



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9663 OF 2024

Nanasaheb Maliba Chaudhari

VERSUS

Suryabhan Nana Chaudhari And Others

- Mr. S. S. Kulkarni, Advocate for the Petitioner
- Mr. A. S. Gandhi, Advocate for the Respondent No. 1

CORAM : R.M. JOSHI, J

DATE : NOVEMBER 28, 2024

PER COURT :

1. This Petition takes exception to order dated 29.06.2024 in Civil M.A. No. 14/2024 passed by the District Judge, Rahata whereby the delay of 3 years and 4 months caused in preferring Appeal against the judgment and order dated 30.04.2016 passed in RCS No. 422/2011 came to be condoned.

2. Petitioner is original Plaintiff. In his case that suit summons were served upon the Defendant. Out of three defendants, Defendant No. 2 appeared through Advocate. These Defendants filed common written statement, however, thereafter they did not contest the suit. As a result of this, suit came to be decreed. Original Defendant No. 2 has sought to prefer Appeal

after 3 years by contending that he came to know about the decree in question after receipt of summons in executing proceedings. It is his contention that the Defendant No. 1 had agreed to look after the proceedings on his behalf and as such, he did not pursue the said suit. It is claimed that he is aged about 70 years and illiterate person and on this ground, delay caused in filing of Appeal is sought to be condoned.

3. Admittedly, parties did not lead any evidence before the Appellate Court in application for delay condonation and pursis came to be filed through both sides for not leading any oral evidence. The learned Appellate Court allowed application for condonation of delay with cost of Rs. 2,000/-.

4. Learned Counsel for the Petitioner submits that Defendant No.2 has appeared in the proceeding and has filed written statement too. He however thereafter failed to contest the suit. He drew attention of the Court to the reply filed by Defendant No. 1 wherein it is specifically stated that Defendant No.1 has never agreed to look after the litigation on behalf of

Defendant No. 2 and it was the responsibility of the Defendant No. 2 himself to take care of his case. It is his submission that there is no evidence led by the Defendant No. 2 to prove the reason for condonation of delay and in spite of the said fact the learned Appellate Court has erroneously allowed the application for condonation of delay.

5. Learned Counsel for Respondent/Defendant No. 2 submitted that the litigation herein involves the immovable property and as such, interest of justice requires that the Defendant No. 2 is given an opportunity to substantiate his case. It is his submission that since both sides filed no evidence pursis, the order impugned cannot be faulted with. Learned Counsel for Respondent submits that an opportunity be given to Defendant No. 2 to lead evidence before the First Appellate Court. Though it is sought to be argued that it was a wrong advise given to the Defendant No. 2 by his Counsel for not leading evidence before the Appellate Court, no such contention is found in the affidavit-in-reply filed on his behalf.

6. No doubt, it is settled position of law that

the lis between the parties is required to be decided on merits instead its dismissal on technicalities. However, it does not mean to give a licence to the parties to approach the Court at belated stage and not even to justify the delay by leading cogent evidence. Even in this case if both sides have filed pursis for not leading evidence, burden was on the Defendant No. 2 to prove delay sufficiently and reasonably in preferring Appeal belatedly. Now, there is absolutely no evidence on record to support the reason cited for condonation of delay. In spite of same, learned Trial Court holds that even in absence of evidence being led by the Defendant No. 2, it cannot be presumed that reasons cited are false. The said Court also proceeds to hold that the delay is not deliberate or mala fide as the Defendant No. 2 is illiterate person. In absence of any evidence on record, such finding could never have been recorded by the learned Appellate Court. These findings sans evidence is wholly impermissible in law and hence, perverse.

7. If any such condonation without proof by the parties is allowed to be accepted, then hypothetically

there can be situation almost in every case that where there are more than one defendants in the suit any one of them will prefer to remain absent till the judgment is delivered. In case judgment is against him, he will take a stand that it was responsibility of co-defendants to take care of the litigation.

8. With regard to the request made by Counsel for Respondent that he be permitted to lead evidence in Appeal is concerned, such request can never be considered for simple reason that unless the Defendant No. 2 satisfy that there is justified reason for condonation of delay, question of entertainment of Appeal itself does not arise.

9. In absence of proof, First Appellate Court committed error in accepting the same as justified reason for condonation of delay. The findings recorded by the learned First Appellate Court being perverse cannot sustain. Hence, Petition succeeds. Impugned order dated 29.06.2024 passed in Civil Miscellaneous Application No. 14/2024 stands set aside. Application for condonation of delay being Civil M.A. No. 14/2024 stands dismissed.

10. After dictation of order, learned Counsel for Respondent seeks stay to this order to enable the Respondent to challenge the same before the Hon'ble Supreme Court.

11. Learned Counsel for Petitioner opposes the said request.

12. In the interest of justice, instant order stands stayed for a period of four weeks from today.

(R.M. JOSHI, J.)