



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

WRIT PETITION NO. 2125 OF 2015

1. Shashikalabai w/o Prataprao Deshumkh,
age major, occ. Agri.,
2. Sanjay s/o Prataprao Deshmukh,
age major, occ. Agri.,
3. Archana d/o Prataprao Deshmukh,
age major, occ. Agri.,
4. Aparna d/o Prataprao Deshmukh.
age major, occ. Agri.,
All R/o Nevpur, Tq. Kannad,
Dist. Aurangabad.

...Petitioners

Versus

1. Pandurang s/o Shenfadu Pawar,
age major, occ. Agri.,
2. Sumanbai w/o Pandurang Pawar,
age major, occ. Agri.,
3. Jaywanta s/o Pandurang Pawar,
age major, occ. Agri.,
4. Yashwanta s/o Pandurang Pawar,
age major, occ. Agri.,
5. Jayashree w/o Pandurang Pawar,
age major, occ. Agri.,
All R/o Chincholi, Tq. Kannad,
Dist. Aurangabad.
6. Gahendra s/o Prataprao Deshmukh.
R/o Nevpur, Tq. Kannad,
Dist. Aurangabad.

...Respondents

Advocate for the Petitioner : Mr. Shubham D. Jayabhar h/f Mr. Jayabhar Dattatraya R.

Advocate for Respondents No.1 to 3 and 5 : Mr. D. R. Bhadekar

Advocate for Respondent No.4 : Mr. V. P. Golewar

WITH
CIVIL APPLICATION NO. 2591 OF 2015
IN WP/2125/2015

CORAM : ARUN R. PEDNEKER, J.

Reserved for Judgment on : August 05, 2024
Pronounced on : August 09, 2024

JUDGMENT :-

1. Rule. Rule made returnable. With consent of the parties, heard finally.

2. By the present petition, the petitioners are challenging the order dated 30/08/2010 in Regular Civil Suit No.101/2000 whereby the suit filed by the plaintiffs was dismissed in default with costs, and also order dated 11/07/2014 in M.A.R.J.I. No.35/2011 whereby the application for restoration of the suit was also dismissed. This Court has considered the challenge in the present writ petition only with respect to the order dated 11/07/2014 in M.A.R.J.I. No. 35/2011.

3. The brief facts leading to the filing of the present petition are summarized as under : -

The petitioners are the original plaintiffs who filed the suit for possession of suit land and compensation against the respondents and

the suit was pending at the stage of cross examination of plaintiff No.1. The Advocate for the plaintiffs submitted that in spite of giving intimation by RPAD to the plaintiffs, the plaintiffs have not turned up and thus he is unable to proceed with the suit for want of instructions and presence of plaintiffs. He filed pursis to that effect as Exhibit 112. The suit was listed for cross-examination on 30/08/2010. Earlier an application was filed at Exhibit 111 for adjournment which was granted as a last chance. The suit being very old was also expedited by the High Court by general order. The Civil Court held that it has no reason to adjourn the hearing of the suit and the suit was dismissed in default with cost by the Civil Judge Junior Division, Kannad by order dated 30/08/2010.

4. Thereafter, the plaintiffs filed an application bearing M.A.R.J.I.No.35/2011 for restoration of the Regular Civil Suit No.101/2000 with application for condonation of delay of 1 year 1 month and 9 days. It is averred in the application that the plaintiff No.1 due to her illness was hospitalized and directed bed rest. Plaintiff No.2 had come to his village Nevpur, Taluka Kannad and had received notice from his Advocate, however they could meet their Advocate only after 30/09/2011, when it was informed to them that the suit was dismissed in default for their absence. It is further contended that the plaintiff

No.3 Mahendra Deshmukh was asked to file an application for restoration of the suit, however he failed to do so. As such, he has been added non-applicant in the application. The application for restoration was opposed by the non-applicants with a contention that on 12/08/2010 the Advocate for the plaintiffs has sought adjournment which was rejected and that there was no of whisper of illness of plaintiff No.1 in the said application. It is also stated by the learned Advocate for the plaintiffs that he had filed application at Exhibit 111 stating that he had issued RPAD notice and acknowledgement is awaited and that Advocate for plaintiffs had then filed no instructions pursis vide Exhibit 112, and as such, it was contended that sufficient opportunity was granted, and thereafter, the suit was dismissed. As such, it was prayed that the application be rejected.

5. The Trial Court on consideration of the application, response and the evidence of plaintiff No.1, rejected the application for restoration of the suit. Challenging the order passed by the Civil Judge rejecting the application for restoration of the suit, so also the earlier order passed by the Civil Court dismissing the suit for default, the present writ petition is filed.

6. It is contention of the learned Counsel **Mr. Shubham D.**

Jayabhar holding for Mr. D. R. Jayabhar for the plaintiffs / petitioners that notice issued by RPAD was received by plaintiff No.2 when he had come to the village, however, he failed to take necessary steps. The the plaintiff No.1 is an old age lady who was unwell at that time and was not able to attend the Court for cross examination. The Advocate for plaintiff thereafter filed pursis that he has issued notice by RPAD to the plaintiffs but he had not received acknowledgement and that he had not received instructions in the matter. On the same day, the suit was dismissed and no further opportunity was granted. The suit is of the year 2000 and the plaintiffs have conducted suit for 10 years with diligence and that the Court ought not to have dismiss the suit or at least should have allowed the restoration application with a delay of 1 year 1 month and 9 days. He relies upon the Judgment in case of ***Collector, Land Acquisition, Anantnag and Another vs. Mst. Katiji and Others, reported in AIR 1987 Supreme Court 1353.***

7. Per contra, the learned Counsel **Mr. D. R. Bhadekar** for respondents No.1 to 3 and 5, and learned Counsel **Mr. V. P. Golewar** for respondent no.4 submit that the plaintiff has not been diligent in prosecuting the matter and that they were aware of the fact that the matter is pending in view of the notice given by the Advocate for the plaintiffs and they have not responded to the notice of their Advocate.

The plaintiffs had failed to take steps, as such, the said suit has been rightly dismissed for non-prosecution so also the application for restoration has been rightly dismissed.

8. Learned Counsel for respondents No.1 to 3 and 5 and respondent No.4 relies upon the Judgments as under : -

- a) *Punjab National Bank vs. Vijai Kumar Dhariwal and others, reported in (1994) 24 ALR 532 : 1993 SCC OnLine All 245,***
- b) *Kamalbai w/o Narasaiyya Shrimal and Another vs. Ganpat s/o Vithalrao Gavare, reported in 2007 (1) Mh.L.J. 807,***
- c) *Sathy M.P. w/o N.C.Purushan Nikathithara and Another vs. Sarasa w/o Thankappan, (R.P.497/2015), decided on 16/07/2014,***
- d) *Dattatraya s/o Laxman Misal and Another vs. govind s/o Narayan Misal and others, (Second Appeal No.593/2011), decided on 08/06/2022. And***
- e) *Amardeep and Others vs. State of Delhi and Anr., (CRL.REV.P.573/2014 and Crl.MA.14417/2014 (stay) and Crl.MA 14420/2014) decided on 14/01/2015.***
- f) *Madhumati Suresh Raut and Another vs. Namdeo Tukaram Yadav, reported in 2006 (1) Bom.C.R. 505.***
- g) *Union of India and Anr. vs. Jahangir Byramji Jeejeebhoy (D) Through his LR., Civil Appeal No.4672***

***of 2024 (arising out of SLP (Civil) No.21096 of 2019),
decided on 03/04/2024.***

9. Considered the rival submissions. The question that arises for consideration before this Court is whether the Trial Court was justified in not restoring the suit. In the instant case it is apparent that notice was issued by RPAD by the Advocate for the plaintiffs seeking their instructions and to remain present in the Court. At the relevant time the matter was listed for cross-examination of the plaintiff No.1. Plaintiff No.1 being an old aged lady and at the relevant time it is contended that she was unwell and she did not remain present in the Court. Ordinarily when there is no instructions pursis filed by the Advocate, the Court would issue notice to the party. However no such course of action was adopted in the instant case. The proof of service is also not filed by Advocate for plaintiffs. The plaintiff No.2 has admitted that he received the notice of the Advocate. However, it is not known what are the contents of that notice, whether there is any indication given in the notice as regards that the matter is likely to be dismissed for non-prosecution. It has to be noticed that the plaintiffs prosecuted the suit for 10 years diligently. Undoubtedly there are some lapses on the part of the plaintiffs but the suit is diligently prosecuted by the plaintiffs for 10 years before dismissal for non prosecution. Plaintiffs does not get any benefit by delaying the proceeding. In the Judgment

relied upon by the learned Counsel for the respondent in case of **Union of India and Anr. vs. Jahangir Byramji Jeejeebhoy (D)** (Supra) the delay was substantial of 12 years and 158 days, as such the Hon'ble Supreme Court had not permitted the delay to be condoned without sufficient explanation for the same. The Hon'ble Supreme Court in case of **Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy & Others, (2013) 12 SCC 649**, has laid down the parameters for condonation of delay as under :-

"21. From the aforesaid authorities the principles that can broadly be culled out are :

21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) *Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.*

21.6. (vi) *It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.*

21.7. (vii) *The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.*

21.8. (viii) *There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.*

21.9. (ix) *The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*

21.10. (x) *If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.*

21.11. (xi) *It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking*

recourse to the technicalities of law of limitation.

21.12. (xii) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

22. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

22.1. (a) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

22.2. (b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

22.3. (c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

22.4. (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."

Considering the law on subject discussed above and the facts of this case, it is pertinent to note that non restoration of the suit would create serious prejudice to the right of the plaintiffs, whereas restoration of the suit will give an opportunity to the plaintiffs to establish their case. The plaintiffs were immediately not aware of the dismissal of the suit and became aware of the same when the plaintiff No.2 visited their Advocate on 30/09/2011. Thereafter, there is not much delay in filing the application for restoration of suit. The delay is not so substantial that this Court cannot interfere. This Court can impose certain cost for the delay caused, as such, the suit stands restored with cost of Rs.30,000/- (rupees thirty thousand only) to be paid to the defendants.

10. It is made clear that, on restoration of the suit the plaintiffs would not be entitled for further adjournment and that it would conclude its evidence as expeditiously as possible and within nine months from the date of this order being produced before Trial Court. The Trial Court also to make an endeavour to decide the suit as expeditiously as possible.

11. Petition is allowed in above terms. Pending application stands disposed of.

Rule is made absolute in above terms.

(ARUN R. PEDNEKER, J.)

12. After the pronouncement of the judgment, the learned counsel for the respondents prays for the judgment to be kept in abeyance to allow the respondents to approach the Hon'ble Supreme Court.

13. At the request of learned Counsel for respondents, this Judgment kept in abeyance for six weeks from today.

(ARUN R. PEDNEKER, J.)

vj gawade/-.