

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

**WRIT PETITION NO.1908 OF 2020**

Ashish S/o Himatrao Desle  
Age: 33 years, Occu: Agriculture & Business  
R/o: Puntamba, Tq. Rahata Dist. Ahmednagar

... Petitioner  
(Orig. Plaintiff)

Versus

1. Shoba W/o Govind Desle  
Age: 43 years, Occu: Agriculture

2. Govind S/o Bajirao Desle  
Age: 51 years, Occu: Agriculture,

Both R/o Puntamba, Tq. Rahata, Dist. Ahmednagar

... Respondents  
(Orig. Defendants)

...

Mr. K. M. Nagarkar h/f Mrs. Kulkarni Smita S., Advocate for Petitioner  
Mr. R. L. Kute, Advocate for Respondent Nos.1 & 2

...

**CORAM : NITIN B. SURYAWANSHI, J.**

**DATE : 11<sup>th</sup> January, 2022**

**ORAL JUDGMENT:**

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

2. This petition takes exception to the order dated 26/08/2019, passed below Exhibit-1 in Misc. Civil Application No.5/2015, by the learned Joint Civil Judge, Junior Division, Rahata, thereby rejecting

the application filed by the petitioner seeking condonation of delay in filing restoration application.

3. The plaintiff filed Civil Suit No.256/2013 for partition, separate possession and permanent injunction in respect of the suit property described in Paragraph-1 of the plaint. Vide order dated 23/9/2014, the suit was dismissed in default for want of prosecution under Order 9 Rule 4 of the Civil Procedure Code by observing that since last one year, the matter is for evidence of plaintiff and the plaintiff has not taken any steps for hearing and since 25/07/2013, the plaintiff is absent. Today also, the plaintiff is also absent, though repeatedly called and the plaintiff has failed to take any steps for hearing. The plaintiff therefore seems to be not interested in proceeding further.

4. The plaintiff, thereafter, filed Misc. Civil Application seeking restoration of the suit along with delay condonation application. In the delay condonation application, the plaintiff contended that he had gone out of station for his business and he could not contact with his advocate. Thereafter, due to ailment of vertebrae, the plaintiff could not file the application within limitation. He, therefore, prayed for condoning the delay in filing the restoration application. The said application is rejected by the trial court. Hence, the present petition.

5. Heard the learned advocate for the petitioner/plaintiff and the learned advocate for the respondents/defendants.

6. Perusal of the record indicates that the trial court has rejected the application by observing that no evidence was adduced in support of the application. So also no witness or doctor was examined to

show that the petitioner was suffering from ailment and he was out of village. No medical certificate or document is filed to substantiate his illness and therefore, the delay cannot be condoned easily.

7. While passing the impugned order, the trial court has failed to take into consideration the settled legal position that the delay has to be liberally condoned. In the present case, the suit filed by the petitioner seeking partition and permanent injunction was dismissed in default. Though it is a fact that the petitioner approached belatedly seeking restoration, the petitioner was not to be benefited by approaching belatedly in filing the restoration application. The trial court ought to have allowed the application keeping in mind the fact that, the petitioner should be given fair opportunity to contest his suit on merits. In that view of the matter, the impugned order is unsustainable and the same is liable to be quashed and set aside. Hence, the following order:

### **ORDER**

- (a) Writ petition is allowed.
- (b) The impugned order is passed below Exhibit-1 in Misc. Civil Application No.5/2015 by the learned Joint Civil Judge, Junior Division, Rahata, is hereby quashed and set aside.
- (c) The delay in filing restoration application is condoned subject to the plaintiff/petitioner paying cost of Rs.10,000/- to the defendants/respondents.

(d) The restoration application to be decided by the trial court on its own merits.

(e) Rule made absolute in the above terms with no order as to costs.

**(NITIN B. SURYAWANSHI, J.)**

Sameer