

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.931 OF 2022

Sayyad Baba Gulab and others Petitioner

Versus

Karbhari Limba Pawar and another Respondents

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Mr. P.S. Koshti, Advocate h/f Mr. B.S. Shelke, Advocate for
Petitioners

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 14th September, 2023

ORDER :

1. Petitioners are aggrieved by the order passed by learned Civil Judge, Junior Division, Rahuri in Civil Misc. Application No. 19 of 2012, thereby allowing the restoration application filed by the respondents.

2. Respondents/plaintiffs filed suit for permanent injunction against petitioners/defendants. Suit was dismissed in default on 16/03/2012 due to non appearance of respondents. Respondent No.1 filed application for restoration of the suit on 23/04/2012. Petitioners opposed the application contending that there a delay in filing the said application. Therefore, respondent No.1 filed application for condonation of delay, which was numbered as application No.40/2016. The Trial Court allowed the Civil. Misc. Application No.19 of 2012,

filed by respondent No.1 for setting aside of dismissal in default, and restored the suit, petitioners are aggrieved by said order.

3. Heard learned advocate for petitioners. Perused the writ petition memo, annexures thereto and the impugned order. Though duly served none appears for respondents/plaintiffs.

4. Learned advocate for petitioners submits that without deciding delay condonation application, the Trial Court has erroneously proceeded to decide restoration application. There was about 15 days delay in filing of restoration application, and the Trial Court has committed procedural illegality in not deciding delay application and allowing the restoration application.

5. From the record, it is clear that there is delay of 15 days in filing restoration application. Since petitioner objected that no delay condonation application is filed along with restoration application, respondent No.1 filed delay condonation application in restoration application. From the documents placed on record, it is not clear as to whether delay condonation application is decided or not. From the tenor of

the order passed by the Trial Court on restoration application, it is clear that Trial Court has considered the grounds for causing delay in filing restoration application. In the impugned order, Trial Court has observed that the first respondent met with an accident in the year 2010, in which his leg was fractured. He was bedridden, and in December, 2011, he started walking with the help of crutches. At the time of filing of application, he was not in a position to walk alone. The first respondent was ailing, he could not contact his lawyer. Considering these aspects, Trial Court has allowed restoration application.

6. In *Davinder Pal Sehgal and Another Vs. Pratap Steel Rolling Mills Pvt. Ltd. And Another, (2002) 3 SCC 156*, Apex Court held that, in the application for restoration all the relevant facts not only to show that plaintiff had sufficient cause for non-appearance but also to show sufficient cause for condonation of delay in filing restoration application were stated, and in the application for condonation of delay it was merely stated that the facts stated in the restoration application may be taken into consideration for condonation of delay in filing the restoration application. The Trial Court had allowed the restoration application and the High Court

reversed the decision of the Trial Court. While reversing the High Court's decision and allowing the application, the Supreme Court held that though no separate order condoning the delay passed, it cannot be said that the order of restoration has been passed without condoning the delay in filing restoration application. Relying on this decision, learned Single Judge of this Court in ***Antonio Francisco De Silva Vs. Beatriz Noronha Cabral and ors. MANU/MH/1814/2008***, held that,

"In the present case there is an order for condonation of delay though no separate prayer in writing. What must therefore be construed as essential is that the facts which constitute sufficient cause for condoning delay should be presented to the Court and the Court should condone the delay either expressly or impliedly by restoring or admitting the appeal or application.

6. *It is, therefore, clear that in the present case the order of the Tribunal below does not suffer from any error of the law apparent on the face of the record in allowing the restoration of the respondent's revision and condoning the delay since the foundation for the condonation of delay which was condoned was laid in the application for restoration. I am of the view that it is of no consequences that a separate application for condonation of delay was not preferred and a prayer in writing for condonation of delay was not made."*

Present case is squarely covered by aforestated ratio.

7. It is well settled that procedure is handmaid of justice, and it is to be used to further the cause of justice and not to deny fair and reasonable opportunity to the parties to contest the matter on merits.

8. In the facts of present case, Trial Court is justified in allowing restoration application. There is no illegality or perversity in the order impugned in the present petition. No case is made out by the petitioner to exercise extraordinary writ jurisdiction. The writ petition being devoid of merit is dismissed.

[NITIN B. SURYAWANSHI]
JUDGE

S.P. Rane