

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6664 OF 2016

Smt. Mangala Rupchand Sonwane

...Petitioner

versus

Bhimashankar Vishwanath Awalkanthe

(Since deceased, through his L.Rs.)

Bhovara Bhimashankar Awalkanthe and others

...Respondents

.....
Advocate for Petitioners : Mr. Amol S. Sawant
Advocate for Respondents 1-A to 1-E: Mr. N. L. Choudhari
Advocate for Respondents 1E1 and 1E2: Mr. Bora
Advocate for respondent No.2: Mr. Mukul S. Kulkarni
.....

CORAM : V. K. JADHAV, J.
DATED : 29th NOVEMBER, 2019

PER COURT:-

1. The petitioner is original plaintiff. She has instituted Regular Civil Suit No. 77 of 1999 for declaration and decree of perpetual injunction against the respondents. By order dated 26.09.2003, the trial court dismissed the said suit in default. The petitioner-plaintiff has filed an application bearing Civil Misc. Application No. 88 (44) of 2003 under Order IX Rule 9 of the Code of Civil Procedure 1908 for restoration of said R.C.S. No. 77 of 1999. By order dated 25.2.2011 the 2nd Joint C.J.J.D. Dhule in Civil M.A. No. 88 (44) of 2003 rejected the application with costs. Being aggrieved by the same, the petitioner-plaintiff has preferred Misc. Civil Appeal No. 42 of 2011 and the learned Adhoc District Judge-1, Dhule, by judgment and order dated 22.1.2016 in Civil Appeal No. 42 of 2011 dismissed the

appeal with costs. Hence, this writ petition.

2. Learned counsel for the petitioner-plaintiff submits that the petitioner-plaintiff has filed an application under Order IX Rule 9 of C.P.C. bearing Civil Misc. Application No. 44 of 2003 for restoration of the suit. By order dated 26.9.2003 the trial court has dismissed the said suit. The petitioner-plaintiff has filed an application for obtaining the certified copy on 13.10.2003 and received the certified copies on 11.12.2003. Learned counsel submits that in terms of provisions of Section 12(2) of Limitation Act, 1963, on excluding the days required for obtaining certified copies, the application bearing Civil Misc. Application No. 44 of 2003 is within limitation and as such, there was no need to file an application seeking condonation of delay. Learned counsel submits that the petitioner-plaintiff has specifically contended in her application that her husband had a paralytic attack and she was busy in looking after him, as nobody was there in her family to look after him. The petitioner-plaintiff used to come to attend the court dates at Dhule from Adgaon, District Dang (State of Gujarat). Learned counsel submits that she could not attend the court dates due to the said ailment of her husband. Learned counsel submits that the husband of the petitioner-plaintiff in addition to paralytic attack was also suffering from jaundice and as such, the delay has been occurred in filing application seeking restoration of the suit. Learned counsel submits that though the petitioner-plaintiff has not filed any application specifically seeking

condonation of delay, however, the grounds are raised in the application bearing Civil Misc. Application No. 44 of 2003 itself to condone the delay caused in filing the application seeking restoration of the suit. Learned counsel submits that since the trial court has rejected the application seeking restoration of the suit on the ground that the application is filed beyond period of limitation and no application seeking condonation of delay has been filed, the petitioner-plaintiff has filed an application seeking condonation of delay in pending appeal preferred before the District Court as against the order of rejection of the application seeking restoration of the suit. However, both the courts below have not considered this material aspect. Learned counsel submits that there is no delay as such in filing the application seeking restoration of suit, if the period required for obtaining the certified copy is excluded in terms of provisions of section 12(2) of the Limitation Act. Learned counsel submits that if the said period cannot be excluded then the petitioner-plaintiff has raised necessary grounds in the application itself, which supported by her affidavit and the same is sufficient to conclude that the petitioner-plaintiff was prevented from sufficient cause to prefer an application within limitation seeking restoration of suit.

3. Learned counsel appearing for the respective respondents-defendants jointly submit that Section 12(2) of Limitation Act attracts only in computing the period of limitation i.e. (i) for an appeal, (ii) an application for leave to appeal, (iii) for revision, (iv) for review of the

judgment. Section 12(2) of the Limitation Act cannot be made applicable to the application filed under Order IX Rule 9 of C.P.C. seeking restoration of the suit. Learned counsel submit that the petitioner-plaintiff has not filed any separate application for condonation of delay alongwith her application bearing Civil M.A. No. 44 of 2003 for restoration of the suit nor she has supported any document to indicate that her husband was suffering from paralytic attack so also from jaundice. Thus, the trial court has rightly rejected the said application bearing Civil M.A. No. 44 of 2003. So far as the appeal preferred by the petitioner-plaintiff before the District Court is concerned, the learned Judge has rightly dismissed the appeal on the ground that the said provisions of Section 12(2) of the Limitation Act cannot be made applicable and secondly that the delay condonation application filed for the first time in the appeal cannot be considered. There is no substance in this writ petition and the same is liable to be rejected.

4. So far as applicability of Section 12(2) of the Limitation Act 1963 is concerned, I find much substance in the contention raised by the learned counsel for the respondents. In terms of provisions of sub-section (2) of Section 12 of the Limitation Act in computing the period of limitation (i) for an appeal, (ii) an application for leave to appeal, (iii) for revision, (iv) for review of the judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order

appealed from or sought to be revised or reviewed, shall be excluded. In view of the same, the provisions of Section 12(2) of the Limitation Act are not applicable for filing an application under Order IX Rule 9 of C.P.C. for restoration of suit. Consequently, the time spent in obtaining the certified copy of the order cannot be excluded in computing the period of limitation.

5. In the case of ***Mohan Pachari vs. Jagdish Chandra Dube, reported in AIR 2008 M.P. 208***, the Madhya Pradesh High Court while considering the application under Order IX Rule 13 of C.P.C. for setting aside the exparte decree of eviction held that the provisions of section 12 of Limitation Act and exclusion contained therein does not apply to the proceedings under Order IX Rule 13 of C.P.C. This court (Coram C.L. Pangarkar, J.) in the case of ***Bhalchandra Ganesh Naik and Anr. vs. Sona Hotel and Ors. reported in 2009 (4) ALL MR 349*** has also taken the similar view.

6. So far as the view expressed by the Supreme Court in the case of ***India House vs. Kishan N. Lalwani, reported in (2003) 9 SCC 393*** is concerned, the Supreme Court has considered the provisions of Section 12(2) and Section 29(2) of the Limitation Act, 1963 and dealt with the relaxation of computation of limitation period prescribed by special or local laws. The appeals by special leave preferred before the Supreme Court against the order of the High Court wherein the delay caused in filing the revision petition has

been condoned. In reference to that the Supreme Court has dealt with provisions of Section 12(2) r.w. Section 29(2) of the Limitation Act, 1963. In the instant case, the order about dismissal of suit and application preferred against the said order for restoration does not fall in any of the categories as specified under Section 12(2) of the Limitation Act, 1963.

7. In the instant case, the petitioner remained under the impression that she is entitled for exclusion of period spent in obtaining the certified copy of the order about dismissal in default of the suit and as such, at the bottom of the application bearing Civil Misc. Application No. 44 of 2003, the petitioner has specifically mentioned about exclusion of time in computing the period of limitation. Though the legal position does not change, however, it is to be mentioned here that this Court in the case of **Bhalchandra Ganesh Naik and Anr. vs. Sona Hotel and Ors. (supra)** for the first time held that question of exclusion of time is not applicable and further there is no question of obtaining the certified copy to file an application under order IX Rule 9 of C.P.C. Apart from this, the petitioner has mentioned in her application bearing Civil Misc. Application No. 44 of 2003 that her husband had a paralytic attack and he was also suffering from jaundice and there was nobody in her family to look after him. Furthermore, she is residing in village Adgaon, which is situated in Gujarat State and required to attend the court dates in the civil court at Dhule. Thus she could not attend the

court on the given date. Though there is no separate application filed for condonation of delay, the petitioner has made specific averments in her application, necessary for condoning the delay. However, the courts below, instead of considering the said aspect, have gone to the extent by observing that since the petitioner has mentioned her name with prefix Kumari, her marital status itself is under cloud. It is not the case of the respondents that the petitioner is unmarried girl. The petitioner has also explained the same in her appeal preferred before the District Court that she is using her maiden name as appearing in the old record and even after the marriage, it has not been changed so far. The petitioner has even filed an application seeking condonation of delay in the appeal No. 42 of 2011 before the District Court. There is delay of 46 days caused in filing application bearing Civil Misc. Application No. 44 of 2003.

8. In the case of ***Rajiv Lochan Pandey vs. Madan Gopal Sharma and others, reported in AIR 1989 Allahabad 45***, the Allahabad High Court in para 26 of the judgment in identical facts held that the petitioner therein made out a case in the affidavit for condonation of delay. In the facts of the case, separate application is not required. In the instant case, considering the plight of the petitioner and since her husband had a paralytic attack and also suffering from jaundice, in my considered opinion, she was prevented from sufficient cause in attending the Court. I am inclined to condone the delay as an exceptional case without there being any separate

application seeking condonation of delay alongwith the application bearing Civil Misc. Application No. 44 of 2003. Hence, I proceed to pass the following order:-

O R D E R

- I. Writ petition is hereby allowed.
- II. The impugned judgment and order dated 26.09.2003 passed by the Civil Judge, Junior Division, Dhule in Regular Civil Suit No. 77 of 1999, the judgment and order dated 25.2.2011 passed by the 2nd Joint Civil Judge, Junior division, Dhule in Civil Misc. Application No. 88 (44) of 2003 and the judgment and order dated 22.01.2016 passed by learned Adhoc District Judge-1, Dhule in Civil Appeal No. 42 of 2011 are hereby quashed and set aside.
- III. The application bearing Civil Misc. application No. 88 (44) of 2003 is hereby allowed in terms of its prayer clause.
- IV. The trial court is hereby directed to decide the suit on its restoration to the original number, as expeditiously as possible and preferably within a period of nine months from today.
- V. The writ petition is hereby disposed of.

(V. K. JADHAV, J.)

rlj/