

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 2564 of 2017

Abbas Sharafu Teli @ Shaikh & Ors .. Petitioners.
Vs
Kalubai Namdev Bhoir & Ors .. Respondents.

Mr. Amit Ashok Gharte for the petitioners.
Mr. Sankalp Anantwar a/with Mr. Anurag Mankar, Ms. Aparna Vyas I/by
Pan India Legal for Respondents.

CORAM : B.P.COLABAWALLA, J.
DATED :- 4th December, 2018.

P.C. :

1 Rule. Respondents waive service. With the consent of the parties, rule is made returnable forthwith and heard finally.

2 This writ petition challenges the order passed by the Court of District Judge-7, Kalyan dated 6th January, 2017 in Misc. Civil Appeal No. 18 of 2014. In this appeal, the petitioner herein had challenged the order dated 12th November, 2013 passed by the learned 2nd Joint Civil Judge, Senior Division, Kalyan in Misc. Application No.155 of 2012 and for restoration of Special Civil Suit No.221 of 2010. This suit was dismissed for want of leading evidence.

3 It is the case of the petitioner that on the day and time when the suit was dismissed for leading the evidence, on the very same day, later

on, the petitioner had made an application for restoration of the suit and had already got the affidavit of evidence affirmed and was ready to be filed before the trial Court. Despite this, the order of dismissal was not recalled. It is in these circumstances that he was constrained to file a Misc. Application No. 155 of 2012 under the provisions of Order IX Rule 9 of the Code of Civil Procedure. This application was also rejected by the trial Court vide its order dated 12th November, 2013. It is this order that was challenged before the Appellate Court.

4 The Appellate Court has dismissed the appeal mainly on the ground that there was delay of six days (and which is undisputed) in filing the appeal and there was no condonation of delay application filed by the petitioner. It was the case of the petitioner herein that the appeal was filed within time and therefore no application for condonation of delay was necessary.

5 Considering the facts narrated above, I do not think that the impugned order can be sustained. Even if there is a delay, there is delay of only six days. In the interest of justice, the Appellate Court then ought to have given one opportunity to the petitioner to file an application for condonation of delay. This was not done and a very hyper-technical approach has been adopted by the Appellate Court. On this ground alone, the impugned order is set aside and Misc. Civil Appeal No. 18 of 2014 is

restored to the file of the Appellate Court.

6 It is made clear that the petitioner herein shall also file an application for condonation of delay before the Appellate Court which the Appellate Court shall consider on its own merit. Rule is made absolute in the aforesaid terms. However, there shall be no order as to costs.

(B.P. COLABAWALLA, J.)