

SQP

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 2044 OF 2014
IN
FIRST APPEAL (STAMP) NO. 14365 OF 2014
WITH
CIVIL APPLICATION NO. 485 OF 2015
IN
FIRST APPEAL (STAMP) NO. 14365 OF 2014
WITH
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Sudhakar Gangaram Jadhav

...Applicant

Versus

Rahul Jagdish Aanand

...Respondent

Mr. Sugandh B. Deshmukh for the Applicant/Appellant

Mr. Rahul Damodar Motkar for the Respondent

**CORAM : A. S. OKA &
REVATI MOHITE DERE, JJ.
THURSDAY, 2ND JULY, 2015**

P.C. :

1. Heard learned Counsel appearing for the applicant and the learned Counsel appearing for the respondent. Civil Application No. 2044 of 2014 has been filed by applicant-defendant for condonation of delay of about 2 years and 97 days in preferring an appeal against the judgment and decree dated 28th September, 2011. The respondent filed a suit for specific performance of agreement for sale in respect of the suit property executed

on 17th March, 2007. The impugned decree is of specific performance of directing the applicant to accept balance consideration under the suit agreement and to execute a Sale Deed.

2. The contention of the applicant is that the impugned decree is an ex-parte decree. Our attention is invited to averments made in paragraph 19 of the application by pointing out that suit summons was not served to the applicant and he became aware of passing of the impugned decree in the month of January, 2014. We must note here that the appeal along with this application for condonation of delay has been filed on 11th June, 2014. The submission of the learned Counsel appearing for the applicant is that apart from the fact that the summons was not served on the applicant, the learned trial Judge has not even framed issues though he directed the respondent/plaintiff to lead evidence. His submission is that the decree stands vitiated.

3. An affidavit in reply has been filed by the respondent. Paragraph 6 of the affidavit and Annexure 'A' to the affidavit disclose that the applicant was served with the notice of the application for execution of

the impugned decree on 6th November, 2012. A copy of the report of the Bailiff is annexed as Exhibit `A' to the affidavit. The matter does not rest here. It is further stated in the affidavit in reply that the applicant did not appear in the execution application and therefore, the Executing Court proceeded to pass an order appointing Commissioner for the execution of the Sale Deed in favour of the impugned decree. It is pointed out that appointment of Court Commissioner was made on 8th January, 2013. Balance consideration of Rs. 6,50,000/- was deposited by the respondent on 22nd January, 2013. A Sale Deed was executed by the Court Commissioner on behalf of the applicant on 5th March, 2013. Even a mutation entry was made on the basis of the Sale Deed. What is significant is Exhibit `E' to the affidavit in reply which shows that on 6th August, 2013 under the signature of the applicant and his Advocate, an application was made by the applicant in Execution Application for withdrawal of the decretal amount of Rs. 6,50,000/- deposited by the respondent. Accordingly, an order of withdrawal was passed on the said application on 7th August, 2013 by the Executing Court. Paragraph 8 of the affidavit discloses that on 23rd August, 2013, the office of the Executing Court transferred the said amount to the bank account of the applicant by RTGS. It is pertinent to note that the

application for withdrawal is not made without prejudice to the rights and contention of the applicant. Moreover, the documents annexed to the affidavit in reply show that even assuming that suit summons was not served to the applicant, on 6th November, 2012, the applicant was aware of the impugned decree. On 6th August, 2013, the applicant applied for withdrawal of the amount deposited in terms of the impugned decree and the said amount was received by the applicant on 23rd August, 2013. Thereafter, in June, 2014, present appeal has been filed. What is vital is that the aforesaid facts which are disclosed in the affidavit in reply have been suppressed in the application. On the contrary, in paragraph 19, a specific averment of the applicant is that he became aware of the passing of the impugned decree only in January, 2014. Thus, the said averment is completely false. In paragraph 21, another averment has been made by the applicant that he came to know about the judgment and decree in the last week of April, 2013. Even the said averment is false. Hence, there is no sufficient cause to condone the delay of 2 years and 97 days.

4. Considering the conduct of the applicant, a liberal approach cannot be adopted. Accordingly, application is rejected. Consequently, the

First Appeal cannot be registered. Therefore, the applicant will be entitled to refund of Court fees on the first appeal as per the Rules. Civil Application No. 485 of 2015 does not survive and the same is disposed of.

(REVATI MOHITE DERE, J.)

(A. S. OKA, J.)