



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 364 OF 2024

- 1) Narendra Janardhan Wankhede,
Aged about 75 years, Occ.– Agriculturist,
R/o. Sarafa Lane, Tiwsa,
Tahsil Tiwsa, District – Amravati.
- 2) Manish Ramkisan Panpaliya,
Aged about 55 years,
Occ.- Business and agriculturist,
R/o. Tiwsa road, Chandur Railway,
Tahsil - Chandur Railway,
District – Amravati.
- 3) Vishal Rameshwarji Panpaliya,
Aged about 44 years, Occ.-Contractor,
R/o. Lunawat Nagar,
Dhamangaon Railway,
District – Amravati.
- 4) Nilesh Gulabrao Gudadhe,
Aged about 52 years, Occ.-Contractor,
R/o. Pannalal Nagar, Amravati,
District – Amravati.
- 5) Sau. Sunita Manish Panpaliya,
Aged about 52 years,
Occ.-Medical Practitioner,
R/o. Tiwsa Road, Chandur Railway,
Tahsil Chandur Railway,
District – Amravati.

.... **PETITIONERS**

// VERSUS //

- 1) Maharashtra State Road Transport
Corporation through Divisional Controller,
M.S.R.T.C. Amravati Division,
Shivaji Nagar, Amravati,
Tahsil and District – Amravati.

- 2) The Executive Engineer,
Construction Division,
Maharashtra State Road Transport
Corporation, Amravati Division,
Shivaji Nagar, Amravati,
Tahsil and District – Amravati.
- 3) State of Maharashtra,
through District Collector, Amravati.
- 4) Sub-Divisional Officer, Chandur Railway,
Tahsil Chandur Railway,
District – Amravati.
- 5) Tahsildar Tiwsa,
Tahsil Tiwsa, District – Amravati.

.... **RESPONDENTS**

Mrs. I. P. Khisti, Advocate for the Petitioners.
Mr. Ashish Mehadia, Advocate for the Respondent Nos.1 & 2.
Mr. S. C. Joshi, Assistant Government Pleader for the
Respondent Nos.3 to 5.

CORAM : SMT. M.S. JAWALKAR, J.

DATE ON RESERVING THE JUDGMENT : 30.01.2025.

DATE ON PRONOUNCING THE JUDGMENT : 05.02.2025.

JUDGMENT :

1. **Rule.** Rule made returnable forthwith. Heard finally with the consent of the learned counsel appearing for the parties.

2. The present petition is filed by the petitioners challenging the order dated 30.11.2023, passed by the learned District Judge-1, Amravati in Misc. Civil Appeal No.66/2023, thereby set aside the order dated 30.06.2023, passed by the learned 7th Joint Civil Judge, Senior Division, Amravati in R.M.J.C. No.188/2023,.

3. The petitioners have filed the Regular Civil Suit No.148/2013 against the Maharashtra State Road Transport Corporation (MSRTC) Mumbai and others thereby seeking declaration and mandatory injunction against the respondents. The respondent Nos.1 and 2 constructed a compound wall of the 'Bus Stand' from its northern side in the year 2011 and at the time of said construction, the respondent Nos.1 and 2 encroached from the northern side public road and also on the portion in the said lay out Plot No.1 to 7.

4. The learned Counsel for the petitioners drawn my attention to the Roznamas and submitted that till 22nd February, 2019, no steps were taken to submit the documents. On 10th June, 2014, the matter was kept for order to proceed without written-statement against the respondent Nos.1 and 2. The learned Counsel also drawn my attention to the Roznama dated 03.04.2017, application Exhibit-48 filed by defendant Nos.1 and 2 for setting aside the order of proceedings without written-statement and to file written-statement on record. Thus, this application is moved after near-about three years, the said application came to be allowed and written-statement was taken on record. Thereafter also respondent Nos.1 and 2 were not diligent in pursuing their matter. It appears that on 22nd February, 2019, new Advocate Mr. Roshan Dhande was engaged. Thereafter, on 03.10.2019, the application Exhibit-60 for issuing witness summons to T.I.L.R. was

filed, which was came to be allowed. Since last appearance for defendants through his Counsel appears to be on 20.12.2019. The petitioners/plaintiffs closed their evidence on 27.10.2021 and on 30.10.2021 after various dates the order to proceed suit without evidence of defendants was passed, ultimately judgment came to be passed on 24.11.2021.

5. Thereafter, the respondent filed application i.e. R.M.J.C. No.188/2023 for condonation of delay in filing application under Order IX Rule 13 of the Code of Civil Procedure for setting aside an *ex parte* judgment and decree passed in R.C.S. No.148/2013. The petitioners herein filed their reply to the said application.

6. The learned 7th Joint Civil Judge, Senior Division, Amravati rejected the application R.M.J.C. No.188/2023 vide order dated 30.06.2023. The said order is set aside by the learned District Judge in M.C.A. No.66/2023.

7. It is contention of the learned Counsel for the petitioners that order passed in R.M.J.C. No.188/2023 is well reasoned and well founded order which in fact, the learned Appellate Court ought not to have interfere with it. It is submitted that learned Civil Judge, Senior Division, Amravati considered all the aspects and also conduct of respondents. It has also considered that the judgment cannot be said to

be *ex parte* and therefore, the Court is not having jurisdiction to set aside the same. It is further contended that every aspect is taken into account by the learned Civil Judge, Senior Division and also considered the citations in its rights spirits. However, the learned Appellate Court, has not given any consideration to the conduct of the respondents and only given material fact that Counsel for defendant Nos.1 and 2 was seriously ill, it also believed the letter alleged to be issued by Advocate Mr. Dhande. Admittedly, it was not on record, no argument before the learned Lower Court still having been so, it is held by the Appellate Court that “Lower Court although having aforesaid letter, it appears that it has not appreciated the same”.

8. As against this, the learned Counsel for the respondent submitted that the order passed in Appeal is proper, justified and for the reasons mentioned in the application, delay is rightly condoned.

9. I have heard the learned Counsels for both the parties, considered the contention and citation relied on by the petitioners.

10. On perusal of Roznama, admittedly, there was an order passed on 03.02.2014 to proceed without written-statement and application for grant of permission to file written-statement came to be filed on 03.04.2017. As such, there was delay in filing the application for setting aside no written-statement order for about three years.

Even after the same, it appears that the respondent Nos.1 and 2 were not diligent. It also appears that Advocate Mr. Dhande engaged on 20.2.2019 and his last appearance shown to be on 20.12.2019. It is the case of the defendants that their Advocate was seriously ill and bedridden. However, since 20.12.2019 till the passing of judgment on 24.11.2021 i.e. after near about two years, the defendant Nos.1 and 2 have not taken any efforts to engage any Advocate or to get status of pending matter. Now a days even status of the matter can be ascertained through the App of "CIS". One of the defence was that there was strike from November-2021 to April-2022. However, in my considered opinion, the strike begins after closing of the matter for judgment. Moreover, the strike appears to be of "Drivers and Conductors", however, the period of absence from 20.12.2019 till 24.11.2021, unexplained by the respondent Nos.1 and 2. The alleged letter, which is shown across the bar is undated, moreover, that letter does not appear to be a part of record.

11. As such, the respondents have very negligently and in casual manner let the suit proceed without written-statement and after grant of permission to file written-statement, continuously remained absent. Even if, the Advocate appearing for respondent Nos.1 and 2 was bedridden, it appears that for more than two years, none of the responsible person for respondent Nos.1 and 2 ascertained the status of

the matter. It is not only the duty of the Advocate to look into the matter, the concerned party should also be diligent in prosecuting their matter.

12. The learned Counsel for the petitioners relied on the case of *Union of India and Anr. Vs. Jahangir Byramji Jeejeebhoy (D) through his LRs.*, reported in *2024 SCC OnLine SC 489*, wherein the Hon'ble Apex Court in para Nos.25, 26 and 27 held as under :

“25. It hardly matters whether a litigant is a private party or a State or Union of India when it comes to condoning the gross delay of more than 12 years. If the litigant chooses to approach the court long after the lapse of the time prescribed under the relevant provisions of the law, then he cannot turn around and say that no prejudice would be caused to either side by the delay being condoned. This litigation between the parties started sometime in 1981. We are in 2024. Almost 43 years have elapsed. However, till date the respondent has not been able to reap the fruits of his decree. It would be a mockery of justice if we condone the delay of 12 years and 158 days and once again ask the respondent to undergo the rigmarole of the legal proceedings.

26. The length of the delay is a relevant matter which the court must take into consideration while considering whether the delay should be condoned or not. From the tenor of the approach of the appellants, it appears that they want to fix their own period of limitation for instituting the proceedings for which law has prescribed a period of limitation. Once it is held that a party has lost his right to have the matter considered on merits because of his own

inaction for a long, it cannot be presumed to be non-deliberate delay and in such circumstances of the case, he cannot be heard to plead that the substantial justice deserves to be preferred as against the technical considerations. While considering the plea for condonation of delay, the court must not start with the merits of the main matter. The court owes a duty to first ascertain the bona fides of the explanation offered by the party seeking condonation. It is only if the sufficient cause assigned by the litigant and the opposition of the other side is equally balanced that the court may bring into aid the merits of the matter for the purpose of condoning the delay.

27. We are of the view that the question of limitation is not merely a technical consideration. The rules of limitation are based on the principles of sound public policy and principles of equity. We should not keep the ‘Sword of Damocles’ hanging over the head of the respondent for indefinite period of time to be determined at the whims and fancies of the appellants.”

13. The Hon’ble Apex Court further observed in para 29 is as under :

“29. In Oriental Aroma Chemical Industries Limited vs. Gujarat Industrial Development Corporation, (2010) 5 SCC 459, this Court rejected the application for condonation of delay of 4 years in filing an application to set aside an exparte decree on the ground that the explanation offered for condonation of delay is found to be not satisfied.”

14. As such, there has to be justifiable, reasonable and acceptable explanation, there is no explanation about why respondent

Nos.1 and 2 or their respective Officer has not taken any updates for near about two years. So far as the ground of strike is concerned, it was by “Drivers and Conductors”. Moreover, the said period is after matter is closed for argument. As such, there is no satisfactory explanation of absence of respondent Nos.1 and 2 in the matter as their Advocate was suffering with illness.

15. So far as contention of the petitioners is that it was not an *ex parte* judgment as it was on the merit, however I may usefully refer to the dictum in ***Balu @ Madhavrao Shankarrao Ghorpade Since deceased by his LRs. Ajay Madhavrao Ghorpade and Ors. Vs. Radhakkabai Panditrao Ghorpade and Ors.***, reported in ***2004(1) Mh.L.J. 323***, wherein para 14, 15, 16 and 19 reads as under :

“14. In this case the defendants did not appear. Written statement was already filed. But no evidence was laid on behalf of the defendants. Therefore, the case is covered by Order XVII, Rule 2. This Rule requires the Court to fall back on any of the modes prescribed in Order IX. Since the plaintiffs appeared and the defendants did not appear when the suit was called on for hearing the provisions of Order IX Rule 6 will apply to this case. So far as it is relevant for this case, Order IX, Rule 6 reads thus:

"6. Procedure when only plaintiff appears-

(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing then;

(a) When summons duly served - If it is proved that the summons was duly service, the Court may make an order that the suit shall be heard ex parte;

(b)

(c)

(2) " "

15. There can be no dispute about service of summons because the defendants have not made any grievance. Written statement was filed. No evidence was recorded. Therefore, in my opinion, the judgment and decree dated 21.7.1986 is ex parte.

16. Mr. Bandiwadekar urged that under Order XVII, Rule 2 the court can also make "such other order as it thinks fit". Therefore, the present judgment is passed pursuant to that provision. In a given case the court can pass a decree on merits also. In am unable to agree with this submission. This words can never permit the court to override the limits circumscribed by Order IX Rule 6(1)(a). These words do not contemplate an order on merits. Such an interpretation is not consistent with the explanation to Order XVII, Rule 2. If an order on merits can be passed by a court when no evidence is laid on behalf of the party which is absent then there was no need to make a clarification by way of explanation to this Rule that where the evidence or substantial portion of the evidence of any party has been recorded and that party fails to appear the court may in its discretion proceed with the case. In my opinion, all other cases covered by Order XVII, Rule 2 where no evidence is laid on behalf of the absent party the order can only be ex parte.

19. In my opinion, these observations will apply to the facts of the present case also, because the amendments do not change the position so far as

this expression is concerned. The explanation added to Order XVII, Rule 2 merely makes it clear that only in case where evidence is recorded and the party whose evidence is recorded is absent, the court can decide the case on merits. In fact this amendment indicates the legislative intent that, if no evidence is recorded before the default takes place the court cannot decide the suit on merits. By adding Clause (b) to Order XVII, Rule (3) the legislature has merely given an option to the court even in cases where parties fail to carry out their obligation and remain absent to fall back on Order XVII, Rule 2. Therefore, the Full Bench decision on interpretation of the words "make such order as it thinks fit" can be relied upon to interpret the said words even after amendment of Order XVII, Rules 1 and 2."

16. As such, in my considered opinion, the decree passed is an *ex parte* against the M.S.R.T.C. however, as referred in para 14, there is no due diligence shown by the respondent to attend the proceedings or to file application for setting aside the judgment and decree diligently. In view of the above referred citation and in my considered opinion, the observations of the learned 7th Joint Civil judge, Senior Division, Amravati in its order dated 30.06.2023 is incorrect that as the written-statement is filed in the suit, the suit cannot be treated as an *ex parte*. In the Miscellaneous Appeal, the learned District Judge-1 condoned the delay by order dated 30.11.2023. The learned Appellate Court has not considered the defendants negligent conduct in prosecuting the matter. For that reason the inconvenience caused to plaintiffs ought to have been sufficiently compensated.

17. As such, the order dated 30.11.2023, passed by the learned District Judge-1, Amravati in Misc Civil Appeal No.66/2023 is hereby confirmed subject to costs of **Rs.10,000/-** (Rs. Ten Thousand only) to be paid by the defendants to the plaintiffs within a period of three weeks from the passing of this order.

18. The learned Civil Judge, Senior Division, Amravati is directed to register the Application for Restoration of Suit and hear the same as per provision of law, after verifying the fact that amount of costs, as directed, is deposited in the stipulated period.

The Writ Petition stands disposed off accordingly.

(SMT. M.S. JAWALKAR, J.)

Kirtak