

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10039 OF 2024

Anil Baburao Jadhav and Ors.

.. Petitioners

Versus

Tatyabhau Nana Jadhav and Ors.

.. Respondents

.....

- Mr. Shivaji A. Masal, Advocate for Petitioners.

.....

CORAM : MILIND N. JADHAV, J.

DATE : AUGUST 05, 2024

P.C.:

- 1.** Heard Mr. Masal, learned Advocate for Petitioners.
- 2.** By virtue of the impugned order dated 16.06.2023 passed below Exhibit-93 and Exhibit-97 in Regular Civil Suit No.66 of 2011 which is appended at Exhibit-E, page No.38 of the Writ Petition, Application filed by Defendant Nos.1 to 3 below Exhibit-93 for setting aside the “No Written Statement” order dated 23.08.2012 stands rejected. Application is filed below Exhibit-97 seeking condonation of delay. Application is filed on 27.03.2023.
- 3.** Considering the above timeline there is apparently a clear delay of ten years and six months. Be that as it may, under the extant orders of Supreme Court arresting the period of limitation during COVID-19 Pandemic period, the Defendants would be entitled to waiver of period from 20.03.2020 to 28.02.2022. Hence, the aforesaid period would stand reduced to around eight and half years.

4. Mr. Masal would draw my attention to the Application filed below Exhibit-93 which is appended at Exhibit-C, page No.32 of the Writ Petition and he has persuaded me to read the contents of paragraph Nos.1 to 3 therein which gives reasons. According to the Defendants they had appointed Advocate Mr. Khairnar to represent them before the Trial Court in the suit proceedings. However, the said Advocate Mr. Khairnar expired. Next it is stated that thereafter Defendant Nos.1 to 3 appointed Advocate Mr. V. S. Patil to represent them. It is stated that both Advocates did not file the written statement.

5. Mr. Masal has shown the roznama before the Trial Court to me wherein it is seen that Mr. Khairnar and Mr. Patil have indeed represented the Defendant Nos.1 to 3. Mr. Masal would submit that it is only when Advocate Mr. Sonawane was appointed by Defendants to represent and espouse their cause in the Trial Court, it was learnt by them that the written statement was not filed and “No Written Statement” order was passed against them in the year 2012.

6. In his usual fairness Mr. Masal would inform the Court that Plaintiffs had filed a suit for seeking survey of the suit property, measurement of the suit property, removal of encroachment made by Defendants in the suit property and for injunction. This suit is filed in the year 2011 and registered as Regular Civil Suit No.66 of 2011

before the Civil Judge Junior Division, Chandwad, District – Nashik. He would submit that by virtue of the impugned order which rejects the Application filed below Exhibit-93 and Exhibit-97, Defendant Nos.1 to 3 stand completely ousted and non-suited. He would submit that there is no doubt that delay rather substantial delay has occurred but in said suit proceedings, the Court ought to consider the reasons since none of the reasons which are stated are attributable to delay on the part of Defendant Nos.1 to 3. He would submit that Defendant Nos.1 to 3 fully relied upon their Advocates appointed by them and in that view of the matter, delay has occurred.

7. He would submit that there is one more reason as to why this Court should look into this issue and condone the delay though it may not be strictly relevant and germane as a ground in the present Petition. He would submit that in the interregnum and during pendency of the suit filed by Plaintiffs, Plaintiffs have prayed for appointment of Court Commissioner to carry out measurement and survey of the suit property and prepare a report. According to him, the Court Commissioner carried out the imprimatur of the Trial Court and submitted his report on 07.04.2014. He would submit that Plaintiffs had taken out application for amendment of the suit plaint after submission of the report of Court Commissioner and that copy is at page No.27 of the Writ Petition and he has taken me through the same. He would submit that the said report clearly states that it is

Defendant Nos.4 to 6 who have encroached upon the suit property and not the Defendant Nos.1 to 3. He would draw my attention to paragraph No.3(a) of the Application filed at page No.27 of the Writ Petition which records the aforesaid contents also. He would therefore submit that if Defendant Nos.1 to 3 are ousted or rather non-suited by retaining the “No Written Statement” order against them, the substantive right of Defendant Nos.1 to 3 to place the correct facts on record would be lost. Hence, he would urge the Court to take a lenient view in view of the Applications filed below Exhibit-93 read with Exhibit-97 and set aside the impugned order in the interest of justice. He would submit that as an Advocate and Officer of the Court he has no quarrel whatsoever with the findings returned by the learned Trial Court in paragraph No.4 of the impugned order wherein the Trial Court proceeded on the basis that law assists only those who are vigilant and not those who sleep over their rights. He would submit that undoubtedly there is delay but in the facts and circumstances which have been argued by him, he would urge the Court to take a lenient view and despite the gross delay consider condoning the same in the light of the aforementioned facts.

8. An arguable case has been made out by Mr. Masal for issuance of notice to Respondents.

9. Hence, issue notice to the Respondent No.1 who is the

answering Respondent i.e. Plaintiff before the Trial Court. Humdast permitted. In addition to Court's notice, Petitioners are directed to serve the Respondent No.1 and inform him about the next date of hearing by any permissible mode of service and file appropriate affidavit of service with tangible proof thereof. Respondent No.1 is directed to remain present himself or through Video Conferencing or either through his Advocate. Service shall be effected of Writ Petition and copy of this order within a period of one week from today positively without any delay. Respondent No.1 is directed to file Affidavit-in-Reply to the Writ Petition within a period of one week from the date of service of Writ Petition.

10. Respondents should note that this Writ Petition shall be disposed at the stage of admission itself on the next adjourned date. It is clarified that if Respondents are served and if they do not remain present, this Court shall not await their presence and decide the Writ Petition in accordance with law. Defendant Nos.1 to 3 who are Petitioners are permitted to file additional Affidavit to explain the delay which has occurred within a period of two weeks from today at the request of Mr. Masal. Copy of the said additional Affidavit shall be served by Advocate for Defendant Nos.1 to 3 on Plaintiffs also.

11. In view of the pendency of the Writ Petition, learned Trial Court shall defer the hearing of the suit proceedings before itself until

the present Writ Petition is determined. Trial Court shall take cognizance of a server copy of this order.

12. Stand over to **19th August, 2024.** To be placed under the caption '**First on Board**'.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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by HARSHADA
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SAWANT
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2024.08.07
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