

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

CIVIL REVISION APPLICATION NO.5 OF 2018

LAXMIBAI KANHE PATIL, SEVABHAVI SANSTHA,  
PARBHANI THROUGH IT'S SECRETARY, DR. ANIL  
KESHAVRAO KANHE

VERSUS

PURBHAJI VENKOBA HARKAL AND OTHERS.

...

Advocate for Petitioner : Mr. Nikam Anup R.

Advocate for Respondents : Mr. Shelke Shivaji T.

...

CORAM : V.K. JADHAV, J.

Dated : January 07, 2020

...

**PER COURT :-**

1. Learned counsel for the applicant/original plaintiff submits that the Trial Court by judgment and decree dated 27.2.2012 decreed the suit of the petitioner/plaintiff on 27.2.2012 and thereby restrained the defendants by a decree of perpetual injunction from causing obstruction to the plaintiff's possession over the suit property otherwise than in a due process of law. Learned counsel submits that in the year 2016 the respondents herein have preferred the appeal against the judgment and decree passed by the trial court alongwith the delay condonation application. The

aaa/-

learned District Judge-2, Parbhani by order dated 13.11.2017 below exh.1 in Civil M.A. No.442 of 2016 allowed the application subject to costs of Rs.2,000/-. Learned counsel submits that there is an inordinate delay in filing the regular civil appeal against the judgment and decree passed by the trial court. There is delay of four years in preferring the appeal and respondents had tried to explain the said delay mainly on the ground of ailment. Learned counsel further submits that before filing of the said Civil M.A. seeking condonation of delay caused in filing the regular civil appeal, the petitioner/original plaintiff has filed execution petition bearing R.D. No.40 of 2013 for execution of the decree passed in R.C.S. No.196 of 2009. Learned counsel submits that in paragraph no.12 of the order passed below exh.1 in R.D. No.40/2013 the 3<sup>rd</sup> Jt. C.J.J.D. Parbhani (Executing Court) has observed that the Judgment debtor has given various opportunities. The judgment debtors 1 and 2 are present but not filed their say hence no say order has been passed. They never appeared before the Court. Notice was duly served

aaa/-

on judgment debtor nos.3 and 4 however, they had not appeared before the Court hence matter proceeded ex-parte against them. Learned counsel submits that in the said execution proceedings nor the respondents/original defendants have filed their say nor brought to the notice of the Executing Court about their ailment. Learned counsel submits that the learned Judge of the executing Court by order dated 3.12.2014 below exh.1 in R.D.40 of 2013 partly allowed the application and the judgment debtors have been sent to Civil Prison for one month. The respondents/original defendants have preferred Civil Misc. Application No.519 of 2015 under section 5 of the Limitation Act for condonation of delay caused in filing the appeal against the said order of civil imprisonment. The learned District Judge-2, Parbhani by order dated 27.7.2016 has rejected the said application. Learned counsel submits that despite the appearance in the execution proceedings and preferring an appeal against the civil imprisonment, respondents/original defendants have not bothered to prefer an appeal against the judgment and decree passed by the

aaa/-

trial court for near about four and half years. The respondents, however, for the first time in their application bearing Civil Misc.A.No.442 of 2016 have raised the ground of their so called ailment. Respondents have placed on record the medical certificates about their ailment and that certificate pertains to the year 2013. Learned counsel submits that there is no satisfactory explanation to said inordinate delay of four and half years, however, the learned District Judge-2, Parbhani has mechanically allowed the application with the observation that the liberal view is required to be taken to advance substantial justice. Learned counsel submits that, Civil Revision Application thus deserves to be allowed by quashing and setting aside the order passed by the learned District Judge-2, Parbhani and application bearing Civil MA No.442/2016 may be rejected.

2. Learned counsel for respondents submits that the respondents are the agriculture labourers and possess very small piece of land. Respondent nos.1 and

aaa/-

2 are old and they are not keeping well. They are taking treatment in the Mathadi Hospital at Mumbai since 2011. Respondent no.1 was operated for spinal/vertebra disorders and he was also operated for kidney ailment. Respondent no.2 has also been operated and she was again operated on 8.6.2018 in Mathadi Hospital at Mumbai. Respondent no.3 is Mathadi labour, whereas respondent no.4 is the agricultural labour. Respondent nos.3 and 4 are required to take care of their aging parents and as both of them were not keeping well, respondent nos. 3 and 4 were required to take them to Mumbai for time and again. Consequently, all of them could not pay due attention to the civil litigation. Learned counsel submits that delay has been occurred due to said aspects. Learned counsel submits that Chief Medical Officer of Mathadi Hospital, Mumbai has issued certificate which is placed on record Exhibit R-3 page 75 wherein the details of sufferings of respondent no.1 has been mentioned and respondent no.1 as per said certificate has attended the hospital on the various dates till 2.2.2015. Respondent no.2 also suffered from

aaa/-

various ailments and medical certificate to that extent is also placed on record. Learned counsel submits that considering the entire aspect of the case, the appellate Court has rightly condoned the delay. There is no substance in this Civil Revision Application and the Civil Revision Application is liable to be dismissed.

3. On careful perusal of the judgment and decree passed by the Trial Court in Regular Civil Suit No.196 of 2009, it appears that the defendants have strongly resisted the suit by filing their written statement. The petitioner/plaintiff has examined the witnesses and they were subjected to cross examination at length. Defendants have also examined defendant no.1 and other witnesses in support of their contentions. On 27.2.2012 the trial court has decreed the suit with costs and restrained the respondents/defendants by a decree of perpetual injunction from causing obstruction to the plaintiff's possession over the suit property otherwise than the due process of law. It appears that in the year 2013

aaa/-

itself the petitioner/plaintiff has filed execution petition bearing R.D. No.40 of 2013 and despite the service of notice on respondent nos.3 and 4, they remained absent in the execution proceedings and though respondent nos.1 and 2 were present before the Executing Court as observed by the Executing Court in paragraph no.12 of the order dated 3.12.2004 passed below exh.1 in R.D. No.40 of 2013 respondent nos.1 and 2 herein have not filed any say. It is pertinent that even in the said proceedings, respondent nos.1 and 2 have not raised any ground about their ailment. On the other hand, since the evidence of the plaintiff remained unchallenged in the execution petition, the learned Judge of the executing Court by order dated 3.12.2014 sent the Judgment Debtor to Civil Prison for one month. However, by way of Exh.45 the respondents/original judgment debtor have filed an application before the executing Court for staying the effect of the order passed about their civil imprisonment till their application preferred against the said order is decided by the District Court. Said application Exh.45 was filed in the

aaa/-

month of December 2015 wherein the respondents no.1 and 2 have raised ground of their ailment, however, thereafter, they have preferred Civil Misc. Appln No.519 of 2015 for condonation of delay caused in filing the appeal against the order of civil imprisonment, however, the learned District Judge-2, Parbhani by order dated 27.7.2016 rejected the said application on the ground that right of appeal is not given to the petitioner under the provisions of the Civil Procedure Code against the said order of civil imprisonment. Even thereafter one another order is passed by the learned Judge of the Executing Court dated 7.9.2016 and respondent nos.1 and 4 sent to Civil Prison for one month. The learned counsel appearing for the respective parties admit that respondents have undergone the Civil Imprisonment. Despite all these orders, it is pertinent that, respondents have not bothered to prefer an appeal against the judgment and decree passed by the trial court and, as such, there is an inordinate delay of four and half years. The learned District Judge-2, Parbhani by giving reference to the medical papers of respondent

aaa/-

nos.1 and 2 and by reference to their ailments seems to have taken liberal view, however, the learned District Judge, Parbhani has forgotten that before the said application bearing Civil M.A. No.442 of 2016 preferred for condonation of delay, respondent nos.1 and 2 have participated in the execution proceedings and even they had approached the District Court against the order of civil imprisonment. Though, medical certificate is placed on record, the learned District Judge, Parbhani has considered the same and even though certain dates are mentioned in the said certificate alongwith ailment of respondent nos.1 and 2 respectively in two medical certificates, I do not think that both respondent nos.1 and 2 were actually bed ridden. Respondent no.3 is a Mathadi labour, and respondent no.4 is a agriculture labour, however, none of the respondents bothered to file appeal against the judgment and decree passed by the Trial Court for near about four and half years. There is no satisfactory explanation for such an inordinate delay. Delay cannot be condoned by stretching the liberal approach to such an extent so as to cause injustice to

aaa/-

the other side. Furthermore, the judgment and decree passed by the Trial Court is to the extent that the respondents/defendants are restrained by perpetual injunction from causing obstruction to the plaintiff's possession over the suit property otherwise than due process of law. Meaning thereby liberty and option is left to the respondents to exhaust due process of law, in case, if occasion so arises. In view of this, I find much substance in this Civil Revision Application. Even though, no case is made out for condonation of delay by the respondents, the learned District Judge-2, Parbhani has condoned the delay by the impugned order. Hence, I proceed to pass the following order.

### **O R D E R**

1. The Civil Revision application is hereby allowed.
2. The impugned order dated 13.11.2017 passed by the District Judge-2, Parbhani below exh.1 in Misc. Civil A. No.442 of 2016 is hereby quashed and set aside.

aaa/-

3. Misc. Civil A. No.442 of 2016 is hereby rejected.
4. Civil Revision Application is accordingly disposed off.

**( V.K. JADHAV, J. )**

...