

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

58. CA/1019/2015 In SAST/34296/2014

DAMU SITARAM PATIL LRS NANABAI LRS RAMBHAU AND OTHERS
V/S
MOTIRAM NATHU CHAUDHARI LRS SHANTABAI AND OTHERS

Mr. Hemant Survey, Advocate for applicants.

Mr. S.B. Yawalkar, Advocate for respondent Nos. 1B to 1E.

CORAM : T.V. NALAWADE, J.
DATED : 14th October, 2015.

ORDER :

1. The application is filed for condonation of delay of 1203 days caused in filing second appeal. Both the sides are heard.

2. The suit was filed for removal of encroachment, possession of encroached portion, admeasuring 30.5 R. by the respondents in the year 1975. The suit came to be decided in the year 2003 in favour of plaintiffs. The first appeal filed by defendants, present applicants came to be decided on 27.4.2011. It appears that the application was filed for certified copy of judgment and order of first appeal and it was delivered to the applicants on 7.6.2011. In spite of that, the appeal came to be filed with delay condonation application in the year 2015.

3. It is the case of applicants that they had handed over the file to one advocate from Aurangabad on 22.6.2011 with instruction to file second appeal. It is contended that the said advocate gave the file to his junior advocate for filing appeal, but the said junior advocate did not file the appeal probably due to some objections taken by the office. It is contended that the file remained with the junior advocate. It is contended that when on 20.11.2014 the applicants received notice of execution proceeding, they approached the advocate from Aurangabad and then they realized that the appeal was not filed. The proceeding came to be filed in December 2014, but the circulation was taken in the year 2015.

4. The respondents/plaintiffs have filed reply affidavit and they have contended that the execution proceeding was filed by them in the year 2007 itself, but due to the pendency of first appeal, in execution proceeding progress was not made. It is contended that after dismissal of the first appeal, application was moved for possession warrant on 29.7.2011 and notice of this was given to the applicants and so, the applicants cannot say that they had no knowledge about the execution proceeding. It is contended that the applicants played delaying tactics and

when the possession warrant was actually sent, they took some steps.

5. The aforesaid circumstances show that even when the certified copy of decision of first appeal was delivered to the present applicants on 7.6.2011, steps were taken to file the second appeal in the month of December 2014. The condonation of delay is possible only when 'sufficient cause' is shown. Further, the Court condoning delay has discretionary power and the Court needs to form opinion that the delay deserves to be condoned. For that, the Court is expected to see as to whether there is some case for the appellant in the appeal. When the party wants to file second appeal, the Court is expected to further consider as to whether there is any material available for formulation of substantial question of law.

6. The delay of about 3 years is caused in filing the proceeding. For removal of encroachment, the suit was filed in the year 1975 and it can be said that even after 40 years from the date of suit, the plaintiffs could not get the possession of encroached portion. Many parties, who are in possession, have been misusing the process of Court and they are playing delaying tactics. The parties like the present applicants have

started to act under the presumption that the Courts are liberal and the Court will definitely condone the delay even after it is huge delay. Due to such belief, the modus operandi like one used in the present matter is used. During trial, the time is sought and the decision is delayed. When the decree is given, every time an attempt is made to protract the execution. In view of such tactics, which are being employed by some persons, who are in possession, it has become necessary for the Court to see that unnecessarily delay is not caused in giving fruits of the decree and delay is not condoned on flimsy grounds. From the aforesaid contentions, it can be said that there is virtually no material with the applicants to make out the case of 'sufficient cause'. There is clear probability that the appeal was not intentionally filed, but under the pretext that the party is filing appeal or it has filed appeal, time was sought in the execution proceeding. Steps were actually taken only after issuing possession warrant in execution proceeding.

7. To ascertain as to whether the applicants have any case on merits, this Court has gone through the rival contentions and the reasoning given for deciding the matter in favour of present respondents/plaintiffs. It appears that the possession of the disputed portion with the defendants is not seriously

disputed. When the suit was filed, the land of the plaintiffs was bearing Survey No. 423 and during pendency the portion of the plaintiffs was given land Gat No. 742/1. This happened due to implementation of consolidation scheme. But the fact remains that in the past, in survey number and after implementation of consolidation scheme, the plaintiffs were shown as owners of 75 R. portion. It appears that there was division of survey number and at that time defendants were in possession of some portion as tenants. The plaintiffs have given evidence on cause of action. The defendants took alternative defence of ownership due to adverse possession. There was no room for disputing the title of plaintiffs over the disputed portion. The Courts below have given finding in favour of plaintiffs on the title. The defendants took a vague stand that for 18-20 years, they have been in possession of the disputed property and so, they have become owner due to adverse possession. They did not give the particulars as to how and when they came in possession and as to why their possession needs to be treated as hostile to the title of plaintiffs. Due to the absence of such pleading and evidence, the trial Court has given decree of possession and the decree is confirmed by the first appellate Court. Though the point of adverse possession involves point of law also, when on facts the decision is given by the Courts below and the finding is

concurrent of the Courts below, this Court, at this stage, is expected to ascertain carefully as to whether the point involved is a substantial question of law. In view of the aforesaid circumstances and nature of defence taken by the defendants, it cannot be said that any substantial question of law as such is involved. The plaintiffs have proved the encroachment also by examining Cadastral Surveyor though the case of encroachment, the possession of defendants over the disputed portion was not seriously disputed. In the result, this Court holds that the delay does not deserve to be condoned. Nothing can be achieved if the delay is condoned and the defendants are given the opportunity to file the second appeal.

8. In the result, the application stands dismissed.

[T.V. NALAWADE, J.]

SSC/