

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

WRIT PETITION NO. 4281 OF 2017

1. Ishwar Ramkisan Barwal,
Age : 53 years, occup. Business,
R/o Lalwan colony, Padampura,
Aurangabad
2. Gajanan Ramishan Barwal,
Age : 58 years, occup. Business, .. Petitioners/
R/o Lalwan colony, Padampura, Ori. Defendants
Aurangabad no. 1 and 2

versus

Shamsunder Ramvilas Lakhotia,
Age : 60 years, occu. Medical .. Respondent/
Practitioner, R/o Wadwani, Ori. Plaintiff
Taluka : Majalgaon, District: Beed

Mr S.V. Adwant, Advocate with Mr J.C.Patil, Advocate for petitioners
Mr V. S. Palsikar, Advocate for respondent

CORAM : SUNIL P. DESHMUKH, J.

DATE : 28th August, 2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for parties finally by consent.

2. This writ petition has been moved by defendants no. 1 and 2, in regular civil suit no. 386 of 2009 questioning propriety and validity of order dated 06-01-2017 whereunder the 4th joint civil judge, junior division, Aurangabad has dismissed miscellaneous

application requiring judicial inquiry bearing no. 183 of 2014 filed by present petitioners seeking condonation of delay caused in making application for setting aside ex-parte decree in the suit.

3. Learned counsel Mr Adwant appearing on behalf of petitioners – original defendants no. 1 and 2 submits that petitioners had been going through harrowing times and had not been able to prosecute proceedings in aforesaid suit and eventually were unaware of the decree being passed in the suit. During the stressful days while they received summons of execution proceedings, an application had been moved by them for setting aside ex-parte decree under Order IX, rule 3 of the Code of Civil Procedure, 1908. However, in the process, there had been delay of about ten months. Learned counsel submits that seemingly, there may be an impression about litigation being prosecuted by petitioners haphazardly. He submits, however, entire blame cannot be placed on petitioners. He submits, as referred to above, petitioners were undergoing excruciating times and had not been able to have normal disposition. He further submits that it is relevant to consider here that the courts are supposed to approach delay condonation application liberally and unless there is gross case of abuse of process of law, the delay, if properly explained,

should receive its due. He refers to the guidelines by the apex court as referred to in the decision in *Collector, Land Acquisition, Anantnag vs. Mst. Katiji*, reported in *AIR 1987 SC 1553* and *Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and others*, reported in *2013 12 SCC 649*, particularly referring to paragraphs no. 21 and 22 of second judgment culling out broad principles in respect of condonation of delay. He, therefore, urges to indulge into the request under writ petition.

4. On the other hand, learned counsel Mr Palshikar appearing on behalf of respondent – original plaintiff submits that overall approach of the petitioners hitherto in prosecuting suit and as well application for delay condonation exhibits not only casual but callous approach to the litigation. Things are being taken rather too easily. It is submitted that as considered by trial court, a vague submission has been made about mishap and there is no material placed on record in respect of the same. He further submits that trial court has taken into account conduct of petitioners before the decree had been passed. He further goes on to contend that even before this court, while it had been perceived that the court dealing with writ petitions may not be conducive for the purpose underlying writ petition, petitioner had withdrawn said writ petition and civil revision application had been filed albeit with liberty. While civil revision application

had been contested raising point of maintainability and since it was found to be not maintainable, there has been re-approach by present petitioners under present writ petition. He submits, all this sums up to that the petitioners are flippant in prosecuting the matter and are not serious and are not entitled and eligible even for consideration of their request for indulgence.

5. It has been considered that the allegations are not with respect to improper service and as such applicants having no knowledge would not be a consideration. The court considered that contention on the ground of mishap and some other problems in the family tends to be rather away from the truth as there is no witness examined to substantiate said contention.

6. It may have to be considered that while the court has also referred to that there should be liberal approach to the application seeking condonation of delay and that litigant is unlikely to gain by causing deliberate delay, in present matter it ostensibly appears that the application is not giving reasons with sufficient details but yet, it may be considered that after the notice of execution proceedings has been served on petitioners, there has been movement by them for corrective action in the matter. Going by the principles and guidelines appearing in the decisions of the apex court in *Esha Bhattacharjee* referred to

supra, particularly in paragraphs no. 21 and 22 of said judgment and paragraph no. 3(1) to 3(6) of the first judgment in *Collector, Land Acquisition, Anantnag*, it appears appropriate to indulge into the request being made in writ petition subject, of course, to payment of sufficient costs.

7. In view of aforesaid, impugned order dated 06-01-2017 passed by the 4th joint civil judge, junior division, Aurangabad dismissing miscellaneous application requiring judicial inquiry bearing no. 183 of 2014 is set aside subject to payment of costs of ₹ 75,000/- by petitioners to the respondent. Costs be deposited in trial court within a period of four weeks from the date of receipt of writ of this order by the trial court. In case of failure to deposit costs within stipulated period, this order shall be deemed to have been recalled and impugned order would stand revived.

8. Learned counsel for respondent, at this stage, submits that if the court is inclined to condone the delay, the decree which is contended to be ex-parte may as well be set aside with a direction to dispose of suit in right earnest preferably within a period of six months.

9. Having regard to that the writ petition is directed against order refusing to condone delay, aforesaid recorded concession

may be taken into account by the court before which the application under order IX, rule 13 of the Code of Civil Procedure, is pending.

10. Court dealing with application under Order IX, rule 9 of the Code of Civil Procedure, 1908 may take into account the concession made before this court. Said application be proceeded with and decided expeditiously preferably within a period of three months from the date of receipt of writ of this order.

11. Rule made absolute in aforesaid terms.

12. Writ petition is disposed of.

SUNIL P. DESHMUKH
JUDGE

pnd/-