



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

WRIT PETITION NO. 6336 OF 2022

Shahuraj Madhavrao Musande,
Since died, through L.Rs.

1. Bhumika Shahuraj Musande,
Age : 42 Years, Occu. : Household,
R/o Virat Hanuman Nagar,
Rukmini Apartment, Rajeev
Gandhi Chowk, Latur.
2. Atharva Shahuraj Musande,
Under guardianship of petitioner
No. 1,
Age : 17 Years, Occu. : Education,
R/o As stated above.
3. Arnav Shahuraj Musande,
Under guardianship of petitioner
No. 1,
Age : __ Years, Occu. : Education,
R/o As stated above.

.. Petitioners

Versus

1. Anita Sanjay Raut,
Age : 41 years, Occu. : Household,
R/o Wathwada, Tq. Kalamb,
Dist. Osmanabad.
2. Dilip Madhavrao Musande,
Age : 57 Years, Occu. : Agriculture,
R/o Nagarsoga, Tq. Ausa,
Dist. Latur.
3. Manisha Chandrashekhar Musande,
Age : 38 Years, Occu. : Household,
R/o Latur, Tq. & Dist. Latur.

4. Mahesh Chandrashekhar Musande,
Under guardianship of respondent
No. 3,
Age : 07 Years, Occu. : Education,
R/o Same as above.
5. Vaishnavi Chandrashekhar Musande,
Under guardianship of respondent
No. 3,
Age : 09 Years, Occu. : Education,
R/o Same as above.
6. Suman Ashok More,
Age : 63 Years, Occu. : Household,
R/o Yeli, Tq. Omerga,
Dist. Osmanabad.
7. Minakshi Shahuraj Dhavale,
Age : 50 years, Occu. : Household,
R/o Latur, Tq. & Dist. Latur. .. Respondents

Shri A. A. Joshi, Advocate h/f Shri S. V. Natu, Advocate for the
Petitioners.

Shri Prashant S. Shinde, Advocate h/f Shri Rahul V. Patil,
Advocate for the Respondent Nos. 1, 6 and 7.

Shri K. D. Khade, Advocate h/f Shri N. D. Kendre, Advocate for
the Respondent No. 2.

CORAM : SHAILESH P. BRAHME, J.

CLOSED FOR JUDGMENT ON : 11.12.2023

JUDGMENT PRONOUNCED ON : 15.12.2023

JUDGMENT :

. Rule. Rule is made returnable forthwith. With the consent
of the parties taken up for final hearing at the admission stage.

2. The petitioner is challenging order dated 15.02.2022 passed in Civil Misc. Application No. 265 of 2019 by the learned Joint Civil Judge Junior Division, AUSA rejecting application for condonation of delay caused in filing application for setting aside *ex-parte* decree passed against the petitioner. The petitioner is the defendant No. 2 against whom suit proceeded *ex-parte* and decreed. The respondent No. 1 is the original plaintiff and remaining respondents are other defendants. They are related *interese*.

3. The respondent No. 1 filed R.C.S. No. 463 of 2015 for partition and possession. The subject matter of the dispute are seven agricultural lands. In response to the summons the petitioner and others appeared before the Trial Court through lawyers. An order of no written statement was passed against the petitioner on 01.02.2016. The respondent No. 2 filed written statement and supported the plaint. The suit of the respondent No. 1 was decreed on 09.02.2018. All the parties were allotted shares. The present petitioner was also allotted 1/6th share.

4. It is the case of the petitioner that there was communication gap and the lawyer engaged by him did not inform the dates. The petitioner was in service. His wife was looking after the matter. The lawyer engaged by the petitioner and his wife mislead them and no steps could be taken in time to set aside the *ex-parte* decree. On 12.07.2019 an application for setting aside *ex-parte* decree was submitted by the petitioner

along with Civil Misc. Application No. 265 of 2019 for condonation of delay of one year five months. It was objected by the respondent No. 1. Oral evidence of the wife of the petitioner was led. By the impugned order the Trial Court refused to condone the delay.

5. The learned counsel for the petitioner submits that there was sufficient cause shown in the application which is supported by the oral evidence. The learned Judge ought to have accepted the reasons. The learned counsel has vehemently submitted that the learned Judge erred in holding that it was not *ex-parte* decree because the petitioner had appeared. It is further submitted that there was no contest on merits in the suit. The petitioner wanted to raise a plea that suit lands are not joint family properties. As the wife of the petitioner was busy with other household core, she was unable to keep in touch with the lawyer. The learned counsel submits that the approach of the learned Judge is pedantic.

6. The learned counsel for the petitioner seeks reliance on the following judgments of the Supreme Court :

- I. G. P. Shrivastava Vs. R. K. Raizada and others reported in (2000) 3 SCC 54.
- II. Ummer Vs. Pottengal Subida and others reported in (2018) 15 SCC 127.
- III. GMG Engineering Industries and others Vs. Issa Green Power Solution and others reported in (2015) 15 SCC 659.

- IV. M. K. Prasad Vs. P. Arumugam reported in (2001) 6 SCC 176.
- V. G. Ratna Raj (Dead) By Legal Representatives Vs. Sri Muthukumarasamy Permanent Fund Limited and another reported in (2019) 11 SCC 301.

7. Per contra, the learned counsel for the respondent No. 1 supports the impugned order. He would submit that application U/O IX Rule 13 of the Code of Civil Procedure (for short "C.P.C.") is not maintainable because the petitioner was being represented through lawyer and voluntarily did not participate. He would submit that the delay is inordinate and there is no sufficient explanation. He would further submit that the petitioner has already been allotted 1/6th share. He has informed that part of the subject matter was being acquired and the parties to the proceedings have received compensation. Further proceedings are pending in the Reference Court.

8. I have considered the rival submissions of the parties.

9. There is delay of about one year five months in presenting application U/O IX Rule 13 of the C. P. C., which is refused to be condoned. The application bearing Civil Misc. Application No. 265 of 2019 lacks the material particulars. It does not show the dates when lawyer did not inform or how much time was consumed for the admissions of the siblings in the school.

10. Perusal of application U/O IX Rule 13 of the C. P. C.,

application for condonation of delay and the deposition of the petitioner's wife disclose that the proceedings have been conducted by the wife of the petitioner. The petitioner was at the relevant time in service as Class II employee. The petitioner is an educated person having his matriculation from Pune. There is no material on record to show that the petitioner was suffering from any mental illness or having any psychological disorder. The reasoning assigned by the learned Judge in the impugned order especially in para No. 11 cannot be faulted. I approve the finding that there are no sufficient reasons.

11. The petitioner was being represented by lawyer. His wife was looking after the litigation. It would be equal responsibility of the litigant to keep in touch with the lawyer. A lawyer cannot be castigated for not informing the dates or not informing the progress in the matter. Therefore, explanation in that regard cannot be accepted. I do not find any perversity in the findings recorded by the trial Judge in respect of the castigation against a lawyer engaged.

12. Another facet of the matter which is surfaced, is that wife of the petitioner has admitted in the cross examination that the suit property is an ancestral property. Both the learned counsel have informed during the course of arguments that part of the subject matter was acquired and all the parties have received compensation. The further proceedings are pending in the reference. If this is the situation, I do not find that any prejudice is caused to the petitioner by rejection of application for

condonation of delay.

13. The conduct of the petitioner and admission in the cross examination indicate that any different conclusion regarding status of the subject matter than recorded by the Trial Judge is not possible. The negligence of the petitioner is apparent and it is impossible to set the clock reverse by allowing application for condonation of delay and setting aside *ex-parte* decree.

14. The learned counsel for the petitioner has relied upon the judgment of the Supreme Court in the matter of **G. P. Shrivastava Vs. R. K. Raizada and others** (supra) to show law laid down in para No. 7. The sufficient cause has to be construed liberally and with elasticity. However, the facts and circumstances of the present case did not permit me to hold that sufficient cause is shown. Next judgment of the Supreme Court in the matter of **Ummer Vs. Pottengal Subida and others** (supra) is also distinguishable on facts. The judgment in the matter of **GMG Engineering Industries and others Vs. Issa Green Power Solution and others** (supra) more particularly para Nos. 7 to 9 also fall in the line of earlier judgment of the Supreme Court in the matter of **G. P. Shrivastava Vs. R. K. Raizada and others** (supra). I respectfully hold that the same is also not applicable.

15. The judgment in the matter of **M. K. Prasad Vs. P. Arumugam** (supra) is vehemently pressed into service by the learned counsel for the petitioner. By referring to para Nos. 7

and 10, it is contended that both the petitioners should have been more vigilant, their failure to adopt extra vigilance should not have been a ground to oust him from the litigation. I have already recorded my finding that the petitioner has not been excluded from the benefits of the decree. He has been allotted 1/6th share. He has been awarded share in the compensation along with other family members. Thus, no prejudice as such is caused. Therefore, under the peculiar facts of the case in hand, the said judgment may not enure to the benefit of the petitioner.

16. Lastly, para Nos. 21 and 27 of the judgment of the Supreme Court in the matter of **G. Ratna Raj (Dead) By Legal Representatives Vs. Sri Muthukumarasamy Permanent Fund Limited and another** (supra) are relied to buttress that it was an *ex-parte* decree when the petitioner had appeared. That enquiry is now immaterial because the explanation for condonation of delay is found to be insufficient and unconvincing.

17. For the reasons stated above, I find no merit in the petition. The writ petition is dismissed. There shall be no order as to costs. Rule is discharged.

[SHAILESH P. BRAHME, J.]

bsb/Dec. 23