

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11852 OF 2019**

Dr. Rahul Shankar Koushik	...Petitioner
V/s.	
Dr. Shankar Narayan Koushik & Anr.	...Respondents

Mr. R.S. Apte, Senior Counsel with Mr. T.D. Deshmukh for the
Petitioner.
Mr. Abhijit Sarwate a/w Mr. Ajinkya Udane, Ms. Hardev Kaur for
Respondents.

CORAM : MADHAV J. JAMDAR, J.
DATED : 20th July, 2022

P.C. :

1. Heard Mr. Apte, learned Senior Counsel appearing for the Petitioner and Mr. Sarwate, learned Counsel appearing for the Respondents.

2. By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging order dated 7th March 2019 passed by the learned Judge, Small Causes Court, Pune in Miscellaneous Application No.60 of 2017 and order dated 8th August 2019 passed by learned District Judge-12, Pune in Miscellaneous Civil Appeal No.128 of 2019. The said Miscellaneous Civil Application No. 60 of 2017 is an application for condonation of 96 days delay in filing the application for restoration of the Suit and for setting aside order of

dismissal of Suit dated 27th June 2017. By order dated 27th June 2017, the learned Judge, Small Causes Court, Pune has dismissed the Suit for default on the ground that the issues were framed on 20th September 2016 and thereafter several applications were filed by the Plaintiffs for adjournment and same were allowed subject to costs. However, the Plaintiff neither complied the order of costs nor proceeded with hearing of the suit. The learned Judge further observed that the Plaintiff has filed application for adjournment on the very day i.e. 27th June 2017 which is bearing Exhibit 42 and by rejecting the said application, the learned Judge has also dismissed the suit.

3. Mr. Apte, learned Senior Counsel appearing for the Petitioner submitted that the Plaintiff at the relevant time was of 78 years old and she was not well. He submitted that at the relevant time, she was in Mumbai and taking rest as per medical advise. He further submitted that her other son was in United State of America and therefore considering her physical condition, the applicant could not keep in touch with her advocate. He submitted that therefore the delay condonation application be allowed as immediately within 96 days the steps were taken for restoration of the Suit and for condonation of delay.

4. On the other hand, Mr. Sarwate, learned counsel appearing for the Respondents submitted that the Plaintiff was in good physical condition. She has executed power of attorney in favour of Rahul Shankar Kaushik on 30th October 2018 and executed the gift deed on 8th January 2018. He further submitted that the affidavit of evidence has been filed by Rahul Kaushik on 3rd November 2018. He further submitted that all these documents show that her physical condition was good.

5. Perusal of order dated 7th March 2019 passed by learned Judge, Small Causes Court, Pune and order dated 8th August 2019 passed by learned District Judge No.12, Pune show that both the Courts have observed that the petition has not put up the bonafide reasons behind the delay. For arriving at the said conclusion, the Courts have relied on cross-examination of Mr. Rahul Kaushik, who has stated that he had visited India on 3rd June 2016, 5th September 2016, 11th November 2016 and thereafter on 30th January 2017, 26th March 2017 and 16th August 2017. It has been further observed that prior to 4-5 months, his mother travelled to Mumbai for medical appointment and on that basis, the Courts have concluded that as the Plaintiff travelled to Mumbai for medical appointment, her ailment was not so serious and she was in a position to travel. The appellate Court has also relied on the said dates.

It has been further observed by the appellate Court that as during the relevant period said Rahul Kaushik was not in India and therefore he had no personal knowledge whether his mother was really ill. The order dated 27th June 2017 by which the Suit was dismissed for default records that the issues were framed on 20th September 2016 and thereafter several applications were filed by the Plaintiff for adjournment and the same were allowed subject to costs. However, the Plaintiff has not complied with the order of costs nor proceeded with the hearing of the suit.

6. Mr. Sarwate has produced on record the Roznama. A perusal of the Roznama shows that the reason given in the order dated 27th June 2017 by which the Suit was dismissed for default is not correct. The reason given is that the issues were framed on 20th September 2016 and since then the matter is pending and the Plaintiff took several adjournments, which were allowed subject to costs. Perusal of the Roznama shows that the issues were framed on 20th September 2016, thereafter immediately on the next adjourned date i.e. 11th November 2016, the defendants i.e. present Respondents filed application bearing Exhibit 30 praying that the plaint be returned. It appears that the said application is the second application seeking said prayer. The Plaintiff filed reply to the said application on 3rd December 2016 bearing

Exhibit 33. Thereafter the stage of the matter was hearing arguments on Exhibit 30 application. It appears that on 9th December 2016, the defendants have filed application seeking adjournment at Exhibit 34 and the same was allowed. On 17th December 2016 again the Defendant filed an application for adjournment bearing Exhibit 35. It appears that on 22nd December 2016, both the sides advanced arguments on the said application for return of plaint at Exhibit 30. Thereafter on 10th January 2017 and 5th February 2017, the matter was adjourned for passing order on Exhibit 30. Ultimately the order on Exhibit 30 was passed on 8th February 2017. On 8th February 2017, the Suit was adjourned for filing affidavit of evidence of the Plaintiff to 20th February 2017 and thereafter on 28th February 2017. On 28th February 2017, the Defendant filed an application (Exhibit 36) for closing the evidence of the Plaintiff. Thereafter the matter was adjourned to 10th March 2017 and 20th March 2017. On 29th March 2017, the Plaintiff filed an application for adjournment bearing Exhibit 38 and the same was allowed and the matter was adjourned to 15th April 2017. On 15th April 2017 also, the Plaintiff filed an application for adjournment (Exhibit 39) and the same was allowed and the same was adjourned to 21st April 2017 and on 21st April 2017, the application (Exhibit 40) filed by the Plaintiff seeking an adjournment was rejected. On 7th June 2017, the Plaintiff filed an application for

adjournment and the same was rejected and thereafter by order dated 27th June 2017, the Suit was dismissed for want of prosecution.

7. Thus, it is clear that the observation that issues were framed on 20th September 2016 and thereafter applications were filed by the Plaintiffs from time to time seeking adjournments is not correct. It appears that in fact Exhibit 30 application was filed on 11th November 2016 seeking return of plaint by the Respondents and the same was decided on 8th February 2017. Thus, it is clear that after issues were framed, for considerable period, the trial Court was hearing Exhibit 30 application.

8. A bare perusal of the application which was rejected by the trial Court bearing Exhibit 42 shows that the learned Advocate has specifically stated in the said application that the Plaintiff could not be contacted and therefore adjournment was sought and the same was rejected by order dated 27th June 2017.

9. The present application for setting aside dismissal of the Suit was filed on 31st October 2017 and therefore there is delay of about 96 days in filing the application. The said delay was sought to be explained by contending that the applicant was at Mumbai and fell ill and she had sent Doctor's certificate from Mumbai to Pune to her lawyer and which was filed in the proceeding of the suit. It is further

stated that thereafter the applicant was advised to take rest and therefore she was at Mumbai. It is stated that in these circumstances and in view of the physical condition of the Plaintiff, she could not contact her Advocate. It is further stated that the applicant has been looking after her without there-being any help or assistance from the immediate family, the applicant due to her medical condition could not contact her lawyer. It is further stated that however, advocate for the applicant was attending the matter in the regular basis. It is further stated that after the order of dismissal of the Suit was passed, there was no contact established between the applicant and her advocate for many days due to her illness.

10. As observed earlier, both the Courts below have mainly relied on the visits of Mr. Rahul Kaushik to India.

11. Mr.Sarwate, learned counsel appearing for the Respondents has very strenuously argued that the power of attorney was executed on 30th October 2018 and gift deed was executed on 8th January 2018 and therefore the applicant was in good physical condition. He therefore, submitted that the reason of illness of the Petitioner given is not correct. However, it is to be noted that the order of dismissal of the Suit was passed on 27th June 2017. The said power of attorney and gift

deed are dated 30th October 2018 and 8th January 2018 and the delay condonation application was filed on 31st October 2017 and therefore execution of power of attorney and gift deed in January 2018 and October 2018 has no bearing on the physical condition of the Petitioner between 27th June 2017 and 31st October 2017 and for earlier period.

12. The Courts below have relied on the judgment of the Supreme Court in the matter of *Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and Others*¹. In the said case, it has been held that there should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay. The Supreme Court has specifically observed that the Courts are not supposed to legalise injustice but are obliged to remove injustice. It has been further observed that lack of bonafides imputable to a party seeking condonation of delay is a significant and relevant fact. Both the Courts below have relied on said observation and observed that the reasons given are not bonafide reasons. However, the said finding has been arrived at on the basis of the visits of said Mr. Rahul to India and that therefore he was available in India during certain period and in spite of that he has not taken steps. However, it is to be noted that during said period, the power of attorney was not executed in favour of

¹ (2013) 12 SCC 649

said Rahul. The power of attorney was executed on 30th October 2018 and therefore execution of said power of attorney by the Petitioner in favour of Mr. Rahul and his presence in India has no relevance for the period upto 27th June 2017 when the order of dismissal of Suit was passed on 31st October 2017 when delay condonation application was filed. In view of this, it is clear that the finding recorded by the Courts below is perverse. It is undisputed that the Petitioner was 78 years old at the relevant time and the medical certificates are produced on record and therefore, there is substance in the contention that during the relevant time she was not well.

13. In view of this, order dated 7th March 2019 passed by learned Judge, Small Causes Court, Pune in Miscellaneous Application No. 60 of 2017 and order dated 8th August 2019 passed by the learned District Judge No. 12, Pune in Miscellaneous Civil Appeal No. 128 of 2019 are quashed and set aside and said Miscellaneous Application No. 60 of 2017 is allowed.

14. The Writ Petition is disposed of in above terms with no order as to costs.

BHALCHANDRA
GOPAL
DUSANE

(MADHAV J. JAMDAR, J.)

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