

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

55 WRIT PETITION NO.402 OF 2021

SUKHDEO HARIBHAU CHINCHANE

VERSUS

HARAKCHAND PREMRAJ MANDLECHA SINCE DECEASED
THR LRS PANKUNWAR HARAKCHAND MANDLECHA

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Advocate for Petitioner : Mr. R.N. Dhakne
h/f. Mr. Thombre S.S.

Advocate for Respondent Nos. 1.1. to 1.7 : Mr. Palodkar D.P.

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CORAM : SHAILESH P. BRAHME, J.

DATE : 28th NOVEMBER, 2023

PER COURT :

Heard learned counsel for both the sides finally at the admission stage.

2. The petitioner is the original plaintiff who had filed Regular Civil Suit No. 37 of 1997, for declaration against the respondent. The suit was dismissed on 22nd March, 2001. Being aggrieved, Regular Civil Appeal No. 132 of 2001, has been filed by the petitioner.

3. The sole respondent died on 22nd March, 2010. Though, application Exhibit 31 is filed by the petitioner for bringing his heirs on record the petitioner was not punctual in securing the presence of heirs of the deceased respondent. No steps were taken and hence, on 11th February, 2014, Appeal was dismissed for default.

4. For setting aside the dismissal and restoring the Appeal, Miscellaneous Civil Appeal No. 44 of 2015, is filed with a prayer of condonation of delay of about one year and eighty days. The application is contested by the respondent.

5. It is the case of the petitioner that due to serious ailment at the relevant time, he was unable to prosecute the Appeal and take steps. The medical papers are placed on record and oral evidence is led by examining two witnesses. In rebuttal, respondents also led oral evidence and witnesses.

6. By order dated 03rd December, 2020, learned District Judge – 3, Ambajogai, Taluka Ambajogai, District Beed, rejected the application as there is no cogent and satisfactory reason for condonation of delay. Considering the cross-examination of witnesses, it is held that there is no substance in a plea of serious ailment. It is held that the petitioner was pursuing other activities. It is further held that there is negligence on the part of the petitioner and it is not permissible to adopt any liberal view.

7. Learned counsel for the petitioner submits that learned Judge has adopted hyper technical view. The oral evidence is produced on record to make out a case of ailment. Learned counsel submits that otherwise there was no reason for not taking steps in time because the petitioner has to prosecute a substantive appeal.

8. Learned counsel for the respondent supports impugned judgment and order. He would submit that a plausible and reasonable view has been taken by learned Judge considering the cross-examination of the witnesses. There is no error of jurisdiction or perversity in the impugned order. He has drawn my attention to the cross-examination of P.W. No. 1 and P.W. No. 2. According to him, the reasons for condonation of delay are not only false but improbable also. Learned counsel for the respondent submits that the delay has been deliberately caused with an oblique motive to harass the respondent. He would urge to dismiss the Writ Petition.

9. Considering rival submissions of the parties, I find that the delay is of one year and 80 days and the reason assigned was ailment of the petitioner. Medical papers are placed on record and oral evidence has also been led by the petitioner. The cross-examination of the witnesses indicate admissions against the petitioner.

10. However, it cannot be over looked that petitioner has failed in the Trial Court and at the relevant time prosecuting a statutory remedy of Appeal which is substantive one. The factum of illness of the petitioner cannot be disputed. Though, the respondent is successful in bringing on record that the ailment is not grievous in nature, that itself cannot non suit the petitioner. The pragmatic approach has to be adopted when substantive rights of the parties are at stake.

11. Learned counsel for the respondent is unable to point out any other circumstances for deliberately causing delay. Neither any *mala fides* are imputed against the petitioner. It would be in the interest of the justice that the litigating parties contest the matter on merit. Ends of justice would be made by directing the petitioner to pay costs to the respondent.

12. For the reasons stated above, I pass the following order :

ORDER

- i. The judgment and order dated 03rd December, 2020, passed by learned District Judge – 3, Ambejogai, Taluka Ambejogai, District Beed, is quashed.
- ii. The delay in restoring the RCA No. 132 of 2001 stands condoned and Appeal stands restored to its original position.
- iii. The petitioner shall pay costs of Rs. 7,000/- (Rupees seven thousand) to the respondent within a period of three weeks.
- iv. The petition is disposed of in above terms.

[SHAILESH P. BRAHME, J.]