

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 9243 OF 2018

Mr. Rampati Ramadray Yadav

...Petitioner

Vs.

The Board of Trustees of the Port of Bombay and Anr

..Respondents

....

Ms. Amrin Khan i/by Avinash Gokhale, for the Petitioner.

Mr. Nikunj Mehta i/by Motiwalla & Co., for Respondents.

....

CORAM : NITIN W. SAMBRE, J.

DATED : 17th NOVEMBER, 2022

P.C.:

1. Heard.
2. Impugned in the present petition is order dated 2nd May, 2018 passed by the Small Causes Court, Mumbai on MARJI Application No. 9 of 2018, wherein, prayer of the Defendant/ Judgment Debtor No. 17 for condonation of delay of 171 days came to be rejected.
3. The respondents/decreed-holder initiated suit being L. E. & C Suit No. 380/436 of 1988 which was ex-parte decreed on 11th June, 2012.
4. After the decree came to be passed, the applicant filed MARJI Application being Application No. 138 of 2017 for setting aside

ex-parte decree. Accordingly, the said MARJI Application was rejected of 5th May, 2017.

5. The Petitioner thereafter took out another MARJI Application 9 of 2018 praying therein the delay condoned, which is caused in filing an appeal against the judgment and order passed by the learned Trial Judge. The said Application for condonation of delay is rejected by a reasoned order.

6. The submissions are, even if the MARJI Application for setting aside ex-parte decree is rejected, still the remedy of preferring a statutory appeal is available to the petitioner. Such statutory remedy is invoked at belated stage because of financial hardship, ill-literacy and the fact that the petitioner has moved the MARJI Application for setting aside ex-parte decree. As such, it is claimed that the delay of 171 days caused in preferring MARJI Application ought to have been condoned so as to enable petitioner to pursue the statutory remedy.

7. The prayer is opposed by the Counsel for the Respondent on the ground that decree is already executed and the respondent has received the possession in the Execution Proceedings.

8. No doubt, the claim put forth by the Counsel for the petitioner that the petitioner has a statutory right pursuing an appeal in spite of

there being rejection of the prayer for setting aside ex-parte decree under order IX, Rule 13 of the Code of Civil Procedure was rejected is quite justified. However, this court is required to be sensitive to two issues-

- a) That the petitioner has already lost the possession in execution proceedings and;
- b) Once the execution proceedings is attained finality, the petitioner having lost possession therein, the remedy of seeking restoration of possession is available to the petitioner.

9. Admittedly, it is not pleaded by the petitioner that issues seeking restoration of possession in the proceeding. In that view of the matter and having regard to the cause cited in support of prayer for condonation of delay it cannot be inferred that the petitioner has made out sufficient cause for condonation of delay.

10. As such, the Writ Petition is devoid of merit and same stands dismissed.

(NITIN W. SAMBRE, J.)