

(2011) 08 BOM CK 0052

In the Bombay High Court

Case No : Writ Petition No. 3062 of 2011

Sheshrao Vithobaji Lakhapurkar

APPELLANT

Vs

Shyamrao Shiladin Jaiswal

RESPONDENT

Date of Decision : 01-08-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2012) 1 MhLj 695

Hon'ble Judges : R.M. Savant, J

Bench : Single Bench

Advocate : M.A. Vaishnav, for the Appellant; M.R. Kalar, for the Respondent

Judgement

R.M. Savant, J.—Rule with the consent of the parties made returnable forthwith and heard. The above petition filed under Articles 226 and 227 of the Constitution of India takes exception to the order dated 29-4-2011 passed by the learned Ad hoc District Judge-1, Amravati, by which order the application for condonation of delay of five months and 15 days in filing the application for restoration of the application for condonation of delay in the First Appellate Court came to be rejected.

2. The petitioner herein has suffered a decree in Regular Civil Suit No. 50/2005, which suit was filed by the respondent herein claiming easementry right in respect of light and air, the petitioner and the respondent are neighbours. The suit has been decreed on 31-3-2006 and the Appeal in the First Appellate Court came to be filed on 15th February, 2008. Since it was belated, the petitioner filed an application for condonation of delay and the principal ground on which condonation of delay was sought by the petitioner, was that there was a communication gap between him and his Advocate and that the petitioner was also suffering from various ailments, which has resulted in the said delay. It appears that the said application for condonation of delay was dismissed in default on 1st July, 2010 on account of non-appearance of the Advocate and, thereafter the application for restoration of the said application came to be filed

after a period of 5 months and 15 days.

3. Though much can be said as regards the conduct of the petitioner and the manner in which he has prosecuted the suit in question. In my view, considering the well settled dictum that a party should be allowed to prosecute its remedy on merits rather than being thrown out on technicalities, hence though there is a serious objection by Shri Kalar appearing on behalf of the respondent as regards the delay of 5 months and 15 days, in my view, a final indulgence is required to be shown to the petitioner so that he can prosecute the application filed by him for restoration of the application for condonation of delay of two years in filing the First Appeal on merits.

4. In that view of the matter, the impugned order dated 29-4-2011 is quashed and set aside and resultantly the application Exhibit-1 for condoning the delay of about 5 months and 16 days approximately stands allowed.

5. However, for the inconvenience that the petitioner has caused to the respondent, in my view, the respondent requires to be compensated. The petitioner, therefore, to pay costs of Rs. 5,000/- (Rs. Five Thousand Only) to the respondent within four weeks from date. The same to be a condition precedent. If the said costs are not paid to the respondent within the time stipulated by this order, the benefit of this order would not enure to the petitioner. Resultantly, the petition would be deemed to be dismissed. If such costs are paid, the First Appellate Court would take the application for restoration of application for condonation of delay for consideration. The parties to appear before the First Appellate Court on 25th August, 2011. Rule is accordingly made absolute in the aforesaid terms.