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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.13380 OF 2023

Ganpati Rama Nirmale Since Decd. Thr.
Legal Heirs ... Petitioner

V/s.

Nanibai Ananda Patil Since Deced. Thr.
Legal Heirs and Ors. ... Respondents

WITH

WRIT PETITION (ST.) NO.25994 OF 2023

Ganpati Rama Nirmale since Deceased.
Thr. Legal Heirs ... Petitioner

V/s.

Krishna Rama Nirmale Since Deceased
Thr. Legal Heirs and Anr. ... Respondents

Mr. Prajakt Arjunwadkar for the Petitioner.

Mr. V.B. Rajure for Respondent Nos. 2A2, 2B, 2D, 2E &
2F in WP/13380 of 2023 & Respondent Nos. 1B2, 1C,
1E, 1F, & 1G in WP(st)/25994 of 2023

Mr. Tejpal S. Ingale for Respondent Nos.3A, 3B, 3D, 5,
7A, & 7B.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 31, 2023

RC.:

1. Both the writ petitions arise out of an order rejecting application for condonation of delay for recalling of order of withdrawal of Regular Civil Appeal No.404 of 1998 and Regular

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Civil Appeal No.398 of 1998.

2. Respondent No.1 filed Regular Civil Suit No.50 of 1979 before the Civil Judge Junior Division Kagal seeking perpetual injunction which was decreed on 28th August 1998. Aggrieved thereby, the petitioners filed Regular Civil Appeal No.398 of 1998. In writ Petition No.13380 of 2023, Respondent No.1 had filed Civil Suit No.225 of 1983 for partition and separate possession which was decreed on 28th August 1998 against which the petitioners filed Regular Civil Appeal No.404 of 1998.

3. On 4th November 2003, the petitioners filed a pursis seeking unconditional withdrawal of the appeals. On 20th September 2004, the Appellate Court allowed both appeals to be withdrawn.

4. According to petitioner, filing of pursis was the result of compromise talks between the parties. However, subsequent to filing of pursis, the compromise could not be finalized, and, therefore, on 13th February 2006, petitioners filed Miscellaneous Civil Application Nos.41 of 2006 and 45 of 2006 seeking delay condonation in recall of order of withdrawal. The Appellate Court by the impugned order rejected both the applications.

5. The learned advocate for the petitioner submitted that the petitioner examined witness to prove the fact that before filing of pursis there were compromise talks. He submitted that the nature of compromise on the date of filing of pursis was proved. According to him, delay of 800 days and 480 days in filing the application was due to following reasons.

i) Applicant No.1 A who is main person and looking after

the matter was suffering from kidney stone disease. Other applicants were not aware of the proceedings;

ii) The draft copy of the compromise is produced, but the opponents refused to give effect to the compromise;

iii) The parties tried their best to complete the compromise from 4th November 2003 to 2006. On their failure, they filed applications.

6. The Appellate Court rejected both the applications for condonation of delay mainly on the ground that the applicants are four in number. The reason mentioned in the application is in relation to applicant No.1. There was delay of 800 days and 480 days. Only reason pleaded was that the applicants were suffering from kidney stone and the compromise was not finalized. The reason of illness of kidney stone cannot be termed as sufficient cause.

7. It is true that while considering application under Section 5 of the Limitation Act, 1963 Court must adopt liberal approach. However, interestingly along with application for condonation of delay, petitioner has not filed any application seeking substantive relief. There is no application filed by the petitioner seeking recall of order dated 20th September 2004. In the absence of substantive application seeking substantive relief, the application for condonation of delay was not maintainable.

8. On perusal of the pursis, it appears that the withdrawal of appeal was unconditional. If appellant seeks withdrawal of appeals unconditionally, the Court has no discretion but to allow such

application. It is only when a litigant seeks withdrawal of the proceedings with liberty to file fresh proceedings, the Court has discretion whether to allow such application or not. Therefore, the order dated 20th September 2004 cannot be termed as discretionary order. Therefore, in the background of such facts, mere filing of application for condonation of delay has no consequence. Moreover, the reason assigned by the Appellate Court that the petitioner has failed to prove sufficient cause cannot be termed as perverse.

9. Hence, in my opinion, no cause for interference under Article 227 of Constitution of India is called for.

10. Both the writ petition stands dismissed. No costs.

11. At this stage, learned advocate for the petitioner, seeks extension of ad-interim relief. However, considering the year of decree, request for extension of ad-interim relief is refused.

(AMIT BORKAR, J.)