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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO.120 OF 2015

1. Trivanabai w/o Sopan Dhaigude & Others APPELLANTS
Age – 67 years, Occ – Agriculture & Household
2. Sandipan s/o Sopan Dhaigude
Age – 47 years, Occ – Agriculture
3. Bharat s/o Sopan Dhaigude
Age – 44 years, Occ – Agriculture
4. Narayan s/o Sopan Dhaigude
Age – 42 years, Occ – Agriculture

All R/o Originally Chinchkhandi,
Presently R/o Nehru Nagar, Renapur,
Taluka – Renapur, District – Latur

VERSUS

Baburao s/o Subhana Dhaigude & Others RESPONDENTS
(Died) Through LRs

- 1-a] Ashruba s/o Baburao Dhaigude
Age- 50 years, Occ – Agriculture
- 1-b] Hanumant s/o Baburao Dhaigude
Age – 45 years, Occ – Agriculture
- 1-c] Chagan s/o Baburao Dhaigude
- 1-d] Girijabai d/o Baburao Dhaigude
Age – 48 years, Occ – Household
- 1-e] Meerabai d/o Baburao Dhaigude
Age – 40 years, Occ – Household
2. Trimbak s/o Subhana Dhaigude
Age – 72 years, Occ – Agriculture
3. Dattu s/o Subhana Dhaigude

Age – 67 years, Occ – Agriculture

All R/o Chinchkhandi, Post – Sonwal,
Taluka – Ambajogai, District – Beed

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Mr. V. S. Bedre, Advocate for the appellants
Mr. H. D. Deshmukh, Advocate for respondents No.1a to 1e
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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 21st FEBRUARY, 2018

ORAL JUDGMENT :

1. Heard learned advocates for the parties who fairly concede to hear the appeal from order finally for disposal.
2. Present appeal from order is preferred against refusal to condone delay in filing restoration of miscellaneous civil application No.102 of 2010 filed by present appellants.
3. Miscellaneous Civil Application bearing No. 102 of 2010 has been preferred by present appellants seeking condonation of delay of 108 days in preferring appeal against judgment and decree in Regular Civil Suit No. 374 of 2008 dated 14th December, 2009. Said Miscellaneous Civil Application No.102 of 2010 for condonation of delay, however, had been dismissed in default on 13th February, 2013.

4. Thereafter, Miscellaneous civil application No. 258 of 2013 for restoration of said Miscellaneous Application No. 102 of 2010 had been lodged, which had been delayed by six months and seventeen days.

5. Under order dated 16th October, 2015, impugned in present appeal from order, delay in filing restoration application had been refused to be condoned.

6. Learned advocate Mr. Bedre, appearing for the appellants submits litigation was being looked after by Sopan during his lifetime who was defendant No.1 in Regular Civil Suit No. 374 of 2008 and other defendants were resting with the prosecution of the matter with Sopan. However, immediately after filing of Miscellaneous Civil Application No. 102 of 2010, Sopan died. Thereafter, the matter was being looked after by applicant No.4 Narayan. He had been following up the progress in the same quite keenly. However, it had lingered on for quite a long time. While he had not been keeping well and had been advised rest by doctor, the miscellaneous civil application came to be dismissed in default on 13th February, 2013. He submits that due to his health condition dates could not be attended to and the miscellaneous civil application had been dismissed in default. He

submits that since the matter was being looked after by Narayan, other applicants were not aware of the developments in the proceedings and while Narayan recovered from the illness, it then had been realized that the miscellaneous civil application which had been pending since long had been dismissed in default. Thereafter application for restoration had been moved, which has been rejected under the impugned order. Appeal from order has been preferred by legal heirs of deceased defendant No.1 Sopan, who died on 5th May, 2010.

7. Learned advocate submits that the delay had neither been deliberate nor any benefit had been derived by causing delay in filing the application. He submits that causing delay during subsistence of decree would hardly be of any benefit to the appellants/applicants. However, under genuine circumstances the delay had been caused, yet learned judge of appellate court had chosen to go pedantically about the reasons given in the application and that Narayan, who happens to be a simpleton had given certain answers in the cross-examination, which did not find favour with the court despite him being not keeping well for pretty long period and the application came to be rejected. He submits that Narayan's literacy level is limited and he is not in a position to comprehend impact of plain answers given in

cross-examination. He, therefore, submits that present appeal from order be allowed on the grounds, which have been taken. He submits that the certificate issued by doctor had been placed on record and it should receive its due. The matter concerns immovable property.

8. Mr. H. D. Deshmukh, learned advocate appearing for original plaintiff - respondent No. 1 submits that learned appellate judge has taken a proper view of the matter, having regard to circumstances appearing on record. He submits that the medical certificate can hardly be relied on in the face of evidence given on behalf of applicant No.4 Narayan, who is stated to be prosecuting the application. He further submits that the appellants are bent upon prolonging the matter, since in partition decree the plaintiff has been given one fourth share, which the appellants are refusing to part with and thus are indulging into activities to prolong the litigation. He further purports to refer to that the miscellaneous civil application itself is untenable having been preferred against dead person and thus, further proceedings are even more untenable.

9. Although learned advocate for the respondents purports to put up a stiff resistance to the appeal from order, in the matters

of delay condonation the courts are supposed to be liberal as would emerge from various decisions of the Supreme Court and high courts, particularly having regard to decisions in the cases "*Collector, Land Acquisition, Anantnag V/s. Ms. Katiji and others*" reported in *AIR 1987 SC 1353* and "*Esha Bhattacharjee V/s. Managing Committee of Raghunathpur Nafar Academy and others*" reported in (2013) 12 *Supreme Court Cases* 649. Having regard to the ratio in aforesaid judgments and considering literacy and economic level of the parties concerned, a pedantic approach may be eschewed in the present matter.

10. It appears in the given facts and circumstances of the case that the appellants be let an opportunity to contest miscellaneous civil application No.102 of 2010 on merits by imposing certain costs which to a certain degree may mend the inconvenience caused to the original plaintiff and if the same is allowed, regular civil appeal filed by the appellants be decided on merits expeditiously.

11. In the circumstances, the impugned order dated 16th October, 2015 passed by District Judge-4 Latur on Miscellaneous Application (Delay) No. 258 of 2013 is set aside, Miscellaneous Application (Delay) No. 258 of 2013 stands allowed.

Miscellaneous civil application No. 102 of 2010 is restored for prosecution before the appellate court, subject to payment of costs of Rs.25,000/- which is a condition precedent .

12. The miscellaneous civil application be proceeded with as early as possible and disposed of preferably within a period of three months from the date of receipt of writ of this order and in case the same is allowed, the regular civil appeal filed by the appellants be decided within a further period of six months therefrom.

13. Appeal from order is allowed as aforesaid. Pending civil application stands disposed of.

[SUNIL P. DESHMUKH, J.]