit land. The Petitioners herein filed an Appeal on 16/7/2008 along with application seeking condonation of delay. The said application seeking condonation of delay is rejected by order dated 6/2/2013.

3. The learned Court has observed that the suit was for partition and possession. The Defendant No.1 had failed to file his written statement though he had appeared through his advocate and Defendant No.2 though duly served did not appear. The suit proceeded ex-parte against the Defendants. It is further observed that the Petitioners had not given cogent and convincing reasons for seeking the relief of condonation of delay. Hence the application was rejected.

4. Perused the application filed by the Petitioners seeking condonation of delay. It was specifically stated that Defendant No.1 was 77 years old at the time of institution of the suit. That there was lack of communication with the advocate representing them. The Petitioners happens to be illiterate. They had approached the advocate but he had informed them that the suit had been decreed. It was submitted in the application seeking condonation of delay that the earlier suit filed by the Plaintiff i.e. RCS No.109/1984 for partition and possession was dismissed for want of prosecution. There was suppression of facts. The suit was decreed by order dated 29/2/2008 and the Petitioners had filed an application seeking certified copies on 1/4/2008 and had received the same from advocate on 16/7/2008 therefore there was delay of 30 days in filing the appeal. Learned counsel for the Petitioners submits that the impugned order is based on presumptions and conjectures and that the matter would have to be remanded to lower Court for afresh hearing. This contention cannot be considered at the time of deciding the application seeking condonation of delay. The learned counsel for the Petitioner further submits that appeal would be decided on merits of the case and therefore the said observation was unwarranted.

5. Taking into consideration the age of the Petitioner at the time of institution of the suit itself and the status of the parties, the order dated 6/2/2013 deserves to be quashed and set aside. The condonation of delay is the statutory right accrued upon the litigant and same cannot be denied. In the interest of justice, delay ought to have been condoned. Hence, the order dated 6/2/2013 passed by the District Judge, Gadhinglaj is hereby set aside. The learned Trial Court shall condone the delay and consider the appeal on its own merits subject to the condition that the Petitioners deposit cost of Rs.2,000/- on or before 28/12/2017.

6. Petition is allowed. Rule is made absolute in the above terms.

(SMT. SADHANA S. JADHAV, J.)