

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

WRIT PETITION NO. 14330 OF 2017

Nandlal s/o Ghisulal Pande Age 77 years, occup. Nil, R/o Supari Bagh, Jamner, Tq. Jamner, District Jalgaon	.. Petitioner/ (Ori. Applicant/ Orig. Defendant)
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versus

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| 1) Ashwinkumar s/o Sureschandra Lalwani
Age 52 years, occup. Business,
R/o Jewellery Shop, Jamner, Tq. Jamner,
District Jalgaon | |
| 2) Atulkumar s/o Sureschandra Lalwani,
Age 51 years,
Occup. & R/o As above | .. Respondents/
(Ori. Plaintiffs) |

Mr Amol Joshi, Advocate i/b Mr Rajendrraa S. Deshmukkh
Advocate for petitioner
Mrs S. G. Chincholkar, Advocate for respondent

CORAM : SUNIL P. DESHMUKH, J.
DATE : 21st August, 2018

ORAL JUDGMENT :

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

2. Petitioner is before this court, aggrieved by order dated 26-10-2017 passed by District Judge-1, Jalgaon on miscellaneous civil application bearing no. 174 of 2015 filed by present petitioner rejecting his request thereunder to condone delay of 3 years and 335 days in seeking restoration of regular civil appeal bearing no. 156 of 204 which stood dismissed in default on 15-11-2011.

3. After hearing learned counsel for parties to quite some extent, it appears that petitioner is original defendant in rent suit for eviction filed by landlord - respondents herein. Suit had been initially decreed. It was appealed from by petitioner and the matter was remanded. After remand, suit had once again been decreed and the matter was taken up in regular civil appeal bearing no.156 of 2004 by present petitioner which stood dismissed in default as stated hereinbefore.

4. Learned counsel Mr Amol Joshi appearing on behalf of petitioner has submitted that petitioner had been given to understand that at appellate stage, litigant is not

supposed to attend to the proceedings in appeal day-to-day and the matter would be taken care of by the advocate. This as well was his case in the first round of litigation. Subsequently, his wife had been detected suffering cancer sometime in 2008 and the petitioner had been attending to her since then till she succumbed to the ailment in February, 2012. During this period, the first advocate engaged by petitioner in proceedings before appellate court as well had been ailing and he died around 2013. Petitioner is running 78th year of his age and due to old age his mobility has been severely affected. In the circumstances, it was upon a notice of execution proceedings had been received at his end in October, 2015, he found on verification, that the appeal had already been dismissed on 15-11-2011 in absence of its prosecution from his side. It is thereafter, present miscellaneous civil application for condonation of delay in restoration of appeal had been preferred.

5. Learned counsel Mr Joshi vehemently submits that approach adopted by learned *ad-hoc* district judge has been too pedantic and technical, disregarding the factual

aspects going to the root of the matter and has also erred in getting drifted away by considerations which are not germane and rather are hypothetical in nature. He submits that it is true that a litigant should normally be diligent in his matter. However, the court has failed to appreciate the circumstances which are not disputed. Age had affected mobility of the petitioner. The appeal having been dismissed during ailment suffered by his wife as well as advocate. He submits that these aspects ought to have received their due. He, therefore, urges to consider the request made under the miscellaneous civil application by setting aside order impugned.

6. Countering aforesaid submissions, Mrs S. G. Chincholkar, learned counsel appearing on behalf of respondent - landlord submits that although ailments being suffered by advocate and wife of the petitioner are being put forth as reasons causing delay in filing application, pleadings in this respect fall too short of giving any specific information to the court. Neither there are proper pleadings in respect of period of medical treatment of petitioner's counsel nor about his death.

7. Learned counsel vehemently submits that it has to be taken into account that the petitioner had never attempted to attend the court proceedings to find out the stage reached in the appeal. Petitioner has not been diligent and had not made arrangement to attend to the appeal. This, according to learned counsel, has been supposedly in order to lengthen occupation of suit premises. She submits that the appeal has been ready for hearing from 2007 and petitioner's wife died in 2012. Looking at the wide gap between the dates of appeal being ready for hearing and death of petitioner's wife, consumption of time in attending her during this period is a run away excuse for seeking condonation of delay. She submits that record would depict that wife had been admitted in hospital in May, 2011 to February, 2012 and had been discharged from the hospital. She submits that looking at the dates, the matter having been ready for hearing in 2007 to the date of admission of petitioner's wife in hospital in 2011 there is no explanation coming forth for said gap. She submits that the reasons causing delay are nothing but putting gloss over dilatory tactics

adopted. She submits that law of limitation supports the diligent and not indolent.

8. She goes on to submit that the explanation in the circumstances tends to be fanciful. Learned counsel also contends that pleas about petitioner having become old and suffering mobility problems are subterfuge. Explanations have no nexus with reality. She submits that looking at impugned order, it would reflect that all the aspects as are relevant have been properly considered by the court. The petition lacks *bonafides* and is aimed at vexing respondents.

9. She submits, another aspect is that in writ petition respondents are shown to be residing at old address and notices are tried to be served on that address when, in fact, they are residing at the address given in verification clause of affidavit in reply to writ petition. She purports to submit that petitioner has accommodation at Jamner where suit house is situated and the petitioner is unlikely to suffer any hardship in the event delay is not condoned.

10. Mrs Chincholkar has also referred to the decision in the case *Esha Bhattacharjee (supra)* which the learned judge has referred to in impugned order.

11. Having heard learned counsel for parties as aforesaid, the dispute appears to be in respect of propriety of the reasons being given as cause for condonation of delay. It further appears that it is not in dispute that petitioner has been prosecuting the matter engaging advocate since 2004 and has been dismissed in 2011. It is not in dispute that petitioner's wife was ailing and petitioner had been attending to her till her death. It further appears that advocate of the petitioner as well had been suffering ailment during this period and subsequently he died. It may have to be taken into account that the appeal has been pending since 2004 and is stated to be ready for hearing since 2007 and further events about ailments being suffered by wife and advocate of the petitioner although are resisted, veracity of the same has not been disputed. Some due will have to be given to the circumstances referred to.

12. Having regard to settled position of law as enunciated by supreme court in the case of *Collector, Land Acquisition, Anantnag vs Mst. Katiji* reported in *AIR 1987 SC 1353* as well as the very citation *Esha Bhattacharjee v. Raghunathpur Nafar Academy and others*, reported in *2013 DGLS (SC) 743 = (2013) 12 SCC 649* which has been relied on by learned counsel and has been referred to in impugned order by learned judge, gives indication of that the applications for condonation of delay would have to be given their due.

13. The judgment relied on i.e. *Esha Bhattacharjee vs. Raghunathpur Nafar Academy and others*, (2013) 12 SCC 649 (*supra*) in paragraph 21, refers to the principles culled out from the authorities discussed in the same to which under paragraph 22 guidelines have been added. Learned judge has not referred to in paragraph no. 8 all the principles appearing in said judgment in the case of *Esha Bhattacharjee (supra)*. Having regard to that the pragmatic and unpedantic approach is expected to be taken and further that sufficient cause should be understood in its proper spirit, philosophy and purpose regard being had to that substantial justice is, paramount and pivotal, being aimed

at, learned judge was expected to approach the matter taking undercurrent of decisions while appreciating application for delay condonation. Learned Judge appears to have taken only a part of guidelines into account as quoted in impugned order and appears to be in oblivion of other principles referred to and guidelines given in said judgment.

14. Taking overall view of the matter and having regard to attending circumstances, it appears to be appropriate, in order to have healthy contest on merits to accede to the request under writ petition in larger interest of justice.

15. Writ petition, as such, is allowed.

16. Impugned order dated 26-10-2017 passed by District Judge-1, Jalgaon rejecting miscellaneous civil application bearing no. 174 of 2015 is set aside. Said application stands allowed. Petitioner is liable to deposit amount of ₹ 20,000/- payable to the respondents – plaintiffs as costs. Costs be deposited in district court within a period of four weeks from the date of receipt of

writ of this order and it would be condition precedent. On deposit of costs, plaintiffs would be entitled to withdraw the same.

17. The appellate court is expected to go ahead with pending regular civil appeal no. 156 of 2004 and decide it preferably within a period of three months from the date of receipt of writ of this order.

18. It is open for petitioner to make appropriate application in the execution proceedings. Execution proceedings may be kept in abeyance for a period of three months from the date of receipt of writ of this order by appellate court.

19. Rule made absolute in aforesaid terms.

20. Writ petition is disposed of.

SUNIL P. DESHMUKH,
JUDGE

pnd/-