

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13527 OF 2017

Arun Krushnaji Pawar	]	
Through his Power of Attorney Holder	]	
Anjalu Arun Pawar	]	
Age : 56 years, Occ. Household,	]	
R/of Dattachaya Housing Society,	]	
Shahupuri, Satara, Dist. Satara.	]	 Petitioner

Versus

1. Mariyambi Ayub Mesman	]	
Age : 65 years, Occ. Household,	]	
	]	
2. Tabassum Ayub Mesman	]	
Age : 35 years, Occ. Household,	]	
	]	
Both residents of Plot No.11, Sambhaji Nagar,	]	
Taluka and District Satara	]	 Respondents

Mr. Manmath S. Athalye for the Petitioner.

Mr. V.S. Talkute for the Respondents.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 18TH DECEMBER 2017.

ORAL JUDGMENT :

1. Rule. Rule is made returnable forthwith. Heard finally, at the stage of admission itself, by consent of Mr. Athalye, learned counsel for the Petitioner, and Mr. Talkute, learned counsel for the Respondents.

2. By this Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 21st November 2017 passed

by the Joint Civil Judge, Senior Division, Satara, thereby dismissing the Civil Miscellaneous Application No.9 of 2017. The said application was filed by the present Petitioner for condonation of delay of 807 days in filing the application for restoration of the Restoration Application.

3. The case of the Petitioner is that, the Respondents herein have filed a Special Civil Suit bearing No.140 of 2007 against him and his two brothers for recovery of possession of the suit property on the ground of non-payment of rent and bonafide need. Petitioner was Defendant No.3 in the said Suit. The Suit proceeded ex-parte, as none of the Defendants appeared. According to the Petitioner, on the assurance given by his brothers that they would make proper representation in the trial and his presence was not necessary, he remained unaware of the proceedings under bonafide impression. However, as the Suit came to be decided ex-parte by the Judgment and Order dated 6th October 2008, the Miscellaneous Civil Application No.11 of 2009 was moved by the Petitioner and his brothers for setting aside the ex-parte judgment. During pendency of the said application, in pursuance of the family arrangement between him and his brothers, the suit property came to his share. However, since 2010, Petitioner also started suffering from serious ailments like heart trouble, kidney stone, which put restrictions on his movements. Further he also suffered from forgetfulness, the decease of parkinson and various other mental ailments like the anxiety

disorder, as a result of which, he could not attend hearing of Miscellaneous Civil Application No.11 of 2009. Hence, it came to be dismissed for default on 29th October 2014. Petitioner came to know about the same only when the Bailiff came to execute possession warrant. Immediately thereafter, Petitioner contacted his brothers and then filed the Civil Miscellaneous Application No.9 of 2017 before the Trial Court for condonation of delay of 807 days in filing the application for restoring the Restoration Application.

4. In support of his application, Petitioner examined himself and two Doctors; one Dr. Ravindra Harshe and another Dr. Dnyanesh Kharade. Petitioner has also examined his wife, who is his Power of Attorney Holder. The Trial Court, after appreciating the evidence on record, held that, no sufficient ground is made out to explain the delay, which was not only considerable but inordinate and, accordingly, rejected the said application.

5. While challenging this impugned order of the Trial Court, the submission of learned counsel for the Petitioner is that, the Trial Court has not relied upon the evidence of Petitioner's wife on the count that, she being power of attorney holder, her evidence needs to be confined or restricted only to the facts known to her and she is also not aware of the facts. The Trial Court further held that, the evidence of both the Medical

Practitioners do not disclose that Petitioner was totally unable to attend the proceedings on account of his ailments. Accordingly, the Trial Court found that absolutely no sufficient cause was made out to condone the delay and hence rejected the application. According to learned counsel for the Petitioner, the impugned order passed by the Trial Court, therefore, calls for the interference; especially when some facts have remained unchallenged on record.

6. Per contra, learned counsel for the Respondents has supported the impugned order for the reasons stated therein.

7. In this case, it is undisputed position that, along with the Petitioner, his two brothers were also very much parties to the Suit filed by the Respondents. It is also pertinent to note that, along with the Petitioner, his two brothers had filed application for restoration of the Suit, when the Judgment was passed ex-parte. Assuming for the sake of arguments that, the Petitioner was unable to look after the said proceedings or he was given some assurance, there is no explanation as to why his two brothers did not pursue the said Restoration Application or even the Suit. As per the case of the Petitioner, the suit property was given to his share in the meanwhile and, therefore, they did not pursue the Court proceedings. To substantiate this case, at-least, there should be some material on record, but no material is produced on record to

that effect and, therefore, one can conveniently consider it as a convenient plea taken to dodge the ex-party decree of eviction.

8. Moreover, to substantiate the reason given by the Petitioner for not pursuing Restoration Application, Petitioner himself has not entered into witness box, but relied on the evidence of his wife, giving her the power of attorney. It was for the Petitioner himself to depose about the facts, which were exclusively within his knowledge; especially when the evidence of both the Doctors clearly go to show that the Petitioner was not unable to do so, as the ailments from which he was suffering were not such that they had made him bed-ridden. The evidence of his wife also clearly goes to show that the Petitioner was very much looking after the shop of Pharmacy and he was attending the same. Even the license of the said shop stands in his name and he has renewed the same. She has admitted that she is not herself a 'Pharmacist'. Therefore, it follows that her husband, i.e. the Petitioner, is still looking after the work as 'Pharmacist' and, therefore, the case made out that, on account of his ailments, he was not in a position to look after the court proceedings of Restoration Application, cannot be accepted at all.

9. Even as regards the evidence of Dr. Ravindra Harshe, he has admitted that, whatever the medicines which are being given to the Petitioner are only to reduce his anxiety. He has also admitted that, the

heart ailment, from which the Petitioner is suffering, is not of a serious nature. The evidence of Dr. Shaikh, who is examined to prove that the Petitioner was suffering from mental ailment, goes to reveal that the Petitioner is suffering from Organic Brain Syndrome i.e. he is suffering from anxiety disorder. However, in his cross-examination, he has admitted that, the Organic Brain Syndrome is not an illness.

10. Moreover, if the Petitioner can run the Chemist Shop, which requires the person to be fully in his senses and in a proper state of mind in order to give the medicines as per the prescription, then, it can hardly be accepted that he was not in a position to come before the Court to give instructions to his counsel for the purpose of pursuing the Restoration Application.

11. Thus, on the face of it also, the reasons given by the Petitioner for condonation of delay being not sufficient, the Trial Court was fully justified in rejecting such application; especially when the application is filed not by other two brothers of the Petitioner, who were very much parties to the Suit, but by the Petitioner alone and, that too, without producing any material on record to show that any family arrangement was arrived at between the parties in which the suit property came to his exclusive share.

12. The impugned Judgment and Order passed by the Trial Court, therefore, does not call for any interference and hence, this Writ Petition stands dismissed.

13. Rule is discharged.

[DR. SHALINI PHANSALKAR-JOSHI, J.]