

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.687 OF 2015
IN
SECOND APPEAL (ST). NO.10840 OF 2015
WITH
CIVIL APPLICATION NO.688 OF 2015**

Dhananjay Vishnu Kumbhar
Since deceased through legal representatives
Nikhil Dhananjay Kumbhar and Ors. .. Applicants

vs.

Nagnath Ganpat Tathe (Deshmukh) and Anr. .. Respondents

Mr.Abhijeet A. Joshi for the applicants

Mr.Ajay A. Joshi for the respondent no.1

**CORAM : K.K.TATED, J.
DATED : 27/10/2015**

PC:

- 1 Heard the learned counsel for the parties.
- 2 The present Civil Application is preferred by defendant no.2 for condonation of 11 years and 122 days delay in filing the Second Appeal challenging the judgment and decree dated 12.9.2003 passed by Appellate Court in Regular Civil Appeal No.207 of 2001.
- 3 Office note shows that notice issued to respondent no.2a i.e. original defendant no.1 is awaited. Advocate for the respondent no.1

plaintiff submits that the decree passed by the appellate court is in favour of respondent no.1 plaintiff. He further submits that even the judgment and decree passed by the Trial Court was not challenged by the respondent no.2 org.defendant no.1. Hence, it is necessary to serve the respondent no.2 in the present proceeding.

4 The learned counsel for the applicant defendant no.2 submits that applicants are legal heirs of org.defendant no.2, Dhananjay Vishnu Kumbhar who died on 22.8.2009. He submits that in the present proceeding, the appellate court passed judgment and decree on 12.9.2003 granted specific performance of agreement for sale in favour of respondent no.1 plaintiff. He submits that they learnt about the judgment and decree passed by Appellate Court when they received notice in Execution Application No.13 of 2013 in the year 2013. He submits that thereafter they immediately engaged advocate to represent before the executing court. He submits that advocate who appeared for them in the executing court, informed them that the draft sale deed was approved by the executing court in favour of respondent no.1 plaintiff. Thereafter, applicant sought legal opinion from other advocate. On the basis of legal opinion given by the other advocate, they decided to file the present Second Appeal challenging the judgment and decree passed by appellate court dated 12.9.2003. Hence, there is delay of more than 11 years in preferring the present Second Appeal. He submits that when the judgment and decree was passed by the appellate court, applicant nos.1 to 3 were very young and did not know about the litigation. He further submits that even the applicant no.4 is a house wife and was not involved in the litigation. Hence, there was a delay of more than 11 years in preferring the present proceeding. He submits that applicant has good chance of

success in the present proceeding. He submits that in the interest of justice, this Hon'ble Court be pleased to condone the delay in filing the Second Appeal and matter be heard on its own merits. He submits that if delay is not condoned, irreparable loss and injury will be caused to the applicant. Hence, in the interest of justice, this Hon'ble Court be pleased to condone the delay and hear the matter on its own merits.

5 On the other hand, the learned counsel for the respondent org.plaintiff vehemently opposed the present Civil Application. They filed Affidavit-in-Reply dated 19.7.2015. He submits that in the present proceeding appellate court by decree dated 12.9.2003 allowed the cross-objection filed by the original plaintiff. Hence, the plaintiff filed Execution Petition No.23 of 2005 before the executing court. He submits that in the present proceeding, the executing court had issued notice under Order 21 Rule 22 of the Code of Civil Procedure, 1908 to the defendant judgment debtor. He submits that pursuant to the said notice of executing court, original defendant no.2 father of present applicant appeared and filed Vakalatnama of his Advocate to oppose the Execution Petition. He further submits that in that Execution Petition the executing court passed order of "no say" on 18.11.2005 as father of applicant (defendant no.2) failed to file any say. Thereafter orig.defendant no.2 filed application below Exhibit-22 in Execution Petition No.23 of 2005 on 21.7.2006 for permission to allow him to file reply. That application was allowed by the executing court and thereafter org.defendant no.2 filed reply. He further submits that Execution Application No.23 of 2005 was disposed of by the executing court as no one appeared on behalf of the plaintiffs. Thereafter plaintiff filed Execution Application No.13 of 2003. In support of this

contention, the learned counsel for the respondent no.1 org.plaintiff relies on paragraph 6 to 10 of his Affidavit-in-Reply. He submits that though the father of the applicant died in 2009, before that he contested Execution Application filed by the plaintiff, but failed to file Second Appeal. Hence, the reason given by the applicant in the present Civil Application for condonation of more than 11 years delay cannot be termed as sufficient ground for allowing the present Civil Application. He submits that there is no merit in the present Civil Application and same be dismissed with costs.

6 I have heard both the sides at length. In the present proceeding, appellate court passed decree on 12.9.2003. Thereafter, org.defendant no.2 appeared in Execution Application, filed by the plaintiff and contested the same. That Execution Application was filed by the plaintiff in the year 2005 itself. Original defendant no.2 expired in 2009. During his life time, he had not challenged the judgment and decree passed by the appellate court. Hence, the reason given by the applicant in paragraph 5 to 8 of the Civil Application cannot be termed as sufficient ground for condonation of inordinate delay of more than 11 years.

7 The Apex Court in the matter of **Pundlik Jalam Patil Vs. Ex.Engg. Jalgaon Medium Project and Ors, 2008(6) BCR 513** held that unless and until sufficient cause is shown, inordinate delay should not be condoned.

8 The Apex Court in the matter of **Commissioner, Nagar Parishad, Bhilwara Vs. Labour Court, Bhilwara & Anr, 2009(3) SCC pg 525** held that while dismissing an Appeal on the ground of

limitation, going into the merits of the case is not allowed.

9 The Apex Court in the matter of **Oriental Aroma Chemical Industries Limited Vs. Gujarat Industrial Development Corporation reported in 2010 (5) SCC 459**, held that in the absence of sufficient cause, Court should not condone the delay.

10 The Apex Court in the case of **B. Madhuri Gaud Vs. B. Damodar Reddy, 2012 (12) SCC 693** held that if sufficient cause is not shown, delay should not be condoned.

11 Recently, the Apex Court in the matter of Esha Bhattacharjee Vs. Managing Committee of **Raghunathpur Nafar Academy 2013(12) S.C 450** held that if sufficient cause is not shown, application for condonation of delay be rejected.

12 Considering the submissions made by the learned counsel for the Applicant, the averments made in the Application, Affidavit-in-Reply filed by the respondent no.1 org.plaintiff and the law declared by the Apex Court, I am satisfied that the Applicant failed to make out sufficient ground for condonation of more than 11 years delay in filing Second Appeal. Hence, Civil Application stands rejected.

13 In view thereof, registration of Second Appeal stands rejected and Civil Application No.688 of 2015 for stay does not survive. The same also stands dismissed as infructuous.

(K.K.TATED, J.)