

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 7094 OF 2018

Mohammad Rafiq Abdul Shakoor ... Petitioner
Versus

1) Kisanchand Kamlani

Since deceased through L.Rs.

1-A) Mahesh Kisanchand Kamlani and others ... Respondents

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Mr. Ajit D. Kasliwal, Advocate for petitioner.

Mr. Hemant Surve, Advocate for respondent Nos.1A to 1D, 4 & 8.

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CORAM : M. S. KARNIK, J.

DATED : 5th AUGUST, 2019

PER COURT :-

1. Heard learned counsel for the petitioner and the learned counsel for the respondents.

2. The order under challenge is dated 27.04.2018 passed by the trial Court rejecting the application made for condonation of delay of 301 days in filing petition for restoration of the suit. The petitioner is the original plaintiff. The suit is of the year 1993. The suit was filed for possession and injunction in respect of the suit property. The valuation of the suit then was less than rupees one lakh. In the year 2000, the suit was re-registered as RCS No.898 of 2000 in view of the change in the pecuniary jurisdiction.

3. The suit was dismissed for default on 12.09.2014. It is the contention of learned counsel for the petitioner that the suit was transferred from 9th Joint Civil Judge Junior Division to 8th Joint Civil Judge Senior Division, however, the notices on court motion were not issued to both the parties. It is further the case of the petitioner that he was not in station during the period of 11.02.2014 to 10.09.2014. As he was out of station for business purpose he could not contact his advocate. He returned back on 10.09.2014 and almost a week thereafter he approached the advocate when he came to know that the suit is dismissed for default on 12.09.2014. He received the certified copies on 14.07.2015. The learned counsel for the petitioner would submit that the delay was not deliberate nor intentional. He further submits that the petitioner should not be non suited only on the ground of delay in filing the application for restoration. According to him, the defendant can always be compensated by imposing cost on the plaintiff.

4. Learned counsel for the respondents would invite my attention to the order passed by the trial Court. He would submit that the conduct of the plaintiff all throughout would indicate that he was only interested in dragging the litigation. He vehemently urged that the plaintiff was casual in conducting the court proceedings. He would further submit that the suit was filed as far as in the year 1993.

According to him at no stage and by most stage the plaintiff has been diligent in prosecuting the suit. He would submit that even delay of 301 days in filing restoration application does not disclose reasons which are *bonafide* and genuine. He would invite my attention to the findings of the trial court and even in the cross examination of the plaintiff, which would disclose that for a period of ten months from 17.09.2014 the plaintiff had taken no steps and was negligent in even seeking restoration in time.

5. I have gone through the order passed by the trial court. The suit is filed by the plaintiff is for possession and injunction in respect of the suit property. On going through the orders passed by the trial court, considering the conduct of the petitioner in prosecuting the suit. There is substance in the submission of the learned counsel for the respondent that the application is belatedly filed. The delay in filing application for restoration is 301 days. The reasons given in the application is that he was out of station for a period from 11.02.2014 to 10.09.2014. Thereafter, he visited his advocate from time to time and immediately the application for restoration is filed after a delay of 301 days. Though there is delay, in my opinion, the petitioner does not deserve to be non suited only on the ground of there being delay of 301 days. The explanation of the petitioner in the application for

condonation of delay though not very satisfactory, for condoning the delay in the facts of the present case calls for imposing exemplary costs on the petitioner.

6. Having regard to the circumstances on record, in my opinion, the delay of 301 days in filing application for restoration deserves to be condoned by imposing costs of Rs.25,000/- on the petitioner. This is also subject to the undertaking given by the learned counsel for the petitioner on instructions of the petitioner that in the event the suit is restored, he would cooperate with the trial court in expeditious disposal of the suit and would not seek unnecessary adjournments if it is restored.

7. The impugned order is set aside, subject to payment of costs of Rs.25,000/- to be paid by the petitioner to respondent No.1A who is stated to be 'karta' of the family, within a period of three weeks from today. The parties to appear before the trial court on 27th August, 2019. The payment of costs is condition precedent for hearing the application for restoration. It is made clear that the application for restoration be heard by the trial court on its own merits and in accordance with law.

8. The writ petition is allowed with no order as to costs.

[M. S. KARNIK, J.]