

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 1446 OF 2021

Nimbaji Deorao Pagore,
Aged 65 years,
Occupation-Business,
R/o. Mehkar, Tq. Mehkar,
Dist. Buldhana.

.. Petitioner
(Ori. Defendant / Ori.
Appellant)

.. Versus ..

Buldana District Central Co-op. Bank Ltd.,
Buldana, Divisional Office, Mehkar, through
its Administrative Officer, Head Office,
Buldana.

.. Respondent
(Ori. Plaintiff / Ori.
Respondent).

.....
Shri R.G. Kavimandan, Advocate for the petitioner,
Shri A.P. Wachasunder, Advocate for the respondent.
.....

CORAM : N.B. SURYAWANSHI, J.
DATED : 11.10.2021.

JUDGMENT

1. **Rule.** Rule made returnable forthwith. Heard finally
with the consent of the parties.

2. This petition impugns the order dated 22.08.2019 (Annexure-8) passed by the District Judge-1, Mehkar, District-Buldana below Exh.1 in M.J.C. No.14/2019 (Old M.J.C. No.33/2015) thereby rejecting the delay condonation application filed by the petitioner - original appellant for filing restoration application.

3. The appeal filed by the petitioner bearing Regular Civil Appeal No.106/2009 was dismissed in default by the appellate court on the ground of absence of the appellant as well as his advocate on 19.07.2013. The petitioner filed an application for restoration of appeal under Order 41, Rule 19 of the Code of Civil Procedure along with delay condonation application M.J.C. No.33/2015 which was renumbered as M.J.C. No.14/2019, seeking condonation of delay of 573 days in filing restoration application.

4. The petitioner contended in the delay condonation application that he was informed by the learned Advocate at Buldhana that the date of hearing of the appeal would be informed to him when the appeal will be listed for final hearing. However, at no point of time, the date of hearing was informed to the petitioner-appellant. In the meanwhile, on enquiry, the learned advocate told the petitioner that the paper book of the appeal was under

preparation and the appeal was not listed on board for hearing. The appeal was thereafter dismissed for want of prosecution. The petitioner came to know about the same only after filing of the execution proceeding. The petitioner therefore submitted that the delay may be condoned.

5. Even at the time of hearing of M.J.C. No.14/2019, the petitioner and his advocate were continuously absent. The said application was dismissed on merits by the trial court holding that no proper reasons are mentioned for condonation of delay and no supporting document is filed on record in respect of illness or medical treatment. The repeated absence of the petitioner and his advocate was also noted, which reflected negligence of the petitioner and his advocate in prosecuting the matter. The order of dismissal of delay condonation application is impugned in the present petition.

6. Heard the learned advocate for the petitioner and the learned advocate for the respondent.

7. The learned advocate for the petitioner conceded that the petitioner and his advocate were negligent in prosecuting the matter. He however submits that for the lapses on the part of the advocate, the petitioner may not suffer. He, therefore, prayed for allowing the

present petition.

8. On the other hand, the learned advocate for the respondent, submitted that the present petition is not maintainable, as the petitioner has alternate efficacious remedy of filing appeal. He further submitted that persistent negligence on the part of the petitioner and his advocate in prosecuting the matter is clear from record and therefore, the petitioner does not deserve any relief. He therefore submitted that the petition is liable to be dismissed with costs.

9. The learned Advocate for the petitioner, on the point of alternate remedy, submitted that in view of ratio in *Commissioner, Mysore Urban Development Authority .vs. S.S. Sarvesh*, (2019) 5 SCC 144 , this petition is maintainable.

10. In *Commissioner, Mysore Urban Development Authority .vs. S.S. Sarvesh (supra)*, in similar facts, the Hon'ble Apex Court held :

14. We, therefore, clarify the legal position that the appeal lies under Order 43 Rule 1 (t) of the Code to the High Court against the order dated 29.6.2016 passed by the appellate court which dismissed the application made under Order 41 Rule 19 of the Code.

15. *Be that as it may, in our considered opinion, the High Court erred in dismissing the writ petition. The High Court should have allowed the writ petition and the appellate Authority should have been given the indulgence of hearing of their appeal on merits.*

19. *In our view, the courts below should have seen that the first appeal is a valuable right of the appellant and, therefore, the appellate Authority was entitled for an opportunity to prosecute their appeal on merits. If the appellant's advocate did not appear may be for myriad reasons, the Court could have imposed some costs on them for restoration of their appeal to compensate the respondent (plaintiff) instead of depriving them of their valuable right to prosecute the appeal on merits. That is what Vivian Bose, J. has reminded to the courts while dealing with the cases of this nature in Sangram Singh to do substantial justice to both the parties to the lis. Indeed, dismissal of the appeal in default and dismissal of the appeal on merits makes a difference. The former dismissal is behind the back of the litigant and latter dismissal is after hearing the litigant. The latter is always preferred than the former.*

11. In the light of above ratio, the present petition is maintainable. If the delay is not condoned, the valuable right of the petitioner to prosecute his Regular Civil Appeal on merits will be taken away. It is settled law that for the fault of advocate, the litigant should not suffer. In my view, the grounds stated in M.J.C. No.14/2019 are sufficient for condonation of delay and the delay is

liable to be condoned, subject to the petitioner paying the costs.

Hence, the following order :

O R D E R

1. The writ petition is allowed.
2. The impugned order passed by the District Judge-1, Mehkar, District-Buldana below Exh.1 in M.J. C. No.14/2019 (Old M.J.C. No.33/2015) is hereby quashed and set aside.
3. The delay is condoned, subject to the petitioner paying costs of Rs.25,000/- to the respondent.
4. The restoration application be heard by the concerned court, within a period of four weeks, from the date of receipt of this order.

Rule is made absolute in the above terms. No costs.

(N.B. Suryawanshi, J.)