

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

WRIT PETITION NO. 2129 OF 2020

Kisan Vishnu Vaidya

.. Petitioner

Versus

Mankawati Bhimrao Vaidya
and others

.. Respondents

Shri Sandeep Y. Mahajan, Advocate for the Petitioner.

Shri M. U. Shelke, Advocate for the Respondent Nos. 1 and 3.

Shri N. S. Tekale, Advocate for Respondent No. 8.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 20TH JANUARY, 2023.

FINAL ORDER :

. Heard.

2. The challenge in the petition is to the order dated 03rd September, 2019 passed in Civil M. A. No. 42 of 2014 rejecting petitioner's application for condonation of delay of 03 years and 11 months for setting aside order of dismissal of the civil appeal.

3. Suit R.C.S. No. 65 of 1987 was instituted by the present petitioner for partition and separate possession, which came to be dismissed by the Trial Court by judgment and decree dated 09th December, 1993, which was the subject matter of challenge in R.C.A. No. 09 of 1994. During the pendency of the appeal, the respondent Nos. 7 and 9 expired. In the present case, the issue arising for consideration is the condonation of delay of 03 years and 11 months caused in filing application for setting aside the dismissal of the civil appeal for non prosecution.

4. The application of the petitioner for condonation of delay states that the petitioner had left the village and had migrated to Kolhapur to work as a labourer since November 2008 and thereafter had migrated to different places and as such he could not remain in contact with his lawyer. As the lawyer did not remain present on three occasions i. e. on 17.10.2008, 10.12.2008 and 18.12.2008, the appeal came to be dismissed for non prosecution. The application also states that after coming back to the village on 30.06.2012, he contacted his lawyer, but due to his financial incapacity, the application for condonation of delay could not be preferred within time and hence there is delay of 3 years and 11 months.

5. Learned counsel for the respondents has raised a preliminary objection of the maintainability of the writ petition on the ground that the order dismissing R.C.S. No. 65 of 1987 is a decree and as against the order of Appellate Court a second appeal should have been preferred. He would urge this Court to dismiss Petition as the respondent No. 1 who is sister-in-law of the petitioner claims that there is charge on the property for maintenance, which is sought to be partitioned and due to the pendency of proceedings, she has not been paid the maintenance.

6. Learned counsel for the respondent No. 8 has vehemently opposed the petition and submits that no indulgence ought to be granted to the petitioner who has been negligent and he would further submit that he is subsequent purchaser and due to pendency of the litigation he is made to suffer.

7. As regards the submission of the maintainability of the writ petition is concerned, the provisions of Section 2 Sub Section 2 of the Code of Civil Procedure defines a decree and specifically excludes any order of dismissal in default and as the order of the Appellate Court is rejection of the application for condonation of delay in preferring the civil appeal, the writ petition is maintainable. Learned counsel for the respondent has placed reliance upon the following decisions of the Apex Court.

- I. P. K. Ramchandran Vs. State of Kerala and another reported in (1997) 7 SCC 556.
- II. Union of India and others Vs. Nripen Sarma reported in (2013) 4 SCC 57.
- III. Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and others reported in (2013) 12 SCC 649.

8. There is no quarrel with the proposition that the law of limitation is to be applied with full rigour. However there has to justice-oriented approach while dealing with an application for condonation of delay, and especially when there is sufficient explanation for delay. The provisions of Section 5 of Limitation Act are elastic enough to apply the law in a meaningful manner to subserve the ends of justice. In my opinion, the guidelines laid down by the Apex Court in the case of **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and others** (supra) lays down that there should be liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with application for condonation of delay. In the present case, the

explanation for delay has to be considered against the backdrop of the status of the parties. The petitioner is an agriculturist with the village background and it cannot be expected of a rustic villager to be well informed about the legal position. Considering the explanation put forth in the application about the migration of the Petitioner in search of work and the financial inability which has been put forth as a reason for being unable to approach the Court within time, sufficient explanation has been tendered and a liberal and justice-oriented approach has to be taken in the present matter. As far as objection of the learned counsel for respondent Nos. 1 and 3 is concerned that no maintenance has been paid, the learned counsel has not been able to state as to how by pendency of R.C.S. No. 65 of 1987, execution of decree which has been passed in R.C.S. No. 32 of 1979 is hampered.

09. In my opinion, imposing cost and expediting the matter would meet the ends of justice. For the reasons stated above the impugned order dated 03rd September, 2019 is hereby quashed and set aside. The delay of 3 years 11 months in filing the application for setting aside the order dated 18th November, 2008 passed in M. C. A. No. 42 of 2014 is condoned subject to payment of cost of Rs. 10,000/- (Rs. Ten thousand only) and the receipt evidencing payment to be produced before the District Judge – 1, Bhoom. The cost to be paid within a period of three (03) weeks from today to the respondent Nos. 1 and 3 in equal proportion. The order dated 18th December, 2008 dismissing the appeal for non prosecution is quashed and set aside and R.C.A. No. 09 of 1994 is restored to file. The District Judge – 1, Bhoom to decide the R.C.A. No. 09 of 1994 within a period of four (04) months

from today. Parties to appear before the District Court on 15.02.2023. Writ petition is accordingly allowed in above terms and disposed of.

[SHARMILA U. DESHMUKH, J.]

bsb/Jan. 23