

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3398 OF 2016

Smt. Nagubai Santu Mane & Ors.	..	Petitioners
VS.		
Dastagir Sikandar Pathan		
since deceased through his LRs.		
Shahanaz Sikandar Pathan & Ors.	..	Respondents

Mr. Ramdas Shelke for Petitioners.
Mr. Shivaji Masal for Respondents.

CORAM : M. S. SONAK, J.
DATE: 12 JUNE 2018

ORAL JUDGMENT :

1] Heard the learned counsel for the parties.

2] By order dated 8th September 2015, the parties were already put to notice that this petition may be heard and disposed of finally at the stage of admission. Accordingly, Rule. With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

3] This Court, by order dated 22nd September 2014 had condoned the delay involved in bringing the legal representatives of the defendant no. 1 on record subject to payment of costs of

Rs.1,000/- with the Maharashtra State Legal Aid Fund within two weeks. The petitioners failed to deposit the amount of costs within a period of two weeks. After considerable delay i.e. on 10th March 2015, the petitioners took out an application at Exhibit 129 seeking for enlargement of time to deposit costs. By the impugned order dated 21st April 2015, the learned trial Judge has dismissed this application and consequently, dismissed the suit itself. Hence, the present petition.

4] Mr. Shelke, the learned counsel for the petitioners submits that the petitioner no. 3, who was looking after the matter, was suffering from hyper tension during the relevant period and therefore there was a communication gap between him and their Advocates in the matter of deposit of the amount of costs. Mr. Shelke submits that there are no *mala fides* involved and it is on account of such communication gap coupled with the health issues that the deposit could not be made. Mr. Shelke submits that the trial court was possibly under the impression that it had no jurisdiction to extend time since such time had been granted by this Court. Mr. Shelke submits that the petitioners had absolutely no intention to defy the order made by this Court on 22nd September 2014, particularly since the order was in favour of the petitioners. Failure to deposit the costs within the prescribed period was for genuine

reasons involving health issues and miscommunication with the Advocate. For all these reasons, Mr. Shelke submits that the impugned order may be set aside and the application below Exhibit '1' is made absolute.

5] Mr. Masal, the learned counsel for the respondents submits that this petition is not maintainable since, the petitioners have an alternate remedy by way of an appeal. Without prejudice, the learned counsel submits that the petitioners have suppressed facts. There is no co-relation between the averments in the petition and the medical certificate produced. He submits that in any case the medical certificate does not explain the delay involved in taking out application at Exhibit '1'. For all these reasons, Mr. Misal submits that this petition be dismissed.

6] Rival contentions now fall for determination.

7] The learned trial Judge has basically dismissed the petitioner's application seeking for extension of time. As against such an order, there is no appeal as such provided and therefore, there will be no difficulty in entertaining the present petition. No doubt, the learned trial Judge has also dismissed the suit under Order XXXIX Rule 11 of CPC against which order, an appeal will lie under Order XLIII of the CPC. However, considering the issue

involved and the fact that the impugned order was made way back in April 2015 and this Court, had already issued a notice for final disposal of this petition, it will not be appropriate in the peculiar facts and circumstances of the present case to relegate the petitioners to the alternate remedy which may be available in the present case.

8] The medical certificate produced by the petitioners makes reference to hyper tension and vertigo. The submissions in the petition speak about the petitioner no. 3 taking neurological treatments. To that extent, it cannot be said that there is any serious inconsistency. The medical certificate however states that the petitioner no. 3 was under treatment between 10th September 2014 to 1st October 2014. The application at Exhibit '1' was however taken out only on 10th March 2015. The certificate, therefore, does not explain the delay between 1st October 2014 and 10th March 2015. The explanation, at the highest is that there was miscommunication on account of the treatment which the petitioner no. 3 was said to be taking.

9] In any case, the petitioners had only to pay costs of Rs.1,000/- to the Maharashtra State Legal Aid Fund. Obviously, the petitioners had no intentions to defy the orders of this Court. The petitioners, have not really gained anything by not depositing the amount of costs within the prescribed period. Taking into

consideration all these circumstances, discretion is required to be exercised in favour of the petitioners though, subject to the petitioners, being required to pay substantial costs in favour of the respondents. Ultimately, this is not a case where the respondents are at any fault and if the respondents, are now to be forced to contest the proceedings, then, they have to be compensated by way of costs.

10] In such matters, there is bound to be some lapse on the part of the party seeking exercise of discretion and condonation of delay. As long as there are no *mala fides* involved, the Court, is required to show utmost consideration to such party. Opposite party in such a situation is also required to be compensated by way of costs.

11] For the aforesaid reasons, the impugned orders dated 21st April 2015 below Exhibits 129 and Ex. 1 are hereby set aside. The petitioners are granted extension of four weeks time to deposit costs of Rs.1,000/- with the Maharashtra State Legal Aid Fund. In addition, by way of costs, the petitioners are directed to pay the amount of Rs.10,000/- to the respondents, again within a period of four weeks from today. The petitioners have already deposited an amount of Rs.2,000/- in this Court and the respondents are at liberty to withdraw the same unconditionally. The petitioners to deposit balance amount of Rs.8,000/- before the trial court within four

weeks from today. If such amount is not deposited or if the amount of Rs.1,000/- is not paid to the Maharashtra State Legal Aid Fund within four weeks from today, then this petition shall be deemed to have been dismissed with costs in the like amount. However, if such amount is deposited, then, the aforesaid impugned orders shall stand set aside and RCS No. 314 of 2008 shall stand restored. Upon deposit, the respondents shall be entitled to withdraw the amount of Rs.8,000/- unconditionally.

12] In case, the petitioners desire to pay the amount of costs to the respondents directly, the petitioners are at liberty to do so but the petitioners should then file a receipt along with affidavit to this effect before the trial court within a period of four weeks from today.

13] Rule is made absolute in the aforesaid terms.

14] All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)