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

WRIT PETITION NO. 5390 OF 2023

Dashrath Babu Waghmode and Ors.

.. Petitioners

Versus

Dipak Bhaskar Jagtap and Anr.

.. Respondents

-
- Mr. Vaibhav R. Gargade, Advocate for Petitioners.
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CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 06, 2024.

P.C.:

- 1.** Not on Board. Mentioned. Taken on Board.
- 2.** Heard Mr. Gargade, learned Advocate for Petitioners.
- 3.** Present Writ Petition takes exception to the order passed below Exhibit “1” in Civil M.A. No.21 of 2019. Application was filed for seeking condonation of delay of 1 year, 1 month and 3 days by the Applicants i.e. Defendants against whom Regular Civil Suit No.62 of 2013 came to be decreed by the Trial Court on 04.01.2018.
- 4.** Defendants submitted that Suit summons was not properly served and therefore the Trial Court passed an *ex-parte* order against Defendants. Record indicates that Defendant Nos.2 and 3 appeared and filed their written statement alongwith Application for condonation of delay below Exhibit “15” before the Trial Court. The

same was also allowed subject to costs of Rs.200/- but Advocate for the Defendant did not inform the Defendant about the said costs which resulted in miscarriage of justice. This was held by the Appeal Court against the Applicants while passing the impugned order by holding Applicants responsible for negligence about their duties towards the Court and law. Applicants would submit that they came to know about the judgment only thereafter on 23.01.2019 and this explanation of the Applicants was not accepted by the Appeal Court on the ground that it appears to be concocted and Applicants were sleeping over their own rights.

5. On the aforesaid grounds, the Application seeking condonation of delay filed below Exhibit “1” to challenge the judgment and decree by the Appeal Court came to be rejected.

6. I have perused the Application filed below Exhibit “1” which is at Exhibit “D” - page No.48 of the Writ Petition. Perusal of the said Application reveals what has been noted by the Appeal Court while passing the impugned order has been explained in detail by the Applicants who are the original Defendants.

7. There is undoubtedly delay of 1 year, 1 month and 3 days in filing the Appeal. The substantive right of Appeal against a decree passed against the Defendants would be lost if the impugned order passed below Exhibit “1” is sustained by this Court. Right of Appeal is

undoubtedly a valuable statutory right available to any litigating party and more so in the present case when it is the case of the Defendants that an *ex-parte* decree came to be passed against them.

8. Be that as it may, it is also equally true atleast from the *prima facie* turn of events that there has been some dereliction on the part of the Applicants in approaching the Appeal Court in filing Civil M.A. No.21 of 2019. The delay of 1 year, 1 month and 3 days is *prima facie* there. However, what is important for any Court to consider is whether adequate explanation has been given by the Applicants or not. After perusing the delay condonation Application filed in Civil M.A. No.21 of 2019, I am of the opinion that the delay of 1 year, 1 month and 3 days deserves to be condoned in view of the explanation offered by the Applicants in the said Application subject to payment of costs of Rs.5,000/- to be paid to the Kirtikar Law Library, High Court, Mumbai. Payment of costs is a condition precedent and receipt of payment of costs shall be placed before the Appeal Court for further consideration of Civil M.A. No.21 of 2019 strictly in accordance with law.

9. In view of the above, Application filed below Exhibit “1” stands allowed. The impugned order dated 03.02.2022 stands quashed and set aside. The delay of 1 year, 1 month and 3 days in filing Civil M.A. No.21 of 2019 is condoned.

10. It is clarified that, this Court has not expressed any opinion about the merits of the matter. All contentions of the parties including Plaintiffs and Defendants before the learned Appeal Court are expressly kept open and the same shall be decided on its own merits.

11. With the above directions, Writ Petition is allowed and disposed.

[MILIND N. JADHAV, J.]

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