

Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 15576 OF 2023

Rajes Khan Rasheed Khan Nee
Raees Khan Rashid Khan & Ors.

...Petitioner

Versus

Khatoon Wd/O Abdul Hai Fitwalla & Ors.

...Respondents

Adv. Sapna Khobragade a/w Rahul Yadav. i/b Rajesh Khobragade for
the Petitioner.

Adv. Surel Shah i/b Ashoka Law firm for Respondent Nos. 1 to 11.

CORAM : SHARMILA U DESHMUKH, J.
DATE : DECEMBER 19, 2023

P. C. :

1. Heard.
2. The challenge in the Petition is to the order dated 1st November, 2023 passed by the Revisional court upholding the order of the Trial court in MARJI Application No. 37 of 2020 whereby the Trial Court rejected the Application of the Petitioner's seeking condonation of delay of 122 days caused in filing the Application for setting aside the ex-parte decree.
3. The Application seeking condonation of delay puts forth the

reasons that the Petitioner after receipt of the summons had engaged an Advocate to represent him, however the Advocate failed to attend the proceedings. It is further submitted that, it is only when the bailiff came for execution that the Petitioner acquired knowledge of the passing of the ex-parte decree on 29th August, 2019. The second ground which was put forth is that the Petitioner is an old lady and due to her ill-health she was unable to keep track of the Court proceedings.

4. The Trial Court as well as the Appellate court has considered that the Constituted Attorney of the Petitioner was looking after the other matters which were filed in the City Civil Court as well as before this Court and there is no reason as to why the constituted attorney could not have pursued the proceedings in the suit for eviction.

5. Mr. Shah learned counsel for the Respondent submits that there is no explanation which has been tendered for the delay of 122 days. He would further point out that the Constituted Attorney of the Petitioner is her own son and not some stranger and as such, there is no cause shown as to why her own son did not attend the proceedings considering that the suit was for eviction of the Petitioner.

6. The cause which has been put forward is default on part of the Advocate who was engaged to represent the Petitioner. The admitted

position is that the appearance was filed by the Advocate and thereafter he did not remain present leading to the passing of the ex-parte decree. Once, a litigant engages an Advocate in the matter, it is expected of that Advocate to attend the proceeding and the Defendant who is a lay person is not expected to know the nitty gritty of the procedure. It appears that the Advocate after filing the appearance has failed to attend the proceedings resulting in the proceeding being decreed ex-parte. No doubt it is expected of the litigant to be in constant touch with the Advocate and give instructions so that the Advocate is able to defend the proceedings, however there is no material to demonstrate that the Advocate was appearing in the matter and due to lack of instruction on part of the Petitioner he could not proceed further in the matter. The delay in the present case is of 122 days and it cannot be said to be substantial delay so as not to be condoned. The provisions of Section 5 of the Limitation Act, are elastic enough to apply the law in a meaningful manner to sub-serve the ends of justice. In the present case, the ex-parte Judgment and Decree is passed in the suit filed for eviction of the Petitioner and the rejection of the application for condonation of delay of 122 days is not in interest of justice.

7. In light of the above, the impugned order dated 1st November, 2023 is quashed and set aside and the Application being MARJI

Application No. 37/2020 stands allowed subject to payment of cost of Rs. 5,000/- to be paid by the Petitioner to the Respondent within a period of two weeks from today.

8. Needless to clarify that the observations made herein are only as regards the condonation of the delay which had been caused in filing the Application for setting aside the ex-party judgment and decree. The Trial Court while deciding the Application for setting aside the ex-parte decree is required to decide the same on its own merits uninfluenced by the observations made herein.

(SHARMILA U. DESHMUKH, J.)