



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO. 17641 OF 2024

1. Union of India
(Through Secretary Central Railway
New Delhi)

2. General Manager,
Indian Railway, Railway Bhavan,
New Delhi

3. General Manager,
Central Railway, CST,
Mumbai

4. Divisional Engineer (LM)
DRM
(Labour), office Third floor,
Annex Building,
above Reservation Office,
Mumbai Division,
Central Railway CST, Mumbai.

...Petitioners

vs.

1. Noor Mohd. Shaikh @ Noor
Mohd. Ibrahim Shaikh (deceased)

1/1. Sultana Noor Mohd. Shaikh
Age – Adult, Occupation – Nil

2. Shabbir Ibrahim Shekh (deceased)
2/1. Ashabi Shabbir Shekh
Age- Adult, Occupation – Nil

2/2. Farzana Ajij Vahab
Age – Adult, Occupation – Nil.

2/3. Samee Shabbir Shekh
Age – Adult, Occupation – Nil.

2/4 Munnejar Shabbir Shekh
Age – Adult, Occupation – Nil

3. Jabbir Ibrahim Shekh
Age – Adult, Occupation – Business

All r/o. Gundge, Tal. Karjat,
Dist. Raigad

...Respondents

Mr. R. P. Ojha	Advocate for the Petitioners
Mr. Rohit Joshi	Advocate for the Respondents

CORAM : S. M. MODAK, J.

DATE : 03rd DECEMBER 2024

ORAL JUDGMENT :-

1. Not on board. Matter is mentioned by way of Praecipe moved on behalf of the Respondents/Plaintiffs/decreed holders considering the limited issue involved. It is taken on board. It is about maintainability of the present petition. Heard finally by consent on that issue.
2. I have heard learned Advocate Mr. Joshi for Respondents/Plaintiffs/decreed holders and learned Advocate Shri Ojha for the

Petitioners/Defendants / judgment debtors.

3. The order which is challenged in this petition was passed by the Court of the District Judge-3, Panvel, District Raigad on 01.01.2024. **The Appellate Court refused to condone the delay caused in filing the First appeal**, (at page no. 179 of the compilation tendered by learned Advocate Mr. Joshi). **In fact Defendants were directed by the trial Court to hand over the possession of certain premises by removing 3rd railway line.** This judgment was passed on 17/01/2019 by the Court of 02nd Jt. CJJD Panvel, (at page no. 98 of the said compilation).

4. In delay condonation application the judgment debtors have tried to explain the delay caused in preferring an appeal. However, they could not find favour from the Appellate Court. According to them, the delay was properly explained. **The said decision is challenged by way of this petition.**

5. On 19.01.2024, this Court (Coram :- Milind N. Jadhav, J.) has restrained the decree holders from taking any coercive action against the Petitioners (as a consequence of dismissal of delay condonation application). In the said order, appearance of the Respondent was shown. There is some grievance raised by learned Advocate Mr. Joshi

for the Respondents. Court is not expressing any opinion about this grievance.

6. Urgent circulation is sought because it is contention on behalf of the Respondents that under the garb of ‘no coercive action’, the Railways started with the construction on the site and this is also pleaded in their affidavit-in-reply. Further objection about maintainability of the writ petition is also taken in affidavit-in-reply.

7. Learned Advocate Mr. Joshi relied upon the observations made by the Division Bench in case of *Devidas Ganpati Kale (died) Through his Lrs Bhagwan Devidas Kale and Others Vs. Sow. Munirbi Mahebub Karanje*¹ at page no. 206. According to him, there was divergence of opinion about maintainability of the second appeal (when the delay condonation is refused pending first appeal), whether such order is order or decree. The Division Bench observed “*this is decree and hence it is challengeable under provisions of Section 100 of the Civil Procedure Code*” (para no. 26 of the said judgment).

8. Learned Advocate Shri Ojha submitted that the scope of the writ petition is vast and even the order refusing the condonation of delay

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can be challenged by way of writ petition. He invited my attention to the observations made by this Court in the order dated 23.02.2024 (Coram :- Milind N. Jadhav, J.) in para no. 5, it was observed

“If Petitioners are in position to show that land of Respondents has been acquired, case of the Petitioners will be considered, failing which appropriate orders shall be passed considering that though this Writ Petition is filed under Article 227, it does ingrain the attributes and provisions of Article 226 of the Constitution of India and this Court can pass appropriate directions in the interest of justice.”

9. According to learned Advocate Mr. Ojha there are several judgments of the Hon’ble Supreme Court wherein the writ petition under Section 227 was held maintainable even though alternate remedy is available.

10. Be that it may, this Court feels that scope of the inquiry in respect of grievance raised in this petition are concerning the correctness of the order refusing delay condonation application. This Court feels that whether land has been acquired or not can only be considered when the first appeal will be heard or suit will be heard, if

judgment debtor succeeds in the relevant proceedings.

11. On this background learned Advocate Shri Ojha for the Petitioners seeks liberty to file Second appeal and requested for grant of eight weeks time to file it because he requires time to obtain certified copy of the documents and he has requested for continuation of 'no coercive order' passed by this Court earlier.

12. It is opposed by learned Advocate Mr. Joshi and he submitted, let there be observations that if the Petitioner will go on with the construction they will not claim equity. He further submitted with all fairness that he will not oppose the delay caused in Second appeal in view of the pendency of the writ petition.

13. This Court feels that this issue can be raised before the Court who will be dealing with Second appeal. Certainly some time needs to be given to the Petitioners to obtain certified copies.

14. In view of that following order is passed :-

ORDER

- (i) Petitioners are at liberty to file appropriate proceedings challenging the order refusing delay condonation passed by the Appellate Court.

- (ii) The protection granted by this Court on 19/01/2024 that no coercive action shall be taken against the Petitioners as a consequence of dismissal of CMA No. 67 of 2023 is extended for period of six weeks from today.
- (iii) Writ petition is disposed of.
- (iv) If delay condonation application is filed, let it be considered by considering the submission made by non-opposing the same.
- (v) Petitioners to serve copy of those proceeding to Respondents in advance.

[S. M. MODAK, J.]