

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7076 OF 2017

Narmada Dattatray Bhosale
(since deceased) through
LRs. and ors.

.. Petitioners

vs.

Yashoda B. Lokhande
through POA and ors.

.. Respondents

Mr. Manmath S. Athalye for the Petitioners.

Mr. Nikhil N. Wadikar i/b. Mr. Nandu Pawar for the
Respondents.

CORAM : M. S. SONAK, J.

DATE : 18 MARCH 2019.

ORAL JUDGMENT :-

1] Rule. With the consent of and at the request of learned
counsel for the parties, Rule is made returnable forthwith.

2] Heard Mr. M.S. Athalye, learned counsel for the
petitioners and Mr. N.N. Wadikar, learned counsel for the
respondents.

3] The challenge in this petition is to the order 3rd
January 2017 by which learned Trial Judge has condoned
the delay in institution of the appeal.

4] Learned counsel for the petitioners points out that the delay in this case was of about 5 years. He points out that in the course of cross-examination, the appellant has admitted that her advocate had informed her about disposal of the suit. The learned counsel points out that even the Doctor who was examined have referred to the medication offered to husband of respondent No.1 on account of paralysis for the period between 2008 to 2010 and the appeal was however instituted in the year 2013.

5] The learned counsel relying on ***Kuddus Khan Gaggar Khan and anr. vs. Mohammad Yakub Pir Mohammad and anr. - 2002 (2) BCJ 71, B. Madhuri Goud vs. B. Damodar Reddy – (2012) 12 SCC 693*** and ***Abdul Hameed Abdul Gani Shaikh vs. Amjad Ali Shafi Khan – 2018 (6) ALL MR 441*** has pointed out that a party, cannot, simply plead that he/she was illiterate or put blame on advocate. For all these reasons, Mr. Athalye submits that the impugned order warrants interference.

5] Mr. Wadikar, learned counsel for the respondents, defends the impugned order on the basis of the reasoning reflected therein. He points out that the respondents are financially in a weak position, apart from being illiterate. He points out that respondent No.1's husband suffers from paralysis attack and it is in these circumstances, she was unable to attend the Court. He, therefore, submits that this petition may be dismissed.

6] The rival contentions now fall for determination.

7] In this case, respondent No.1 not only filed an application seeking condonation of delay, but further she examined herself as well as the Doctor, who had issued a Certificate on the aspect of treatment of her husband who was afflicted with paralysis. Learned Trial Judge has appreciated the evidence in some details and thereafter exercised the discretion in a positive manner so as to condone the delay.

8] The fact situation in the judgments relied upon by Mr. Athalye were quite different. This is not a case where the respondent No.1 has simply blamed her advocate but this is a case where respondent No.1 has explained in details the circumstances which prevented her from filing the appeal within prescribed period of limitation.

9] In ***N. Balakrishnan vs. M. Krishnamurthy - (1998) 7 SCC 123***, the Supreme Court has held that it is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction,

unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first Court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court. The Supreme Court has then proceeded to state reason for such a different stance.

10] In the aforesaid case, the Supreme Court has also noted that in every case there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would

have incurred quiet a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss.

11] Applying the aforesaid principles to the facts of the present case, there is really no case made out to interfere with the impugned order to the extent such order condones the delay in the institution of an appeal against the partition decree. However, the amount of costs of Rs.2000/- in the facts and circumstances of the present case is too meagre and therefore, the same deserves to be enhanced.

12] Taking into consideration the financial status of the parties, the amount of costs are required to be enhanced from Rs.2000/- to Rs.10,000/-.

13] The impugned order is accordingly modified only to the aforesaid extent, i.e., only amount of costs are increased from Rs.2000/- to Rs.10,000/-. The balance amount of costs, i.e., Rs.8,000/- should be paid by respondent No.1 to the

petitioners herein within a period of two weeks from the date of this order is uploaded on the website. In case, there is any difficulty in payment, the amount can be deposited before the Appeal Court and the petitioners herein will have liberty to withdraw the same unconditionally. In case, the balance amount of costs are not deposited within two weeks as aforesaid, then the order of condonation of delay shall be deemed to have been dismissed.

14] Rule is accordingly made partly absolute to the aforesaid extent only. There shall be no order as to costs.

15] Further taking into consideration the facts and circumstances as aforesaid, the hearing of the appeal is expedited. The learned appellate Court is directed to dispose of the appeal, as expeditiously as possible and in any case by 31st December 2019.

16] All concerned to act upon an authenticated copy of this judgment and order.

(M. S. SONAK, J.)