

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

906 WRIT PETITION NO.2202 OF 2023

**BALASAHEB KONDIBA JATHAR AND OTHERS
VERSUS
DATTATRAY NANASAHEB JATHAR AND ANOTHER**

...
Advocate for Petitioners : Mr.Kadam Gajanan G.

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CORAM : SHARMILA U. DESHMUKH, J.

DATE : 22.02.2023.

PER COURT :

1. Heard.

2. The challenge in the petition is to the order dated 01.02.2022 passed in Civil Misc. Application No. 37 of 2020 rejecting the petitioner's application for condonation of delay.

3. The application was filed by the petitioners seeking condonation of delay caused in filing the restoration application against the order of dismissal of appeal for non prosecution of R.C.A. No. 44 of 2013. Respondents had instituted suit bearing No. 12 of 2004 in the Court of Civil Judge, Junior Division, Shrigonda seeking the relief of partition, which came to be decreed on 10.12.2012 on merits. As against the decree the petitioners preferred RCA No. 44 of 2013. As the appeal was not prosecuted by the petitioners, on 13.09.2017, the Appellate Court dismissed the appeal for non

prosecution under the provisions of order XLI Rule 17 of the Code of Civil Procedure. On 21.11.2020 an application came to be filed, seeking condonation of delay caused in filing the application for restoration of appeal dismissed in default. The reason stated in the application is that after the appeal was filed, the respondent decree holder had met the petitioners and informed them that they will not proceed further, as such by placing trust on decree holder, the appeal was not prosecuted.

4. Learned counsel appearing for the petitioners submits that there is delay of 885 days caused in preferring the application for restoration of appeal dismissed in default. He would further submit that delay has been sufficiently explained in as much as, the petitioners were informed by the decree holder that they will not put the decree further in execution. In support of his contention he relies upon the decision of the Hon'ble Apex Court in the case of **Bhivchandra Shankar More Vs. Balu Gangaram More and Ors.** MANU/SC/06872019 relevant Citation (2019)6 SCC 387. He would further submit that it is necessary in the interest of justice that the delay be condoned.

5. Considered the submissions of learned counsel for the petitioners. The decree which was passed in the partition suit RCS No. 12 of 2004 was passed on 10.12.2012. As against this decree, an

appeal was filed in the year 2013 and till 2017 there was no progress in the appeal which ultimately came to be dismissed on 13.09.2019. After the period of almost 3 years an application for condonation of delay has been filed on 21.11.2020. The application preferred by the petitioners does not make out any cause much less sufficient cause to explain the delay of 3 years. It is the submission of the petitioners that the decree holder had approached them and informed that they would not further proceed with the execution, which submission has been denied by the respondents in reply to the application. Considering the documents, it is a case of word against word. There is no material which has been produced on record to substantiate this submission. It is not demonstrated that this fact was communicated by the petitioners to their counsel, in which event an application to that effect would have been preferred before the appellate Court and in all probability appeal would have been withdrawn and consent terms would have been filed in the Appeal. The application is silent about the details. The provisions of Section 5 of the Limitation Act assists the parties who are diligent and pursue their remedies in time. The provision of the Limitation Act though harsh are required to be complied to ensure that the decree holder is not deprived of the fruits of the decree.

6. In the present case the decree is of the year 2012 and

after a period of 8 years in the year 2020 an application is being moved and appeal is being made that in the interest of justice the Petition be allowed.

7. In my opinion, it would be traversity of justice that after a period of 8 to 10 years the decree holder is being asked to proceed with the appeal proceedings and not reap benefits of the decree. The decision relied upon by the learned counsel for the petitioners in fact, supports the case of the respondents, in as much as the Hon'ble Apex Court has held that the liberal construction is to be given to the expression "Sufficient Cause" when there is no inaction.

8. Considering the facts of the present case, I do not find that the petitioners were diligent in prosecuting the appeal. The explanation which is sought to be tendered for the delay is highly improbable.

9. For the above reasons, there is no merit in the writ petition. The Writ Petition is dismissed.

(SHARMILA U. DESHMUKH)
JUDGE