

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

39 WRIT PETITION NO.7828 OF 2022

NOYEL MADHUKAR DETHE AND ANOTHER
VERSUS
LAXMIBAI DADA ALIAS DADU MAKASARE

Mr. K. N. Shermale, Advocate for the Petitioners.
Mr. Rahul B.Temak, Advocate for the Respondent No.1.

CORAM : SHARMILA U. DESHMUKH, J.
DATED : JANUARY 31, 2023.

PER COURT :

1. Heard.
2. By this petition, petitioners challenges the order dated 11th July, 2022 passed by the Appellate Court in Civil Misc. Application No.38 of 2016, whereby the delay of 01 year 08 months and 15 days caused in filing the restoration of application, came to be allowed on payment of costs.
3. The facts of the case are, the petitioners instituted Regular Civil Suit No.48 of 2006 for a decree of perpetual injunction against the Respondent which came to be decreed by judgment and decree dated 10th March, 2010, as against which the Regular Civil Appeal No.30 of 2010 came to be filed. On 6th January, 2015, the Appellate Court noted that the Respondent and

the counsel for the Respondent were not attending the matter and as such the Regular Civil Appeal came to be dismissed for non-prosecution. On 22nd August, 2016, an application was filed by the Respondent for condonation of delay and for restoration of Regular Civil Appeal No.156 of 2014, which came to be allowed by the impugned order.

4. Learned counsel for the Petitioners submit that there is no explanation, which has been tendered by the Respondent, much less sufficient explanation so as to condone the delay of 01 year 08 months and 15 days caused in filing the application for restoration. He would further submit that by virtue of dismissal, valuable rights have accrued in their favour, which is not considered by the Appellate Court. He has further invited the attention of this Court to the observations of the Appellate Court and submits that in spite of observing that the application does not spell out days of delay and does not mention the nature of ailment suffered by the Respondent, the submissions are accepted. In support of his submissions, he relied upon the following decisions of this Court:

- (i) **Brijesh Kumar vs. State of Haryana**, reported in **LAWS (SC)- 2014-3-34**;
- (ii) **Shantilal Babu Patel vs. Ramakant Subrao Shetye**, reported in **LAWS(BOM)-2018-7-154**;
- (iii) **Majji Sannemma vs. Reddy Sridevi**, reported in **LAWS (SC)- 2021-12-65**;
- (iv) **Modu Sonsing Vanjari and Ors. vs. Kamalabe Basilal Patil and Ors.** in **Second Appeal No.248 of 2021** of this Court, decided on **December 08, 2022**;

- (v) **Dilip Rambhau Wadal vs. Bharti Pravin Parse**, in **Second Appeal No.82 of 2020** of this Court decided on **November 06, 2020**.

5. Per contra, learned counsel for the Respondent submits that fair and justice oriented approach would be required to be taken considering the fact that the respondent is rustic villager and it was only on account of default on the part of her lawyer to appear in RCA No.30 of 2010 that the appeal came to be dismissed. He would further submit that sufficient explanation has been given in the application for condonation of delay. In support of his contention he relied upon the following decisions :

- (i) **Rafiq and Another vs. Munshilal and Another**, reported in **(1981) 2 SCC 788**;
- (ii) **Collector, Land Acquisition Anantnag and Another vs. Katiji and others**, reported in **(1987) 2 SCC 107**;
- (iii) **N.Balakrishnan vs. M.Krishnamurth**, reported in **(1998) 7 SCC 123**;
- (iv) **Maksood and another vs. Upper District Judge IIIrd, Azamgarh and others**, reported in **2004 SCC Online All 725**;
- (v) **Chhaya Dattatray Aurangabadkar vs. Waman Pundlik Bhaje**, reported in **2017 (6) Mh.L.J. 671**.

6. I have considered the rival submission of the parties.

7. RCA No.30 of 2010 was instituted by the Respondent on 21st April, 2010. On 2nd April, 2013, the Appellate Court has recorded that since 12th July, 2011, no steps were taken as against

the Respondent Nos. 1 and 3 and hence the appeal stood dismissed as against them. Subsequently, on 6th January, 2015, as there was no appearance caused by the appellant or by her lawyer before the Appellate Court, RCA No.30 of 2010 came to be dismissed. It is apparent that for the period from 2010 to 2015, the Respondent was not diligent in prosecuting the appeal.

8. Learned counsel for the Respondent has submitted that non prosecution was on account of default on the part of her lawyer, however it is required to be appreciated that the respondent had suffered a decree in the trial Court and was well aware about the legal proceedings and ought to have been more diligent.

9. The application for condonation of delay and restoration dated 22nd August, 2016 merely states that the respondent is old lady and was suffering from ailments and could not remain present before the Appellant Court and also that her lawyer remained absent, as a result of which the Appeal came to be dismissed. Pertinently, the application is not supported by any medical certificate to show that the respondent was suffering from any ailment. It is also worthwhile to note that in the said application, it has been averred that the respondent learnt about the dismissal for non-prosecution on 30th July, 2015. In spite of having acquired knowledge of dismissal on 30th July, 2015, the application came to be filed on 22nd August, 2016 and there is no explanation set out for the delay of this period of one year from the date of acquiring knowledge to the filing of the application for

restoration. The Appellate Court has also noted that without leading any evidence, the respondent had closed her evidence. It is therefore, apparent that in spite of sufficient opportunities given to her to explain the delay, the Respondent has not availed the opportunities. The only conclusion that can be drawn from the dates mentioned above i.e. from the period 2010, when the appeal was filed till 2016, when the application for condonation of delay and restoration was filed, is the negligence of the respondent. The application blames the counsel for non appearance and it is common knowledge that if no explanation is available, the blame is placed on the counsel. The application does not set out as to whether the respondent had contacted her counsel on any date to find out the status of her appeal. This conduct is not expected from the litigant who has suffered a decree and was aware of the Court proceedings.

10. Learned Trial Court while allowing the application has observed that nowhere it is come on record that the respondent was aware of the decision of the dismissal and even after the same she has acted negligently and did not file the application for restoration in time. The Appellate court has failed to notice that in the application of the Respondent, she avers that she acquired the knowledge about the dismissal on 30th July, 2015. In such situation, the only conclusion that ought to have been drawn is that the respondent is negligent. Upon the dismissal of the Regular Civil Appeal rights have accrued in favour of the Petitioner and whereas

the discretion exercised by the Appellate Court ought not to be lightly interfered, in the present case I find that the discretion has not been exercised judicially. There is no sufficient explanation and the explanation tendered is not supported by evidence. The delay of considerable period of one year , eight months and fifteen days has to be properly explained. The application must set out some explanation which would assist the Court in exercise of its discretion.

11. In the present case, the only reason that has been given is that the respondent is an old lady and was suffering from medical ailment which is not supported by in any document on record. As far as the decisions relied upon by the Respondent, the consistent view appears to be that if any explanation for the delay is setup which is found to be satisfactory then the discretion has to be exercised in favour of the parties. In the present case, considering the facts of the case and in absence of sufficient explanation in the application, in my opinion, the discretion exercised in favour of the respondents by the Appellate Court cannot be sustained.

12. Considering the above, the petition succeeds. The impugned order dated 11th July, 2022 is quashed and set aside.

(SHARMILA U. DESHMUKH, J.)