

DDR

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1134 OF 2017**

Noor Mohammed Qadar Mujawar
(since deceased) through lrs. .. Petitioners
Vs.
Gulam Hussain Maqbool Mujawar and ors. .. Respondents

Mr.Amitkumar D. Sale for the petitioners.
Mr.M.J. Jamdar for the respondent Nos. 1 to 5.

CORAM : M.S.KARNIK, J.

DATE : 3rd DECEMBER, 2018

P.C. :

By filing this Petition under Article 227 of the Constitution of India, the representatives of original defendant No.1 have filed this Petition challenging the order dated 05/10/2016 passed by the Presiding Officer, Maharashtra State Waqf Tribunal at Aurangabad thereby dismissing the application filed by them for condoning the delay caused in applying for setting aside the exparte decree passed by the Presiding Officer, Maharashtra State Waqf Tribunal.

2. It is the Petitioner's case that the proceedings were filed by the present Respondents before Waqf Tribunal for declaration that the original Plaintiffs and original Defendants No.1 to 3 are mutawalis of Waqf Institution namely Peer Shaikh Fardeen (Shaikh Shakker Gunj) situated at village Mane rajuri Taluka Tasgaon, Dist. Sangli. The Tribunal by the judgment and decree dated 06/09/2013 was pleased to partly decree the Waqf Suit. The Tribunal was pleased to declare the Plaintiffs and Defendants No.1 to 3 as Mutawalis of Waqf Institution. Further Defendants No.1 to 3 were perpetually restrained from interfering and obstructing the plaintiffs in the joint enjoyment of the Waqf Institution.

3. Learned Counsel for the Petitioners pointed out that during the pendency of the Suit, Defendant No.1 died on 27/01/2012. According to him, the Tribunal proceeded to decree the Suit without bringing legal representatives of the Defendant No.1 on record.

4. The Petitioner therefore filed Misc. Application No. 12 of 2014 before the Tribunal for setting aside the exparte decree and for condoning the delay of 160 days caused in filing the application for

setting aside the exparte decree. In the application it is contended that they came to know about the exparte decree only through the Circle Officer, Tasgaon when they noticed the names of the Plaintiffs were mutated in revenue records. Therefore on 17/12/2013 they applied to the Tahsildar Tasgaon for copy of the impugned decree. The Petitioners were in receipt of the copy of the decree only on 30/01/2014. Thereafter they applied for the certified copy of the decree which they received only on 30/04/2014. The present application for condoning the delay and for setting aside exparte decree is filed on 11/04/2014.

5. By the impugned order the Tribunal was pleased to reject the application for condonation of delay. The Tribunal did not find any substance in the submissions of the Counsel appearing on behalf of the representatives of the defendant No.1 that irreparable loss will be caused to them if the delay is not condoned.

6. Learned Counsel for the petitioners submits that the application for condonation of delay itself would indicate that sufficient cause has been shown for condoning the delay of 160 days in filing the application for setting aside the exparte decree. In his

submission, for the reasons mentioned in the application, the delay should have been condoned in the interest of justice.

7. Learned Counsel for the respondents/original plaintiffs on the other hand supported the impugned order. He submits that the petitioners have not shown any cause much less sufficient cause for condoning the delay. According to him, the Tribunal has also considered the matter on merits in as much as the plaintiffs are held to be 'Mutawallis' along with the predecessors of the petitioners. In any case, the petitioners are called upon to offer their nomination of one family member in place of the deceased defendant No.1. He therefore submits that no prejudice whatsoever is caused to the petitioners if the Tribunal has rejected the application for condonation of delay.

8. Heard learned Counsel for the parties.

9. It is not in dispute that the defendant No.1 i.e. predecessor of the petitioners died on 27/1/2012. The petitioners are the representatives of the defendant No.1. The exparte decree is passed on 6th September, 2013 declaring the plaintiffs and the

defendant Nos. 1 to 3 as “Mutawallis”. The original defendant No.1 was restrained from interfering and obstructing the plaintiffs in the joint enjoyment of the Institution.

10. Be that as it may, the impugned decree was passed on 6th September, 2013. It is only when the names of the plaintiffs were recorded in the revenue records that the petitioners who are the representatives of the defendant No.1 got knowledge of the exparte decree. In the application, it has been stated that they made an application on 17/12/2013 before the Tahsildar and the copy was received by them on 30/1/2014. The certified copy was received only on 3/3/2014. The application came to be filed on 11/4/2014.

11. In my opinion, the delay is sufficiently explained and the delay deserves to be condoned subject however to cost of Rs.2000/- to be paid by the petitioners to the original plaintiffs.

12. It is made clear that I have only condoned the delay in filing the application for setting aside the exparte decree. The Tribunal may consider the Misc. Application No. 12 of 2014 for setting aside the exparte decree on its own merits without being

influenced by the observations made in this order or the observations contained in the impugned order dated 6th September, 2013. Hence the following order :

ORDER

- i) The delay in filing the application for setting aside expart decree is condoned.
- ii) The impugned order to that extent is set aside.
- iii) The petitioners may make an appropriate application for amendment in the Misc. Application No. 12 of 2014 with a specific prayer for setting aside the exparte decree, if such a prayer is not already made which shall be considered on its own merits.

13. The Writ Petition stands partly allowed in the above terms.

(M.S.KARNIK, J.)