

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

WRIT PETITION NO. 2364 OF 2016

Shri Sadashiv Rama Gore ... Petitioner

Versus

Shri Dattatray Rama Gore & Ors. ... Respondents

Mr. Vijay Killedar for Petitioner.

Mr. Surel S. Shah for Respondent No.1.

CORAM : NITIN W. SAMBRE, J.

DATE : JUNE 25, 2018.

P.C. :

. This Petition is by the Petitioner - original Plaintiff whose suit bearing Regular Civil Suit No. 26 of 2004 for partition and separate possession came to be dismissed in default for non-prosecution.

2. The learned 3rd Joint Civil Judge Junior Division, Ichalkaranji in response to a prayer for condonation of delay of 400 days in moving the

Application for restoration of the Regular Civil Suit No. 26 of 2004, appreciated the claim of the Petitioner that he was under medical advise having suffered heart ailment and as such condoned the delay. Whereas the prayer for restoration of the Suit came to be rejected by order impugned dated December 19, 2013. Hence, this Writ Petition.

3. Heard learned Counsel for the Petitioner. He submits that the order impugned goes contrary to the earlier appreciation of the same cause by the same court while condoning the delay on February 9, 2012. According to him, the same court has considered the evidence of some witnesses with different perception for consideration of delay and that of application for restoration of suit, which view appears to me infirm. The learned Counsel then would urge that at the most the Applicant could be put to some condition while granting his prayer for restoration, considering the cause cited *qua* his medical ailment which was established through the oral and documentary evidence.

4. Per contra, the learned Counsel for the Respondent – original Defendant would urge that the appreciation of evidence on different stages of the suit is very much permissible. According to him, the

Petitioner – Plaintiff has already filed a counter claim in a suit for partition preferred by him, that being so, the present Writ Petition is liable to be dismissed, as infructuous.

5. Considered rival submissions.

6. Vide order dated February 9, 2012, the court of 3rd Joint Civil Judge Junior Division, Ichalkaranji while dealing with Misc. Civil Application No. 4 of 2007 considered the medical ailment of the Petitioner, the oral and documentary evidence brought by him on the record and accepted a plea that there was sufficient cause which kept him away from the court proceedings and ordered condonation of delay of 400 days in preferring an application for restoration of the suit.

7. The same piece of evidence which impress the learned court below for condonation of delay was viewed differently for no good reasons while dealing with the prayer for restoration of the suit, when the fact remains that the suit came to be dismissed for want of prosecution. The cause cited for non-attendance *qua* the medical ailment of the

Petitioner, which was substantiated by oral and documentary evidence including that of Doctor under whose treatment the Petitioner was.

8. In the aforesaid background, considering the infirmity and perversity of the findings recorded, in my opinion, the order impugned needs to be quashed and set aside.

9. As such, the Writ Petition is allowed.

10. The order impugned dated December 19, 2013 passed by the learned 3rd Joint Civil Judge Junior Division, Ichalkaranji in Misc. Civil Application No. 13 of 2012, which is confirmed by the District Judge, Ichalkaranji in Misc. Civil Appeal No. 6 of 2014 on October 3, 2015 is hereby quashed and set aside.

11. The suit of the Petitioner bearing Regular Civil Suit No. 26 of 2004 is restored to the file of the learned court below on the condition that Petitioner shall deposit costs of Rs. 2500/- within a period of eight weeks from today payable to the Respondents.

12. The issue *qua* the maintainability of the suit of the Petitioner in the wake of filing of counter-claim by him in a suit for partition initiated by the Respondents is kept open.

(NITIN W. SAMBRE, J.)