

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

CIVIL REVISION APPLICATION NO. 10 OF 2022

1. Bhimraj s/o Nanaji Dusing,
Age : 51 yrs., Occu. Agri/Service

2. Kishor s/o Nanaji Dusing,
Age : 43 yrs., Occu. Agri.,

Both R/o. Nevargaon,
Tq. Gangapur, Dist. Aurangabad.

....Applicants

Versus

1. The State of Maharashtra,
Through Collector,
Aurangabad.

2. Smt. Venubai w/o Mohaniraj Londhe,
(Died) Through her LR's.,
Dnyandeo s/o Mohaniraj Londhe,
R/o. Wadala, (Mahedeo),
Tq. Shrirampur, Dist. Aurangabad.

....Respondents

....

Mr. S. P. Salgar, Advocate for the applicants
Mr. S. B. Pulkundwar, AGP for respondent no. 1
Mr. S. S. Wagh, Advocate for respondent no. 2

....

CORAM : RAJESH S. PATIL, J.
DATE : DECEMBER 08, 2022

ORAL JUDGMENT : -

CHALLENGE :

1. This Civil Revision Application is filed challenging an order dated 21.08.2021 passed below Exh. 1 in M.A.R.J.I. Application No. 38/2019, by District Judge-1, Vaijapur, Dist. Aurangabad, by which

application for condonation of delay of 4 years 7 months and 8 days in filing appeal was rejected.

FACTS :

2. Respondent no. 2 had filed a Petition under the provisions of Bombay Regulation Act, 1827 for issuance of Heirship Certificate. The said petition was allowed by Civil Judge, Senior Division, Vaijapur, Dist. Aurangabad vide order dated 22.09.2014.

3. Applicants thereafter preferred a review petition challenging the order dated 22.09.2014 and the same was rejected on 24.02.2015. Applicants also filed suit being R.C.S. No. 144/2015 for a declaration of ownership and permanent injunction in respect of the same property.

4. Much thereafter, an appeal was filed by the applicants herein challenging the judgment and order dated 22.09.2014. Along with the said appeal, an application for condonation of delay of 4 years 7 months and 18 days was also filed. The grounds stated in the application for condonation of delay was that the delay was caused because the applicants had preferred review petition, so also they had preferred a civil suit and also that their advocate had not instructed

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them for preferring an appeal. However, the District Judge, Vaijapur, after hearing the parties rejected the delay condonation application by his order dated 21.08.2021. By the present Civil Revision Application, the order dated 21.08.2021 is being challenged.

SUBMISSIONS :

5. The learned advocate for the applicants argued that the delay has been caused due to non instructions of advocate in lower court and so also much time had consumed in preferring the review petition and civil suit. He further argued that he is placing reliance on the judgment in the case of **Pattherao Narsu Patil Vs. Gangubai A. Lad and others** reported in 2019 (3) Mh.L.J. 121. The ratio laid down therein is applicable to the present matter.

6. Learned advocate for the respondent opposed this application and submitted that the learned District Judge has dismissed the application for condonation of delay of 4 years 7 months and 18 days by a well reasoned judgment and order. No justifiable cause had been shown by the applicants. The applicants, in the meanwhile, had preferred review petition so also had filed a separate suit and after he was not able to secure any favourable orders, had preferred the appeal mischievously with a delay condonation application to support his
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contention. The advocate for the respondent relied upon the judgments in the case of **Ramlal and others Vs. Rewa Coalfields Ltd.**, reported in AIR 1962 Supreme Court 361(1), **State of Assam Vs. Gobinda Chandra Paul** reported in AIR 1991 Gauhati 104(1) and **Abhimanyu Rath Vs. Virendra Pandey** reported in AIR 1978 Madhya Pradesh 112.

ANALYSIS : -

7. I have heard both the counsels and gone through the application for condonation of delay of 4 years 7 months and 18 days and the impugned order. The Application seeks condonation of delay on the ground of fault on the part of the counsel in the lower court for not advising to file an appeal, time consumed in preferring review petition so also in filing suit.

8. Taking into consideration the ground of applicants that their advocate in the lower court did not advise them to file an appeal, does not satisfy me since, at the relevant time, the applicants in consultation with his lawyer had preferred a review petition, which was rejected on 24.02.2015 and much thereafter the Condonation of Delay Application and the appeal was filed on 12.07.2019.

9. The Supreme Court in the case of **Conception Fernandes & Anr. Vs. Tasneem Shaikh (Mrs.) & Ors.** reported in 2014 (5) ALL M.R. 751, held in paragraph nos. 14, 15 and 16 thus :

- “14. A party can of course say, he being not a legal expert, would not know immediately that decision of his Advocate is not sound and so he would not be in a position to promptly exercise his choice of Advocates and would be able to do so only after passage of sometime, when he would learn or be told about the incorrectness of approach of his Advocate. Even this justification, in my opinion, cannot answer the test of due diligence. The reason being that a representative or Advocate and the party being represented in a case are not two separate identities in that case, so far as conduct of the case is concerned. Whether an Advocate does on behalf of the client is considered to be done by the party himself. The acts of the Advocate before the Court are binding upon the party he represents and what he submits before the Court on facts is only what the party says and what he says in law is with the approval, express or assumed, of the party. In other words, all actions taken before the Court by an Advocate, are the actions of the party. So, there is no splitting of concept of due diligence, one of the party and the other of the Advocate, so as to enable the party to be excused for negligence of the Advocate just by showing his own diligence. If such a ground is to be taken as a good ground, it may provide an effective tool to the lazy and indolent parties to conveniently get over the rigour of due diligence test prescribed under the proviso to Rule 17, Order 6 CPC. All that he would have to do is change the Advocate blaming it on the previous Advocate.
15. Viewed in this way, I am of the opinion that the learned Civil Judge was right in holding that the amendment application could not have been allowed only on the ground that there was failure of the Advocate to raise the matter inspite of he been duly instructed by the petitioner.
16. Learned Civil Judge in para 20 of the impugned order has observed that the petitioners have not averred any facts to show that they had exercised due diligence before signing and verifying the Written Statement prepared by their Advocate on record. But, as rightly submitted by learned Counsel for the respondents, learned Civil Judge has made some amends in his approach to the amendment application and later on, as seen from his observation in paragraph 31, the learned Civil Judge considered the very ground of failure of the Advocate on record to incorporate the pleadings inspite of he being duly instructed and found that it was not a sufficient ground to enable the Court to exercise its discretionary power under Rule 17, Order 6 of the CPC. This later observation indicates application of mind on the part of learned Civil Judge, to the facts and circumstances of the case, thereby satisfying the test laid down in the case of Rohit Kapadia (supra).

The criterion is not whether any averment regarding due diligence is made, and the real test is whether the Court has, by taking into account the facts and circumstances of the case, decided as to whether or not the party could have raised the matter earlier after exercise of due diligence.

10. Therefore, in the above judgment, Supreme Court has concluded that just blaming an advocate would not suffice the purpose of the Applicants to seek Condonation of Delay.

11. The second and the third ground, of time being consumed in filing review petition and the suit, also does not satisfy me as the review petition was dismissed on 24.02.2015 and the suit being R.C.S. No. 144/2015 was filed in the year 2015. Much later, the appeal along with the application for condonation of delay was filed on 12.07.2019 and no plausible explanation was offered to condone the delay so caused.

12. Similarly, in the case of **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and others** reported in 2013 (12) SCC 649, a delay of 7 years was not condoned by Supreme Court. In the case of **P. K. Ramachandran vs. State of Kerala and another** reported in 1998 AIR SCW 2177, the Supreme Court did not condone delay of 565 days. The facts in the case of Pattherao Narsu Patil (supra) referred to by the Applicants, were quite different than the facts in the case at hand. Therefore, the said judgment does not support the Applicants.

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13. In view of above, the impugned Judgment and Order dated 21.08.2022 passed by the District Judge-1, Vaijapur, Dist. Aurangbad, does not require any interference in view of the facts stated above and in view of the ratio laid down in judgments of the Supreme Court in the cases of **Conception Fernandes** (supra), **Esha Bhattacharjee** (supra) and **P. K. Ramachandran** (supra). Hence, this Civil Revision Application is Dismissed.

[**RAJESH S. PATIL**]
JUDGE