

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

943 WRIT PETITION NO.6599 OF 2022

**TUKARAM PARWATI MOTE AND OTHERS
VERSUS
PRIYANKA TUKARAM MOTE AND OTHERS**

...

Advocate for Petitioners : Mr. Markad Dattraya R.
Advocate for Respondents : Mr. Vinayak P. Narwade

CORAM : MANGESH S. PATIL, J.
DATE : 28.06.2022.

PER COURT :

Heard.

2. Issue notice to the respondents. Learned advocate Mr. Narwade waives service on behalf of all the respondents.
3. The petitioners are the original defendants who had challenged the judgment and order passed in a suit filed by the respondents by preferring Regular Civil Appeal before the District Court. The appeal was dismissed in default on 11.01.2018. In order to seek restoration they preferred an application for restoration along with an application for condonation of delay under Section 5 of the Limitation Act.
4. I have heard the learned advocates by consent finally.
5. There was delay of 509 days in applying for restoration. The petitioners have given some reasons for the delay in their application. The respondents while opposing that application did not controvert the cause being put forth and were only satisfied in demonstrating as to how the petitioners were not prosecuting the appeal diligently.

6. Pertinently, instead of objectively considering the cause being put forth by the petitioners, even the lower appellate court has apparently got swayed away by the manner in which the petitioners were contesting the appeal, to demonstrate as to how they were not prosecuting it with due diligence. It is necessary to bear in mind that this was an application for condonation of delay and should have been decided objectively on its own merits *vis a vis* the cause that was being put forth by the petitioners. Instead, the lower appellate court has referred to their conduct before the appeal was dismissed in default, which could have been relevant while considering their application for restoration of the appeal but that was utterly irrelevant to the extent of prayer for condonation of delay. The lower appellate court in the process of deciding the application for condonation of delay has resorted to the reasoning which would befit to the decision on the application for restoration. The course adopted is not permissible.

7. The cause that was being put forth by the petitioners in their application seeking condonation of delay, the reply filed by respondents was evasive. They did not specifically controvert the grounds which were being put forth by the petitioners seeking condonation of delay.

8. The Writ Petition is allowed. The impugned order is quashed and set aside. The application for condonation of delay stands allowed.

(MANGESH S. PATIL, J.)

mkd/-