

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.2091 OF 2016**

Bapu Gopal Mane

.. Petitioner

V/s.

Sou.Anubai Ganpati Mahatugate  
and Others

.. Respondents

Mr.Chetan G. Patil for the petitioner

**CORAM: K.K. TATED, J.**

**DATED : DECEMBER 5, 2018**

**P.C. :**

1 Heard the learned counsel for the petitioner.

2 By this petition, under Article 227 of the Constitution of India, petitioner original defendant challenges the order dated 30.09.2014 passed by learned District Judge-1, Kolhapur below Exhibit-1 in Miscellaneous Appeal No.335 of 2011 rejecting their application for condonation of 13 years 10 months 9 days delay to file application for re-admission of Regular Civil Appeal No.168 of 1991 which stand dismissed for default on 16.01.1998.

3 The learned counsel for the petitioner submits that in the present proceeding, initially the respondents original plaintiffs filed Regular Civil Suit No.79 of 1985 in the court of Civil Judge,

Junior Division, Kagal at Kagal for declaration that the sale dated 09.06.1982 got executed by the defendant from the plaintiff no.2 was sham and bogus, void, illegal and not binding upon the plaintiffs. He submits that after hearing both the sides in that Suit, the Trial Court framed following issues:

*“1) Whether plaintiffs prove that the suit property is a joint Hindu family property?*

*2) Whether plaintiff prove that the sale-deed dated 9-6-1982 is sham and bogus?*

*3) Whether Defendant proves that the Plaintiff had sold the suit property for the satisfaction of the debt amounting to Rs.1,850/- for the purpose of the construction of the wall of his house?*

*4) Whether the Plaintiffs are entitled for declaration as prayed for?*

*5) What order and decree?*

*6) Whether the Plaintiffs prove that the sale-deed dated 9-6-1982 is legal, and not binding on them?*

*7) Whether the suit is within limitation?”*

4 The learned counsel for the petitioner submits that after hearing both the sides, the Trial Court decreed the Suit by judgment and decree dated 11.03.1991 holding that Sale Deed dated 09.06.1982 executed by original plaintiff no.2 in favour of the defendant i.e. petitioner in the present proceeding was void and as such, not binding on the plaintiffs.

5 Being aggrieved by the said judgment and decree dated 11.03.1991 passed by Civil Judge, Junior Division, Kagal in Regular Civil Suit No.79 of 1985, petitioner original defendant preferred Regular Civil Appeal No.168 of 1991 in the court of learned District Judge-1, Kolhapur at Kolhapur under Order 41 Rule 1 of the Civil Procedure Code, 1908 on 22.04.1991. The said Appeal was fixed for hearing on 16.01.1998. On that date, no one appeared on behalf of the petitioner. Hence, the appellate court dismissed the said appeal in default. Order dated 16.01.1998 reads thus:

*“ORDER*

*Read pursis Exhibit 22. None present for the appellant. The appeal is fixed for hearing. Dismiss in default.”*

6 The learned counsel for the petitioner submits that thereafter, the petitioner preferred application dated 23.09.2011 under Order 41 Rule 19 of the Code of Civil Procedure, 1908 for re-admission of the Appeal which was dismissed for default. He submits that there was delay in filing application under Order 41 Rule 19 of the Code of Civil Procedure, 1908. Hence, the petitioner preferred application under section 5 of the Limitation Act on 10.11.2011 before the appellate court bearing Miscellaneous Application No.335 of 2011.

7 The learned counsel for the petitioner submits that there was delay of 13 years 10 months 9 days in filing the application

under Order 41 Rule 19 of the Code of Civil Procedure, 1908 for re-admission of the Appeal. He submits that petitioner also filed affidavit of evidence as per Order 18 Rule 4 of the Code of Civil Procedure, 1908. He submits that petitioner specifically stated in his affidavit that matter was settled between the parties and therefore, no one attended Regular Appeal No.168 of 1991. As no one appeared on behalf of petitioner before the appellate court, court dismissed their Appeal on 16.01.1998. Thereafter, some time in the year 2011, petitioner learnt from the copy of 7/12 extract of suit land, that the respondent original plaintiff deleted petitioner's name from 7/12 extract. At that time, petitioner made enquiry and learnt that because of dismissal of the appeal preferred by the petitioner, his name was deleted from the 7/12 extract. Thereafter, he made enquiry with his advocate and learnt that appeal stands dismissed for non-prosecution by order dated 16.01.1998.

8 The learned counsel for the petitioner submits that thereafter immediately petitioner filed application under Order 41 Rule 19 of the Code of Civil Procedure and under section 5 of the Limitation Act for condonation of delay in filing the said application. He submits that there was delay on the part of the petitioner only because the petitioner was under impression that matter was settled between the parties and it is not necessary to appear in the Appeal. He submits that even the respondent original plaintiff assured the petitioner that it is not necessary to appear in Appeal as the matter is already settled between the parties. He submits that these facts were specifically stated by the petitioner in his application for condonation of delay. He

submits that the appellate court at the time of passing impugned order dated 30.09.2014 failed to consider those facts. He submits that in the interest of Justice, this Hon'ble Court be pleased to set aside the impugned order dated 30.09.2014 passed by learned District Judge-1, Kolhapur below Exhibit-1 in Misc. Civil Appeal No.335 of 2011 and allow the petitioner's application for condonation of delay. He submits that there was no intentional delay on the part of the petitioner to file the said application after more than 13 years. He submits that because of the assurance given by the respondent original plaintiff that matter is settled, no one appeared in Regular Civil Appeal No.168 of 1991.

9 Advocate for the petitioner submits that in the interest of Justice, this Hon'ble Court be pleased to allow the petitioner's present Writ Petition. He submits that if present Writ Petition is not allowed, irreparable loss and injury will be caused to them. He submits that they have good chance of success in the present proceeding.

10 I have heard the learned counsel for the petitioner at length. It is to be noted that admittedly there was delay of more than 13 years 10 months 9 days in filing the application under Order 41 Rule 19 of the Code of Civil Procedure, 1908 for re-admission of the Regular Civil Appeal No.168 of 1991 which stand dismissed for default by order dated 16.01.1998. Bare reading of the petitioner's application under Order 41 Rule 19 of the Code of Civil Procedure, 1908 shows that petitioner failed to make out any case for re-admission of the said Appeal by condoning delay of more than 13 years. Apart from that, even bare reading of the

Misc.Civil Application No.335 of 2011 filed by the petitioner under section 5 of the Limitation Act for condonation of delay shows that petitioner failed to make out any sufficient cause for condonation of delay. He has not placed on record any documentary evidence to show that matter was settled between plaintiffs and defendant out of court.

11 It is to be noted that re-determination of Appeal which was dismissed for default can be restored as per Order 41 Rule 19 of the Code of Civil Procedure Code, 1908 if the applicant proves that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing. Order 41 Rule 19 of the Code of Civil Procedure, 1908 reads thus:

***“19. Re-admission of appeal dismissed for default. - Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17, the appellant may apply to the Appellate Court for the re-admission of the appeal, and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”***

12 Bare reading of Order 41 Rule 19 of the Code of Civil Procedure, 1908 shows that application can be allowed only if the applicant proves that he was prevented by any sufficient cause from appearing when the Appeal was called out for hearing. The word “prevented” shows that the burden is on the applicant to prove his case beyond the doubt. In the present proceeding, petitioner failed to make out any case for condonation of more

than 13 years in filing the application. Even the story put up by the petitioner about the settlement cannot be considered for allowing his application for condonation of delay for want of documentary evidence.

13 It is to be noted that our Hon'ble court in the matter of ***Shiva Subhan Gandhi vs. Suban S. Gandhi***, ***MANU/MH/0044/2009*** held that plea of settlement cannot be considered for condonation of delay unless and until, same is proved satisfactorily. Paragraph 14 of the said authority reads thus:

*“14. The conclusions that can be drawn, are that the petitioners have raised the plea of settlement which appears to be improbable. The defendants did not contact their Lawyer and remained complacent and failed to take further steps to defend themselves. The complacency is nothing short of negligence. The delay of 3 years is inordinate. The learned Judge of the Trial Court, did not commit any error in rejecting the application. There is no substance in the petition. It is dismissed.”*

14 Considering these facts that the petitioner failed to prove sufficient cause for condonation of more than 13 years and the law as declared in the matter of ***Shiva Subhan Gandhi vs. Suban S. Gandhi***, (Supra), I am of the opinion that petitioner failed to make out any case for allowing the Writ Petition.

15 Hence, Writ Petition stands rejected.

16 No order as to costs.

(K.K. TATED, J.)