

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

919 WRIT PETITION NO. 1415 OF 2017

SMT. BABY PRAKASH KATHAR AND ANOTHER
VERSUS
SHRIRAM ANANDA KATHAR AND OTHERS

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Advocate for Petitioners : Mr. R.R. Suryawanshi
Advocate for Respondents : Mr. Chetan V. Jadhav

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CORAM : V. K. JADHAV, J.
DATED : 13th MARCH, 2018

PER COURT:-

1. By consent of the parties, heard finally at admission stage.
2. By this writ petition, the petitioners are challenging the order dated 20.08.2016 passed by the Additional District Judge, Aurangabad in MARJI No. 441 of 2013 filed for condonation of delay caused in filing the Regular Civil Appeal preferred against the order below Exh.1 in MARJI No. 280 of 2006.
3. Brief facts, giving rise to the present writ petition, are as follows:-
 - a) Deceased Prakash, who happened to be the husband of petitioner No.1 died on 23.8.2005. The petitioner No.1 claimed to be first wife of deceased Prakash and respondent No.3 also claimed to be wife of

deceased Prakash. Petitioner No.2 Pramod is the son of deceased Prakash born from petitioner No.1.

b) After death of Prakash, respondents herein filed an application bearing MARJI No. 705 of 2005 for issuance of succession certificate in their favour by contending that they are only surviving legal heirs of deceased Prakash. By order dated 3.1.2006, the trial court has allowed the said MARJI No. 705 of 2005. Being aggrieved by the same and also on the ground that the respondents herein are not only surviving legal heirs of deceased Prakash, the petitioners herein filed MARJI No. 280 of 2006 for revocation of the said succession certificate granted in favour of the respondents by order, as aforesaid, in MARJI No. 705 of 2005. The said MARJI No. 280 of 2006 came to be dismissed in default by order dated 20.1.2012. Being aggrieved by the same, the petitioners herein have filed Misc. Civil Appeal for restoration alongwith the application for condonation of delay bearing MARJI No. 441 of 2013 before the District Court. There is delay of 554 days in preferring the aforesaid Misc. Civil Appeal before the District Court. The learned Additional District Judge, Aurangabad by order dated 20.8.2016 rejected the said application. Hence this writ petition.

4. Learned counsel for the petitioners submits that the mother of

petitioner No.1 was seriously ill and she was hospitalized for certain period. The petitioners have also produced before the court discharge cards issued by the hospital authorities, however, the learned Additional District Judge, Aurangabad has not given any reference to those discharge cards. On the other hand, learned Additional District Judge has given reference to the proceedings pending before this Court arising from MARJI No. 153 of 2006 which is in connection with the legal heirship certificate proceedings. On the basis of the said proceedings, the learned Additional District Judge has erroneously observed that the petitioners were knowing about the dismissal order dated 20.1.2012 and it is highly improbable to hold that they were not having knowledge about any limitation. Learned counsel submits that as per three discharge cards, the mother of petitioner No.1, aged 75 years in the year 2011, was admitted in the hospital due to various complications owing to her aging process and petitioner No.1 could not approach to the counsel representing her in the said proceeding. Learned counsel submits that petitioner No.2 at that time got employment and he was in service. However, learned Additional District Judge has not at all considered the aforesaid facts and rejected the application seeking condonation of delay of 554 days. Learned counsel submits that the petitioners' rights have been affected by the order passed by the trial court and since the application for revocation of the earlier

succession certificate issued by the court is also dismissed in default, the petitioners would be deprived from establishing their rights under the provisions of Indian Succession Act and as such, the application seeking revocation of earlier order of issuance of succession certificate is required to be heard on merits. Learned counsel for the petitioners are ready to pay the costs for condonation of delay.

5. Learned counsel for the respondents has strongly resisted the request on the ground that the respondents have filed MARJI No. 705 of 2005 way back in the year 2005 and it was decided on 3.1.2006. In the year 2006, though the present petitioners have filed MARJI No. 280 of 2006 for revocation of the said order passed in MARJI No. 705 of 2005, however, aforesaid MARJI No. 280 of 2006 also came to be dismissed in default in the year 2012. Learned counsel submits that MARJI No. 441 of 2013 filed for condonation of delay caused in filing appeal against the order of dismiss in default and the learned Additional District Judge has rejected the said MARJI No. 441 of 2013 by order dated 20.8.2016. Learned counsel submits that the original order came to be passed in MARJI No. 705 of 2005, 13 years back and as such, there is no point to re-open the proceeding when the petitioners are not diligent in prosecuting the said proceedings. Learned counsel submits that the petitioners have failed to explain day to day delay caused in filing appeal before the

District Court, and as such learned District Judge has rightly rejected application by observing that though the petitioners were having knowledge about dismissal of their MARJI No. 280 of 2006, failed to prefer an appeal within time. Learned counsel for the respondents, in the alternate, submits that the petitioners may be saddled with heavy costs if this Court is inclined to condone the delay.

6. It appears that there is dispute about succession certificate and the relationship, so far, *interse*, are not disputed seriously by the parties. Furthermore, in the heirship proceeding, the learned District Judge-1, Aurangabad has taken a view that the present petitioner No.2 is one of the heirs of deceased Prakash alongwith other heirs and further clarified that decision on revocation application may take sometime, it may affect prospects of the claimant Pramod for getting job on compassionate ground in place of deceased Prakash. The rights of the claimant Pramod, if any, in respect of other properties will depend upon the revocation application or civil suit, if any, filed. This court has also confirmed the same with observations that the petitioners herein are at liberty to file revocation application or to institute the civil suit. It thus appears that the application was filed by the present petitioners for revocation of order passed in MARJI No. 705 of 2005, however, the said application bearing MARJI No. 280 of 2006 came to be dismissed in default. Though the discharge cards

are placed on record, the learned District Judge has not considered the same. Thus, on perusal of the said discharge cards, which have been placed in this writ petition, it appears that the aged mother of petitioner No.1 was hospitalized on three occasions due to old age ailments. It further appears that petitioner No.1 is prevented from sufficient cause to prefer an appeal within stipulated period as against the order of dismissal in default of MARJI No. 280 of 2006. It is not clear as to on what basis the learned District Judge has observed that though discharge cards are of the period prior to 8.8.2012 and the petitioners are supposed to explain the delay of the period from 8.8.2012 to 23.9.2013, however, considering the ailments of the mother of petitioner No.1 due to old age, the only period, as mentioned in the discharge cards, cannot be a criteria and petitioner No.1, as it appears from the evidence, prevented from sufficient cause to prefer an appeal within stipulated period of limitation. Petitioner No.2 was serving and as per the order passed in the proceedings of legal heirship certificate, his case was considered to the extent of appointment on compassionate ground. It thus appears that petitioner No.1 was only the person prosecuting the MARJI No. 280 of 2006. Thus, considering over all aspects of the case, I am inclined to allow this writ petition. However, the petitioners are also required to be saddled with some costs for their inaction for certain period. Hence, I proceed to pass the following

order:-

O R D E R

- I. Writ petition is hereby partly allowed. No costs.
- II. The order below Exh.1 in MARJI No. 441 of 2013 dated 20.8.2016 passed by learned Additional District Judge, Aurangabad is hereby quashed and set aside.
- III. The MARJI No. 441 of 2013 is allowed in terms of its prayer clause subject to payment of costs of Rs.5000/- (Rupees Five thousand only) to be paid by the petitioners to the respondents, within four weeks from today before the court below, on following conditions:-
 - a) Register the appeal preferred against dismissal of MARJI No. 280 of 2006 and the learned District Judge, Aurangabad shall dispose of the appeal on its own merits after giving opportunity of being heard to both the parties.
 - b) The parties shall appear before the District Court on 27.03.2018.
 - c) The learned District Judge shall dispose of the appeal

within six months from the date of first appearance of the parties.

IV. Writ petition is accordingly disposed of.

(V. K. JADHAV, J.)

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