

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

908 **WRIT PETITION NO.6336 OF 2021**

MAHADEV TATYASAHEB GAPAT

..PETITIONER

VERSUS

VITTHAL TATYASAHEB GAPAT AND OTHERS

..RESPONDENTS

...
Advocate for Petitioner : Mr. S.S. Gangakhedkar
...

CORAM : SANDEEP K. SHINDE J.
DATE : 15TH JUNE, 2021

PER COURT :-

1. Heard. The petitioner-defendant No.1, in Regular Civil Suit No. 180 of 2008, has disputed the order dated 18th February 2021, passed by the learned Civil Judge, Junior Division, Washi, District Osmanabad, condoning the delay, occurred in preferring an application, for restoration of the suit.

2. The subject suit for 'partition' was instituted by the respondent Nos. 1 to 4. The suit was dismissed for default on 17th June, 2014. Whereafter, an application was moved on 28th July, 2014 for its restoration. The application was opposed by the defendants on the ground that the application was not maintainable, being filed beyond the limitation, without seeking condonation of delay. Parties led the

evidence. It appears the plaintiff was cross-examined. In the course which he admitted, the 'delay' occurred while seeking restoration. Whereafter, plaintiff filed an application (Exh.65) in Misc. Civil Application No. 27 of 2014, seeking condonation of 12 days delay. The application was opposed by the defendants. However, the learned trial Judge vide order dated 18th February 2021, condoned the delay subject to cost quantified at Rs. 3,000/-. This order is disputed in this petition.

3. It may be stated that, the impugned order has been challenged by invoking the writ jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. At the first place, it may be stated that an order of the Civil Court could be challenged under Article 227 and not under Article 226 as held by the Apex Court in the case of *Radhey Shyam and Another Vs. Chhabi Nath and Others (2015) 5 SCC 423*. It is also a settled law that, the power of superintendence under Article 227 of the Constitution of India cannot be invoked to correct an error of the facts which only a superior Court can do in exercise of its statutory powers as the Court of appeal; the High Court cannot in exercise of its jurisdiction under Article 227, convert itself to the Court of appeal.

4. Keeping in mind the, the kind of jurisdiction I am exercising, in this case, when plaintiff had applied for restoration of the suit, vide Misc. Civil Application No. 27 of 2014, inadvertently he did not realize that the application was not presented within time. As such, he did not seek for condonation of delay. But when he would admit the lapse of his part which was not intentional but accidental, he made an application below Exh.65 seeking condonation of delay.

5. It may to stated one amongst other defendants, has disputed the order; thereby others have acknowledged the order dated 18th February, 2021. As a consequences, in a suit for partition, among defendants except one (petitioner herein) others, are not averse, to restoration of suit. This fact, cannot be overlooked particularly in this kind 'lis' i.e. partition, whereas plaintiff is defendant and defendant is plaintiff, in as much as at any stage, subject to certain restrictions, if plaintiff abandons the claim, defendants can be transposed as a plaintiff. In consideration of facts of the case, the learned trial Court condoned the delay subject to cost of Rs. 3,000/-. In view of the facts of the case, there is no error in exercise of the jurisdiction by the trial court. As such, I do not see any

reason to interfere with the impugned order in supervisory jurisdiction.

6. The petition is accordingly dismissed.

(SANDEEP K. SHINDE, J.)

YSK/