

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Civil Application No.515 of 2015

In

Civil Application No.942 of 2007

In

Second Appeal Stamp No.16431 of 2007

With

Civil Application No.943 of 2007

(Tanubai (Parvati) Balaram Patil, since deceased, through legal heirs Sachin Subhash Patil and others v. Rajivaji Co-op. Spinning Mill Ltd. and others)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

Shri Dhairsheel Sutar, Advocate for Applicants/Appellants.
Shri P.D. Dalvi, Advocate for Non-Applicants/Respondents.

Coram : R.K. Deshpande, J.

Dated : 30th June, 2015

Civil Application No.515 of 2015 :

1. This is an application for condonation of delay of 7 years and 76 days caused in filing an application for restoration of Civil Application No.942 of 2007, which was dismissed for non-compliance of the office objection to serve the respondents by registered post A.D. and/or by courier service and/or by hand delivery and to file an affidavit of service before the returnable date. The application is opposed by the contesting respondent Nos.1 and 2.

2. The brief background of the case can be stated thus :

In Regular Civil Suit No.1386 of 2000, the Trial Court passed a decree on 8-3-2002 declaring the sale-deed dated 10-5-1993 at Exhibit 63 executed by the defendant No.3 in his capacity as Karta of Joint Family in favour of the defendant Nos.1 and 2 (respondent Nos.1 and 2 herein) as not binding upon the plaintiffs to the extent of their shares, and the defendant Nos.1 and 2 are permanently restrained from obstructing the possession of the plaintiffs over the suit property. The Appellate Court has reversed this decree in Regular Civil Appeal No.174 of 2002 by its judgment and order dated 2-3-2007. Hence, this second appeal by the original plaintiffs.

3. The controversy before the Courts below was whether the sale-deed in question was executed by the defendant No.3 as the Karta of Joint Family for the legal necessity in favour of the defendant Nos.1 and 2. The Trial Court recorded a categorical finding that the defendant No.3 has not filed any written statement and the defendant Nos.1 and 2 have not pleaded that the sale was executed for legal necessity. The Appellate Court has reversed this finding holding that the legal necessity for sale has been established. The reliance is placed exclusively on the mutation entry No.1418 at Exhibit 49 recording the sale in favour of the defendant Nos.1 and 2 on 10-5-1993. The Appellate Court has further recorded the finding that though the loan was cleared by the defendant No.3 Subhash in the year 1991, it can be said that the sale-deed executed by him on 10-5-1993 was for legal necessity.

4. The suit was filed by the two wives of one Balaram, who were Tarabai and Parvati, as the plaintiffs Nos.1 and 2 respectively, along with the plaintiff No.3 Suman, the daughter of Tarabai. The defendant No.3 Subhash was the Karta of Joint Family. There was a delay of 11 days caused in filing the second appeal. This Court passed an order of issuance of notice on Civil Application No.942 of 2007 to the respondents to be served by

registered post A.D. and/or by courier service and/or by hand delivery and filing of affidavit of service before the returnable date. This order dated 22-11-2007 was not complied with and hence the matter was dismissed in default.

5. During the pendency of the second appeal, the plaintiff No.1 Tarabai had died on 17-7-2008, whereas the plaintiff No.2 Parvati had already expired on 2-2-2002 pending the decision of the suit. The defendant No.3 Subhash and the defendant No.4 Dhonlubai were the only legal representatives of Parvati, who were on record. It was, therefore, not necessary to bring the other legal representatives of Parvati on record. The defendant No.3 Subhash had died on 30-8-2013. The present applicants, who claim to be the legatees of Parvati by virtue of the Will dated 2-4-2003, have filed this application for restoration of Civil Application No.942 of 2007 for condonation of delay in filing the second appeal. The averments in the application indicate that the delay caused is of 7 years and 76 days and the reason put forth is that the conditional order dated 22-11-2007 passed by this Court was missed by the Advocate's Clerk due to oversight and hence the order could not be complied with. It is also the averment that the defendant Nos.1 and 2 tried to disturb the possession of the applicants over the suit property and hence they approached the Counsel, who made an enquiry, and as soon as the fact of dismissal of the matter came to their knowledge, an application for condonation of delay was filed on 15-3-2015.

6. After going through the application, the reasons stated in it that the counsel for the applicants missed the matter due to oversight and could not know the conditional order passed by this Court and upon enquiry made by the applicants, the application was filed immediately for restoration along with condonation of delay in filing an appeal. I do not find any lack of bona fides on the part of the applicants. No doubt, there is an ordinate delay, but the same can be compensated by saddling the costs and taking

liberal view of the matter. The civil application is allowed. The delay caused is condoned, subject to payment of costs of Rs.5,000/- payable to the respondent Nos.1 and 2 within a period of fifteen days from today, failing which the application shall stand dismissed without reference to the Court. If the respondent Nos.1 and 2 have refused to accept the costs, the same can be deposited in this Court during the same period.

Civil Application No.942 of 2007 :

This application is for condonation of delay of 11 days caused in filing the second appeal. The contesting respondent Nos.1 and 2 are served. There is no reply filed to the application. After going through the application, I am satisfied that a sufficient cause is made out for condonation of delay in filing the second appeal. The civil application is allowed. The delay in filing the second appeal is condoned.

Second Appeal Stamp No.16431 of 2007 :

1. Heard the learned counsels appearing for the parties.
2. After going through the decisions given by the Courts below on the question of legal necessity and the averments made in the written statement filed by the respondent Nos.1 and 2, it is clear that there is no whisper of legal necessity in executing the sale-deed dated 10-5-1993 by the defendant No.3 Subhash in his capacity as the Karta of Joint Family in favour of the respondent Nos.1 and 2. The respondent No.3 has not appeared in the matter and has not filed any written statement.
3. In view of above, Admit, on the following substantial question of law :

Whether the lower Appellate Court was right in setting

aside the findings recorded by the Trial Court on the point of legal necessity, particularly in the absence of there being any pleading available on record?

4. The learned counsel for the respondent Nos.1 and 2 waives service of notice.

Civil Application No.943 of 2007 :

1. Issue notices to the non-applicants/respondents, returnable on 12-8-2015.
2. The learned counsel for the respondent Nos.1 and 2 waives service of notice.

Judge.

Lanjewar