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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL WRIT PETITION NO.6279 OF 2018**

Somling @ Somning Chandrashekhar Ajnale Petitioner

V/s.

Mahadev Hariba Huchche and Ors. Respondents

Mr. Ramdas Hake Patil, Advocate for the Petitioner.

Mr. Prasad P. Kulkarni, Advocate for the Respondent Nos.1 to 11.

Mr. Suhas S. Inamdar, Advocate for Respondent No.16.

CORAM : NITIN W. SAMBRE, J.

DATE: MARCH 24, 2022.

P.C.:

- 1) Heard.
- 2) The suit of the petitioner being R.C.S. No.891 of 1995 against the Respondent was decreed on April 1, 2000, in which Respondent - Defendant has failed to file written statement.
- 3) After having received notice in the proceedings for execution of aforesaid Decree application being Misc.

Application No.452 of 2004 was taken out for condonation of delay of 4 years, 9 months and 16 days in moving an application under Order IX Rule 13 of CPC. It is claimed that the decree was ex-parte. The said application was rejected by the trial Court vide order dated July 23, 2015 on the ground that the decree was not an ex-parte. It was observed that though the Respondents have entered their appearance, have failed to file written statement.

4) The Respondents accordingly moved Civil Misc. Application No.244 of 2015, seeking condonation of delay of 15 years, 22 days in moving an appeal questioning the aforesaid decree. The Appellate Court vide impugned order dated November 9, 2017 ordered condonation of delay of 15 years 4 months 22 days, subject to payment of costs of Rs.15,000/-. Hence, this petition by decree-holder.

5) Drawing support from the judgment of the Apex Court in the matter of **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Ors. Reported in (2013) 12 SCC 649,** contentions of Mr. Hake -

Patil, counsel appearing for the petitioner are, the Court below has ignored the guidelines laid down by the Apex Court which are binding. Mr. Hake Patil would urge that there are no bonafides on the part of the respondents and the delay is not at all explained. That being so, order impugned is liable to be quashed and set aside.

6) Based on the observations made in the order impugned Mr. Kulkarni supports the order.

7) Considered the submissions.

8) The Court below has exercised the discretion in favour of the respondent – applicant thereby ordering condonation of delay, subject to cost of Rs.15,000/-, which I am informed is already deposited before the Court below.

9) Fact remains that the Respondent took out an application for setting aside decree under mis-conception that same was passed ex-parte by the trial Court. The trial Court, being sensitive to the fact that Respondents have entered their appearance in the suit but suit proceeded without W.S.,

has rightly rejected the said proceedings including that of prayer for condonation of delay therein.

10) After having realized the same, it appears that the Respondents have taken out present proceedings.

11) Practically, it appears that there is delay at the most about 4 years as the application which led to the passing of the impugned order was moved immediately after rejection of application for condonation of delay for setting aside ex-parte decree before the Appellate Court. It appears that the Respondents were pursuing wrong remedy, must be under incorrect legal advice. The Court, while condoning the delay by passing impugned order, was sensitive to the aforesaid and has rightly exercised the discretion as the Respondents have substantive right of appeal under the statute. As such, the discretion exercised while passing the order impugned cannot be faulted with.

12) In the aforesaid background, I hardly notice any illegality which warrants any interference in extraordinary

jurisdiction. However, cost of Rs.15,000/- is enhanced to Rs.50,000/- to be deposited before the Appellate Court within six weeks which the petitioner would be entitled to withdraw. Needless to clarify that amount of Rs.15,000/- deposited to be adjusted with the amount of cost enhanced by this Court.

13) Appellate Court shall decide the appeal on its own merits without being influenced by the findings recorded in this order.

14) Petition stands disposed of in the above terms.

[NITIN W. SAMBRE, J.]