IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

BENCH AT AURANGABAD

WRIT PETITION NO. 8337 OF 2018

Govind S/o Gangadhar Jagalpure,
age 65 years occupation agriculture
R/o Gudsoor Taluka Udgir Dist. Latur,
at present Vikas Nagar, Degloor road,
Udgir Taluka Udgir District Latur. ...Petitioner

VERSUS

1. Laxmibai W/o Baburao Pawar @ Upase,
age 55 years occupation household

2. Baburao S/o Ramchandra Pawar @ Upase
age 65 years occupation agriculture

3. Dhanraj S/o Ramdas Upase,
age 18 years occupation agriculture

4. Balappa S/o Rajkumar Upase,
age 19 years occupation agriculture

5. Tulshidas S/o Gangadhar Jagalpure,
age 50 years occupation agriculture

Nos. 1 to 5 R/o Gudsoor Taluka Udgir Dist. Latur

6. Wanmala W/o Udhav Damkondwar,
age 52 years occupation household
R/o N.D.2, CIDCO, proper Nanded
Taluka & District Nanded.

7. Shobha W/o Vilas Lohgaonkar,
age 49 years occupation household
R/o Sonpeth Taluka Sonpeth District Parbhani.

8. Tungbhadra W/o Venkat Kachawar,
age 47 years occupation household
R/o at post Patoda Taluka Naigaon District Nanded.

9. Bharat W/o Madhukar Devshetwar,
age 42 years occupation household
R/o Janwal Taluka Chakur District Latur. ...Respondents

Mr. S.V. Suryawanshi, Adv. for petitioner.
Mr. A.R. Joshi, Advocate for respondents No. 1 to 4

CORAM : N.J. JAMADAR, J.

Closed for Judgment on : 17th March, 2021

Pronounced on : 6th April, 2021

J U D G M E N T :

Rule. Rule made returnable forthwith and, with the consent of the Counsels for the parties, heard finally.

2. The challenge in this petition is to the judgment and order dated 21st November 2017 passed by the learned District Judge-1, Udgir, in Misc. Civil Appeal No. 7 of 2015, whereby the learned District Judge was persuaded to dismiss the appeal and uphold the common order passed by the learned Civil Jude (J.D.), Udgir, in Misc. Civil Application No. 2 of 2008 thereby dismissing the application for condonation of delay in taking out the application for setting aside the abatement of Reg. Civil Suit No. 262 of 2000 and

also dismissing the application for setting aside the abatement.

3. Shorn of unnecessary details the background facts leading to this petition can be stated as under:

a) Late Gangadhar Jagalpure was the father of petitioner Govind and co-applicant Pandurang and respondents No.5 to 7. Late Gangadhar had instituted a suit, being Regular Civil Suit No. 262 of 2000, against respondents No.1 to 4 seeking a declaration that the registered sale deed, vide No. 3944, dated 8th July 1999 executed in favour of respondent No.1 Laxmibai in respect of the ancestral agricultural land bearing survey No. 21/1 admeasuring 5H. 51R (the suit land), was void and not binding upon him. It was, *inter-alia,* averred that respondent No.1 Laxmibai and respondent No.2 Baburao had fraudulently got the sale deed executed by late Gangadhar by taking undue advantage of his physical condition and the trust and confidence which the late Gangadhar had reposed in them. Gangadhar died on 11th May 2002 leaving behind the petitioner, co-applicant Panurang and respondents No. 5 to 7 as his legal representatives.

b) During the life time of Gangadhar, the relations between late Gangadhar and the applicants on the one hand and the

applicants and respondents No. 5 to 7, on the other hand, were not cordial. Deceased Gangadhar was suffering from a serious disease. Thus, the applicants were unaware of the institution of the said suit.

c) On 3rd January 2008 when the petitioner visited the suit land, respondent No.1 Laxmibai obstructed the petitioner from entering into the suit land as she claimed to have acquired exclusive ownership over the suit land consequent to the dismissal of Reg. Civil Suit No. 262/2000, as having been abated. Thereupon, the applicants obtained the necessary information about the said suit and filed Misc. Civil Application No. 2 of 2008 for setting aside the order of abatement dated 3rd April 2006.

d) Respondents No. 1 to 4 resisted the application for setting aside the abatement. It was, *inter-alia*, contended that the application cannot be entertained as there was no prayer for condonation of delay. Thereupon, on 7th October 2014 the applicants took out a separate application (Exh. 74) seeking condonation of delay in taking out the application for setting aside abatement and bringing the legal representatives of deceased plaintiff on record.

e) The learned Civil Judge, after appraisal of the rival pleadings and material in support of, and in opposition to, the prayer for condonation of delay and setting aside abatement, was

persuaded to reject both the applications for condonation of delay and for setting aside the abatement by order dated 21st January 2015, opining that the applicant had failed to make out a sufficient cause for condonation of almost 12 years delay. The reason assigned by the applicants that they were unaware of institution of Reg. Civil Suit No. 262 of 2000 filed by deceased Gangadhar was found to be unworthy of acceptance.

f) Being aggrieved, the petitioner herein preferred Misc. Civil Appeal No. 7 of 2015 before the District Court. By the impugned judgment and order dated 21st of November 2017, the learned District Judge was persuaded to dismiss the appeal concurring with the view of the trial Court that the applicants/appellants had failed to make out a sufficient cause for condonation of delay in taking out the application for setting aside abatement and also for setting aside the abatement. Hence the petitioner-applicant No.1 has invoked the writ jurisdiction of this Court.

4. I have heard Mr. S.V. Suryawanshi, the learned Counsel for the petitioner and Mr. A.R. Joshi, the learned Counsel for respondents No.1 to 4 at some length. With the assistance of the learned Counsels, I have perused the material on record.

5. Mr. Suryawanshi, the learned Counsel for the petitioner, strenuously urged that the learned District Judge as well as the learned Civil Judge have adopted a very pedantic approach. In the process, the trial Court as well as the Appellate Court lost sight of the time tested principle that an application for condonation of delay, especially in taking out the application for setting aside abatement, ought to receive liberal consideration and discretion has to be exercised so as to advance the cause of substantive justice. As the applicants had assigned justifiable reason, of being unaware of the institution of the suit by their late father, the Courts below, according to Mr. Suryawansbhi, committed manifest error in declining to exercise the discretion to condone delay and set aside the abatement and thereby deprived the petitioner-applicant of the valuable rights in the suit property. Therefore, it is necessary to exercise extra-ordinary jurisdiction to correct the errors into which the Courts below have fallen, urged Mr. Suryawanshi.

6. Per contra, Mr. Joshi, the learned Counsel for respondents No.1 to 4 stoutly submitted that the applicants were guilty of suppression of facts. The material on record indicates that the claim of the applicants that they were unaware of the institution of the suit by their late father was demonstrably false. The assertion

of the applicants that they became aware of the institution and disposal of the suit by late Gangadhar only when respondent No.1 allegedly obstructed applicant No.1 Govind from entering into the suit land is belied by the pleadings and proceedings in Reg. Civil Suit No. 163 of 1997 instituted by co-applicant Pandurang and to which the applicant-petitioner Govind was a party-defendant. The suit land i.e. survey No. 21/1, was the subject matter of the said suit as well and respondent No.1 herein was impleaded as a party- defendant to the said suit in her capacity of transferee of the suit land from late Gangadhar, under the sale deed dated 8th July 1999 and the plaint came to be amended to seek a declaration that the said sale deed was not binding on the share of plaintiff Pandurang. Thus, the trial Court and the Appellate Court were wholly justified in dismissing the application for condonation of delay and for setting aside the abatement, submitted Mr. Joshi.

7. To begin with, it may be advantageous to note few un-controverted facts. The relationship between late Gangadhar, the petitioner, co-applicant Pandurang and respondents No. 5 to 7 is not in dispute. It is incontestable that co-applicant Pandurang had instituted Reg. Civil Suit No. 163/1997 against late Gangadhar, petitioner Govind and respondents No. 5 to 7, for partition and

separate possession of the joint family properties, including agricultural land bearing survey No. 21/1, the suit land herein. In the said suit, petitioner Govind had filed a written statement, wherein the fact that the petitioner had also instituted a suit for partition of the joint family property was admitted.

8. Respondent No.5 Tulshidas-defendant No.3 therein had filed an application for addition of the parties as portions of the suit properties therein were alienated during the pendency of the said suit. Respondent No.1 Laxmibai was also sought to be impleaded as party defendant. Likewise, co-applicant Pandurang had filed an application for impleading respondent No.1 Laxmibai as a party defendant, with the assertion that late Gangadhar-defendant No.1 therein had executed a sham sale deed in favour of respondent No.1 on 8th July 1999. Both these applications were allowed and the transferees, including respondent No.1 Laxmibai were impleaded as party- defendants. Moreover, by way of amendment, co-applicant Pandurang sought a declaration that the said sale deed did not bind the share of the plaintiff in the suit land. Indisputably, late Gangadhar also instituted suit, being Reg. Civil Suit No. 262 of 2000 against respondents No.1 to 4 with the averments that the sale deed in respect of suit land was fraudulently got executed from him and it

was void and not binding upon him.

9. In the backdrop of aforesaid facts, it is necessary to note that there is not much controversy over the fact that late Gangadhar died on 11th May 2002. The application for setting aside the abatement was preferred by the petitioner and co-applicant pandurang on 16th January 2008. Indisputably, the application for condonation of delay in taking out the said application for setting aside the abatement (Exh.74) was preferred on 7th October 2014.

10. From a meaningful reading of the application to set aside the abatement, it becomes evident that it proceeds on a singular premise that deceased Gangadhar was suffering from a virulent disease and late Gangadhar and his legal representatives were estranged and, thus, the applicants were not aware of the institution of the said suit. The trial Court and the Appellate Court were of the view that the said reason ascribed by the applicant did not merit acceptance as a sufficient cause for condonation of delay.

11. The learned Counsel for the petitioner would urge that the aforesaid approach of the Courts below is not in consonance with law. It was submitted that the Courts ought to have taken a liberal view of the matter so that the cause of substantive justice is

advanced. In order to lend support to this submission, Mr. Suryawanshi placed a very strong reliance on the judgment of a Division Bench of this Court in the case of ***Keshao s/o Kawadu Maral and another Vs. State of Maharashtra and others, 2005(1)Mh.L.J.1059,*** wherein emphasizing the nature of the provisions under Order XXII of the Code of Civil Procedure, 1908, which are essentially procedural and, thus, required to be construed as handmaid of justice, the Division Bench observed as under:

> *"8. We are of the view that the order passed by the learned Single Judge is unsustainable in law. The delay in taking out the application has to be computed from the date of knowledge of the death of a party. It is the case of the appellants that they had no knowledge and as soon as they acquired knowledge, they took out application for bringing legal heirs on record. This aspect as regards knowledge is not seriously disputed by the respondent. Secondly, it is now well settled that the provisions of Order 22, Rule 1, Civil Procedure Code are not penal in nature. It is a rule of procedure and substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspect of law. In the aforesaid circumstances, we are of the view that the learned Single Judge was in error in refusing to use discretion vested in him*

> *for condoning delay in taking out application for bringing legal heirs on record. Even if proceeding abates, the Court has ample powers to set aside the abatement, and condone the delay to bring legal heirs on record."*

12. A strong reliance was also placed on the judgment of the Supreme Court in ***Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (dead) by L.Rs. and others, 2009(2) Mh.L.J. 1***, wherein the Supreme Court, after an elaborate discussion on the approach to be adopted in considering applications for condonation of delay, especially in the context of the delay in bringing on record the legal representatives of a deceased party, summarized the principles as under:

> *" 8. The principles applicable in considering applications for setting aside abatement may thus be summarized as follows :*
>
> *(i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not*

on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling

the appeal after rectification of defects.

(v) Want of 'diligence' or 'inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal. "

13. Placing reliance on the aforesaid enunciation of law, Mr. Suryawanshi, the learned Counsel for the petitioner, urged with a degree of vehemence that the Courts below did not adhere to any of the aforesaid principles and were unduly influenced by the fact that there was delay of about six years in taking out the application for setting aside the abatement and, initially, it was not accompanied by an application for condonation of delay. The fact that a formal application for condonation of delay (Exh.74) came to be filed in the year 2014 could not have been accorded undue weight, urged Mr. Suryawanshi.

14. The legal position is fairly crystallized to the effect that the expression 'sufficient cause' within the meaning of section 5 of the Limitation Act 1963 or under Order XXII of the Code or any other like provision ought to receive a liberal consideration so as to advance the cause of substantial justice, when no negligence or inaction or want of bonafide is attributable to a party. In the very nature of things, whether the explanation furnished, in a given case, would constitute a 'sufficient cause', depends on the facts of the case. Though no straight jacket formula can be devised yet the Courts ought not to proceed with a presumption against sufficiency of the cause and consider the explanation through the prism of finding fault. Where no negligence or inaction or want of bonafide can be imputed to a party, normally the discretion ought to be exercised in favour of the party seeking condonation of delay. At the same time, Court should be alive to the fact that by allowing proceeding to abate, a valuable right has accrued to the other party which ought not to be defeated by condoning the delay in a routine fashion. Thus, the courts have to strike a balance between the competitive interests of advancing cause of substantive justice by condoning the delay and that of not depriving a party of an accrued right where a clear case of negligence and inaction is made out.

15. In the case at hand, on a careful analysis of the material, the singular reason ascribed by the applicants that they were unaware of the institution of the suit by late Gangadhar and that they became aware of the proprietory title, which respondent No.1 Laxmibai professed to exercise over the suit land, in the year 2008 only, does not appear to be worthy of acceptance. Indubitably, co-applicant pandurang had instituted Reg. Civil Suit No. 163/1997 much prior in point of time to the suit instituted by late Gangadhar and had sought general partition of the joint family properties including survey No. 21/1 (the suit land in Reg. Civil Suit No. 262/2000). It is imperative to note that in the said suit, not only plaintiff Pandurang but also defendant No.3 Tulshidas, another brother of the applicants, sought impleadment of transferees of various parts of the suit lands therein including respondent No.1 Laxmibai, who had acquired the suit land. Co-applicant Pandurang in the application for impleadment of respondent No.1 Laxmibai asserted in no uncertain terms that late Gangadhar had executed sham and bogus sale deed dated 8th July 1999 in favour of respondent No.1 Laxmibai and, thus, it was necessary to implead her as party defendant. Eventually, plaint in Reg. Civil Suit No. 163/1997 came to be amended and co-applicant Pandurang sought a

declaration that the said sale deed did not bind the interest of the plaintiff.

16. In the face of aforesaid record, it does not stand to reason that the applicants were unaware of the assertion of rights over the suit land by respondent No.1 Laxmibai. The endeavour on the part of the applicants to make out a case that they had no knowledge about the claim of respondent No.1 Laxmibai over the suit land, till the year 2008 is, thus, belied by the pleadings in Reg. Civil suit No. 163 of 1997. Once this position is conceded to, the claim of the applicants that they were unaware of the institution of the suit itself by late Gangadhar pales in significance. Evidently, not only co-applicant Pandurang had instituted the suit for partition against late Gangadhar, but the petitioner herein also had instituted a suit for partition, which was eventually dismissed. In the circumstances, the Courts below cannot be said to have committed an error in arriving at a finding that the cause sought to be ascribed by the applicants was not sufficient.

17. A profitable reference in this context can be made to a judgment of the Supreme Court in the case of ***Balwant Singh (dead) Vs. Jagdish Singh and others, 2010(8) Supreme Court Cases 685,***

wherein after adverting to a number of precedents, including the judgment in the case of **Perumon Bhagwathy Devaswom** (supra), the Supreme Court cautioned against construing the provisions of the Order XXII of the Code and Section 5 of the Limitation Act in such a manner as to render them redundant and inoperative.

18. The observations of the Supreme Court in paragraphs 32 to 35 and 38 are instructive. They read as under:

> *" 32. It must be kept in mind that whenever a law is enacted by the legislature, it is intended to be enforced in its proper perspective. It is an equally settled principle of law that the provisions of a statute, including every word, have to be given full effect, keeping the legislative intent in mind, in order to ensure that the projected object is achieved. In other words, no provisions can be treated to have been enacted purposelessly.*
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> *33. Furthermore, it is also a well settled canon of interpretative jurisprudence that the Court should not give such an interpretation to the provisions which would render the provision ineffective or odious. Once the legislature has enacted the provisions of Order 22, with particular reference to Rule 9, and the provisions of the Limitation Act are applied to the entertainment of such an application, all these provisions have to be given their true and correct meaning and must*

be applied wherever called for. If we accept the contention of the Learned Counsel appearing for the applicant that the Court should take a very liberal approach and interpret these provisions (Order 22 Rule 9 CPC and Section 5 of the Limitation Act) in such a manner and so liberally, irrespective of the period of delay, it would amount to practically rendering all these provisions redundant and inoperative. Such approach or interpretation would hardly be permissible in law.

34. Liberal construction of the expression 'sufficient cause' is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. There can be instances where the Court should condone the delay; equally there would be cases where the Court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect "sufficient cause" as understood in law. (Advanced Law Lexicon, P. Ramanatha Aiyar, 2nd Edition, 1997).

35. The expression "sufficient cause" implies the presence of legal and adequate reasons. The word "sufficient" means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which

provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated.

36. .....

37. .....

38. Above are the principles which should control the exercise of judicial discretion vested in the Court under these provisions. The explained delay should be clearly understood in contradistinction to inordinate unexplained delay. Delay is just one of the ingredients which has to be considered by the Court. In addition to this, the Court must also take into account the conduct of the parties, bona fide reasons for condonation of delay and whether such delay could easily be avoided by the applicant acting with normal care and caution. The statutory provisions mandate that applications for condonation of delay and applications belatedly filed beyond the prescribed period of limitation for bringing the legal

> *representatives on record, should be rejected unless sufficient cause is shown for condonation of delay. The larger benches as well as equi-benches of this Court have consistently followed these principles and have either allowed or declined to condone the delay in filing such applications. Thus, it is the requirement of law that these applications cannot be allowed as a matter of right and even in a routine manner. An applicant must essentially satisfy the above stated ingredients; then alone the Court would be inclined to condone the delay in the filing of such applications."*

19. From the aforesaid exposition of the law, it becomes abundantly clear that though the paramount consideration while determining an application for condonation of delay remains the advancement of cause of substantive justice and not allowing the procedure to score a march over substantive justice, yet, the sufficiency of cause and explanation for delay warrant consideration. Judicial discretion cannot be so liberally exercised as to condone the delay where no cause is made out or the cause ascribed is demonstrably unworthy of acceptance. The delay cannot be condoned for mere asking irrespective of the cause shown and inordinateness thereof.

20. On the aforesaid touchstone, re-adverting to facts of the case, I am of the considered view that the Courts below were justified in refusing to exercise the discretion. From the own showing of the applicants, the cause assigned for the delay did not appear reasonable and betrayed inaction and negligence bordering on taking a ground which was incorrect to their knowledge.

21. The upshot of aforesaid consideration is that no interference is warranted in the impugned judgment and order. Resultantly, the petition deserves to be dismissed. Hence the following order.

O R D E R

The petition stands dismissed.

No costs.

Rule discharged.

(N.J. JAMADAR)
JUDGE

Madkar