

APPEAL FROM ORDER NO. 63 OF 2017

- 1] Ramesh Govinda Mali (Gorade)  
Age : 75 yrs., Occu. Agril.,  
R/o. Karanjgaon, Tq. Vaijapur,  
Dist. Aurangabad.
  - 2] Sheku Kisan Mali (Gorade),  
Age : 59 yrs., Occu. Agril.,  
R/o. Karanjgaon, Tq. Vaijapur,  
Dist. Aurangabad.
  - 3] Hari Govinda Mali (Gorade) Died
  - 4] Tulshiram Govinda Mali (Gorade) Died
- ...Appellants**  
(Orig. Applicants)

1] Raosaheb Punjaba Karale (Died),  
Through LR  
(a) Dnyaneshwar Raosaheb Karale  
Since deceased through LR.

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| 1(a)(I)   | Ashabai w/o Dnyaneshwar Karale,<br>Age : 47 yrs., Occu. Household,<br>R/o. Karanjgaon, Tq. Vaijapur,<br>Dist. Aurangabad.  |
| 1(a)(II)  | Akshay s/o Dnyaneshwar Karale,<br>Age : 25 yrs., Occu. Agriculture,<br>R/o. Karanjgaon, Tq. Vaijapur,<br>Dist. Aurangabad. |
| 1(a)(III) | Raj s/o Dnyaneshwar Karale,<br>Age : 22 yrs., Occu. Agriculture,<br>R/o. Karanjgaon, Tq. Vaijapur,<br>Dist. Aurangabad.    |
| 1(a)(IV)  | Deepali d/o Dnyaneshwar Karale,<br>Age : 20 years, Occu. Household,<br>R/o. Karanjgaon, Tq. Vaijapur,<br>Dist. Aurangabad. |

- 2] Bhika Raoji Karale (Died)  
through LRs.  
(a) Ramkisan Bhika Karale,  
Age : 38 yrs., Occu. Agril.,  
R/o. Karanjgaon, Tq. Vaijapur,  
Dist. Aurangabad.
- 3] Karbhari Sakhahari Karale,  
Age : 35 yrs., Occu. Agril.,  
R/o. Karanjgaon, Tq. Vaijapur,  
Dist. Aurangabad.
- 4] Bhausahab Sakhahari Karale,  
Age : 32 yrs., Occu. Agril.,  
R/o. Karanjgaon, Tq. Vaijapur,  
Dist. Aurangabad.
- 5] Ashok Sakhahari Karale,  
Age : 50 yrs., Occu. Agril.,  
R/o. Karanjgaon, Tq. Vaijapur,  
Dist. Aurangabad.
- 6] Chandrabhan Manohar Gande (died) LRs  
(6a) Anusayabai Chandrabhan Gande,  
Age : 70 yrs., Occu. Agril.,  
R/o. Karanjgaon, Tq. Vaijapur,  
Dist. Aurangabad.
- (6b) Vithabai Nandu Kawade,  
Age : 50 yrs., Occu. Agril.,  
R/o. Parsoda, Tq. Vaijapur,  
Dist. Aurangabad.
- (6c) Pramilabai Tatyerao Harichandre,  
Age : 50 yrs., Occu. Agril.,  
R/o. Lasurgaon, Tq. Vaijapur,  
Dist. Aurangabad.
- (6d) Rohini Rameshwar Tandale,  
Age : 42 yrs., Occu. Agril.,  
R/o. Lasurgaon, Tq. Vaijapur,  
Dist. Aurangabad.
- (6e) Sainath Chandrabhan Gande,  
Age : 40 yrs., Occu. Agril.,

R/o. Karanjgaon, Tq. Vaijapur,  
Dist. Aurangabad.

(6f) Dattu Chandrabhan Gande,  
Age : 40 yrs., Occu. Agril.,  
R/o. Karanjgaon, Tq. Vaijapur,  
Dist. Aurangabad.

7] Balu Namdeo Surase,  
Age : 40 yrs., Occu. Agril.,  
R/o. Karanjgaon, Tq. Vaijapur,  
Dist. Aurangabad.

8] Karbhari Ambadas Ghodke,  
Age : 50 yrs., Occu. Agril.,  
R/o. Karanjgaon, Tq. Vaijapur,  
Dist. Aurangabad.

9] Santabai Sakhahari Karale (Died) LRs.,  
(I) Dhurpadabai Balu Tambe,  
Age : 40 yrs., Occu. Agril.,  
R/o. Shahjatpur, Tq. Vaijapur,  
Dist. Aurangabad.

.....Respondents

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Mr. Ajit D. Kasliwal, Advocate for the appellants

Mr. A. D. Gadekar, Advocate for respondents 1A, 2A & 4, 1a(I) to (IV)

Mr. B. G. Londhe, Advocate for respondent nos. 6A & 6B, 6D to 6F and 8

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**CORAM : RAJESH S. PATIL, J.**

**DATE : OCTOBER 17, 2022**

**ORAL JUDGMENT : -**

**CHALLENGE : -**

1. This Appeal from Order is filed challenging the Judgment and Order dated 25.10.2017 passed by the District Judge-1, Vaijapur thereby dismissing in default M.A.R.J.I. No. 5/2016 filed by the present applicants seeking restoration/re-admission of Reg. Civil Appeal No. 1/2015.

sgp

**FACTS : -**

2. The present applicants had challenged the judgment and decree passed in Reg. Civil Suit No. 157/96 by way of Reg. Civil Appeal No. 1/2015. When the said Reg. Civil Appeal came up on board for hearing, nobody turned up on behalf of the applicants and hence the appeal was dismissed in default on 11.12.2015.

3. The applicants herein thereafter filed M.A.R.J.I. No. 5/2016 on 27.01.2016 thereby praying that the appeal be re-admitted by an appropriate order and suitable order in the interest of justice be kindly passed. The said application was filed under the provisions of Order 41 Rule 19 of the Code of Civil Procedure [hereinafter referred to as 'CPC']. Respondents therein had filed their reply to the said M.A.R.J.I. and opposed the same. The District Judge-1, Vijapur heard the parties and by it's judgment and order dated 25.10.2017 dismissed the M.A.R.J.I. application holding that the applicants were prevented by sufficient cause from attending the court proceedings, but M.A.R.J.I. was not within limitation and no prayers for condonation of delay was made.

**SUBMISSIONS : -**

4. The advocate for the applicants argued that the result of dismissal of M.A.R.J.I. application in turn means that the applicants Reg. Civil Appeal No. 1/2015 is dismissed without hearing the applicants on merits. The learned advocate for the applicants prayed that the restoration application was filed immediately after the knowledge of the dismissal of appeal, however, there was a delay of 16 days. The applicants have very clearly stated in their application that the applicants had engaged a lawyer and they presumed that their advocate would inform them about the progress of the appeal. The applicants

remain engaged in agriculture work as well as labour work for earning their livelihood. The financial position of the applicants is not sound because of natural calamity like insufficient rains and crops. The applicants were totally dependent upon their advocate for the court matter. Only after they heard about rumour in village about the dismissal of the appeal, they applied for certified copy and after receiving the same, they have preferred the M.A.R.J.I. application. The applicants further stated that they should not be punished due to the error of their lawyer.

5. The applicants further prayed that while they filed their M.A.R.J.I. Application, the Court Department did not raise any objection as regards the prayer for condonation of delay. So also, after filing of the M.A.R.J.I. application for setting aside the order of dismissal in default, the court took cognizance of the matter and notices were issued. The parties thereafter appeared in the proceedings through their respective advocates. It is further argued on behalf of the applicants that the litigant should not suffer due to the mistake on the part of the advocate.

6. The applicants also stated that once the court had recorded a finding that the applicants were prevented by sufficient cause from attending the court proceedings; then the M.A.R.J.I. application for restoring the appeal should have been allowed and the same should not have been dismissed on technical grounds.

7. The applicants have further argued that even the order dated 11.12.2015 dismissing the appeal in default could not have been passed as the appeal on that day was listed for taking steps only. It was further argued that the applicants had raised the grounds as stated

under Order 41 Rule 19 CPC, hence the application should have been allowed.

8. The learned counsel for the respondents stated in the reply that although it is true that the appeal was at initial stage for taking steps and it was not for final hearing, the applicants should have been diligent enough in attending their matter personally or through their advocate. Learned counsel for the respondents argued that the applicants did not file any separate application seeking condonation of delay or prayed for condonation of delay in M.A.R.J.I. application. Neither the delay of 16 days caused in filing the M.A.R.J.I. application was explained nor prayer for condoning the same was made. It is further argued by respondents that the applicants have admitted vide ground no. 5 in the present application that they have not made any prayer for condonation of delay in filing the in the present application application. Hence, the Appeal from Order be not entertained and dismissed. The respondent also relied upon the judgment in the case of **National Insurance Co Ltd Vs. Hoshiar Singh**, LAWS(DLH)-2015-2-487.

**ANALYSIS : -**

9. The present application is filed challenging the judgment and order dated 25.10.2017 whereby the application for restoration of appeal was dismissed on technical ground that there is no prayer for condonation of delay of 16 days.

10. The District Judge recorded a finding that the appellants/applicants were prevented by sufficient cause from attending the court proceedings; however, only on the ground of limitation and no prayer for the delay condonation was made, the application was dismissed.

11. I have carefully considered the submissions of the parties and the documents on record and went through the impugned order. The advocate for the respondents refers to the judgment of Delhi High Court in the case of Hoshiar Singh (supra), wherein an application preferred under Order 41 Rule 19 CPC was dismissed as the applicant therein did not attend the hearing. Therefore, the facts in the case of Hoshiar Singh before the Delhi High Court are completely different than the facts in the case at hand. Order 41 Rule 19 of CPC very clearly states that the application for restoration should be allowed if the applicant proves that he was prevented by sufficient cause from attending the proceedings. In the present case, the District Judge has come to a clear finding that the applicants were prevented by a sufficient cause from attending the court proceedings, however, only on technical ground the application was dismissed.

12. It is important to consider the judgment of Supreme Court in the case of **B. S. Sheshagiri Setty and others Versus State of Karnataka and others** reported in (2016) 2 SCC 123. In the said judgment, the Supreme Court held that even if the application for condonation of delay is not filed, in order to prevent miscarriage of justice caused to the litigant, the court should not be hyper technical and the delay can be condoned even on an oral application.

13. Taking into consideration the ratio laid down in the case of B. S. Sheshagiri Setty (supra) and in view of finding recorded by District Judge-1, Vaijapur, that the Applicants were prevented by a sufficient cause from attending the Court proceedings, the Second Appeal needs to be allowed.

**ORDER**

- (i) The Appeal from Order is allowed.
- (ii) Delay of 16 days caused in filing the M.A.R.J.I. Application No. 5/2016 is condoned. The impugned judgment and order dated 25.10.2017 passed by the District Judge-1, Vaijapur dismissing the M.A.R.J.I. Application No. 5/2016 is set aside and the M.A.R.J.I. Application No. 5/2016 stands allowed.
- (iii) The District Judge-1, Vaijapur shall take up Reg. Civil Appeal No. 1/2015 for hearing, and hearing of the same be expedited.

**[ RAJESH S. PATIL ]**  
**JUDGE**