

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9929 OF 2015

1. Vasant Vithal Gawand,	]
Age: 63 years, Occupation Agriculture,	]
Residing at Mandwa, Post Dhokawade,	].. Petitioner
Taluka Alibag, District Raigad.	](Org. Plaintiff)

Versus

1. Shantaram Tukaram Gawand,	]
(since deceased by his LR's)	]

1A. Prakash Shantaram Gawand,	]
Age: 55 years, Occupation Service,	]
R/at: Zirad, Taluka Alibag, Dist: Raigad.	]

1B. Dayanand Shantaram Gawand,	]
Age: 50 years, Occupation Business,	]
R/at: Mandwa, Post Dhokawade,	]
Taluka Alibag, Dist: Raigad.	]

1C. Rajendra Shantaram Gawand,	]
Age: 46 years, Occupation Business,	]
R/at: Parur, Zhakdevi Temple,	]
Taluka Alibag, Dist: Raigad.	]

1D. Surendra Shantaram Gawand,	]
Age: 43 years, Occupation Business,	]
R/at: Zirad, Post Zirad,	]

Taluka Alibag, Dist: Raigad.

]

2. Yatin Amrutlal Patel,

]

Age 49 years, Occ: Agri/Business,

]

Residing at 104/A, Miramar 3,

].. Respondents

Nepean Sea Road, Mumbai 400 036.

(Org. Deft Nos.1A to 1D
& Deft No.2)

Mr. C. G. Gavnekar a/w Mr. A. C. Gavnekar, for the Petitioner.

Ms. Gauri Godse i/by Mr. R. D. Joshi, for the Respondent No.2.

CORAM : R.M. SAVANT, J.

DATE : 28th OCTOBER, 2015

ORAL JUDGMENT

1. At the outset, the Learned Counsel for the Petitioner seeks deletion of the Respondent Nos.1A to 1D as in the context of the challenge raised in the above Petition they are formal parties. The said Respondents are accordingly allowed to be deleted at the risk of the Petitioner.

2. The Writ Jurisdiction of this Court is invoked against the order dated 28.07.2015 passed by the Learned District Judge-2, Raigad-Alibag, by which order the Civil Misc. Application No.150 of 2014 came to be allowed and resultantly, the delay of 1 year and 2 months in filing the Appeal came to be condoned albeit on the payment of costs of Rs.15,000/- to the Respondent No.1.

3. The facts necessary to be cited for the adjudication of the above Petition can in brief be stated thus. The suit in question being Special Civil Suit No.156 of 2010 was filed by the Plaintiff i.e. the Petitioner herein for declaration, injunction and possession. The subject matter of the suit were agricultural lands bearing Survey No.70, Hissa No.3, admeasuring 64 Ares, Survey No.71, Hissa No.1, admeasuring 18.7 Ares and Survey No.72, Hissa No.21, admeasuring 03 Ares situated at village Dhokavade, Taluka Alibag, District Raigad. It seems that on the application of the consolidation scheme the said lands were renumbered and are now numbered as Gat No.499, Hissa No.1, admeasuring 72.4 Ares, Gat No.499, Hissa No.2, admeasuring 17 Ares and Gat No.499 Hissa No.3, admeasuring 03 Ares. It is not necessary to dilate further on the aspect as to who was cultivating the lands etc. Suffice it would be to state that the Defendant No.2 i.e. Respondent No.2 herein purchased the said lands from the Defendant No.1 pending the suit vide two Sale Deeds dated 21.05.2004 and 08.04.2005. It is on the basis of the said Sale Deeds that the Defendant No.2 applied for his impleadment in the suit which application filed by him came to be allowed and he accordingly came to be impleaded as the Defendant No.2 to the suit, this was sometime in the year 2010. Significantly, though the Defendant No.2 applied for his impleadment in the suit, he did not file his Written Statement thereafter.

The suit proceeded to trial and ultimately came to be decreed by the Trial Court by judgment and order dated 20.09.2013. It is long thereafter i.e. on 20.11.2014, the Defendant No.2 ventured to file an Appeal against the said decree. In view of the fact that there was a delay of 1 year and 2 months, the Defendant No.2 filed the instant application being Civil Misc. Application No.150 of 2014 for condonation of delay. The reason for delay, if any can be found in paragraph 5 of the said Civil Misc. Application. The said paragraph 5 is reproduced hereinunder for the sake of ready reference :-

“5. Present Appellant was added in the suit during pendency of suit. He appeared through advocate. However, his advocate did not give proper advice for filing written statement and even after appearance his advocate did not inform the dates and also failed to give proper guidance, in order to protect his rights. Consequently, suit proceeded without W.S. Advocate of the Appellate who appeared in the Trial Court did not inform decision of suit also.”

4. A reading of the said paragraph therefore discloses that it is the case of the Defendant No.2 that the advocate whom he had engaged did not give him proper advice for filing the Written Statement and even after he filed his appearance he did not inform the dates and also did not inform him the decision in the suit.

5. The Petitioner herein i.e. original Plaintiff filed his reply to the said application. The case sought to be made out vide the averments made

in paragraph 5 was sought to be questioned. It was the case of the Plaintiff that the Defendant No.2 i.e. the Appellant was knowing the decision of the suit right from the date of the decision. It was further the case of the Plaintiff that the Defendant No.2 has not explained as to how he got knowledge of the decision of the suit. The Plaintiff also sought to deal with the merits of the case of the Defendant No.2 i.e. Appellant in the Appeal.

6. The Lower Appellate Court considered the said Civil Misc. Application No.150 of 2014 and as indicated above has by the impugned order dated 28.07.2015 allowed the application. The Lower Appellate Court has referred to various judgments which have been relied upon by the Learned Counsel for the parties on the aspect of condonation of delay. The Lower Appellate Court thereafter in paragraph 24 has adverted to the fact that the Defendant No.2 has purchased the property from the Defendant No.1 pending the suit and that it is after the said purchase he was added as party to the suit. The Lower Appellate Court thereafter seems to have gone by the averments in the application and observed that there seems to be collusion between the L.Rs of the Defendant No.1 and the Plaintiff and therefore matter was not properly prosecuted before the Trial Court and the suit was decreed. The Lower Appellate Court has also adverted to the averment in the application as regards the fact that the

information of the decision in the suit was not given to the Appellant by his advocate within time and therefore there is delay which has been caused and that after the information was given by one Yogesh Gawand that he immediately applied for certified copy and filed the application. The Lower Appellate Court has appreciated the fact that it is not the extent of delay, but the reasons given therefor which is the defining aspect. The Lower Appellate Court after observing so has recorded that the delay has been properly explained. The Lower Appellate Court also sought to lay emphasis on the fact that though the Appellant had sought to examine the advocate who was appearing for him in the Trial Court however in spite of summons being issued he did not appear, observed that every litigant may not have the capacity to complain against his advocate. The Lower Appellate Court with a view to balance the equities has imposed costs of Rs.15,000/- on the Appellant, whilst condoning the delay of 1 year and 2 months (wrongly referred as 2 years in the order). As indicated above, it is the said order dated 28.07.2015 which is taken exception to by way of the above Petition.

7. The Learned Counsel for the Petitioner Mr. C. G. Gavnekar would contend that the Lower Appellate Court has condoned the delay without adhering to the well settled principles which are applicable to the consideration of an application for condonation of delay. The Learned

Counsel sought to place reliance on the judgment of the Apex Court reported in (2013) 14 SCC 81 in the matter of Basawaraj and another. Vs. Special Land Acquisition Officer, wherein the Apex Court has observed that the discretion to condone delay has to be exercised judiciously based on facts and circumstances of each case. The Apex Court has further observed that sufficient cause cannot be liberally interpreted if negligence, inaction or lack of bona fides is attributed to the party. The Apex Court has further observed that if party acted with negligence, lack of bona fides or inaction then there cannot be any justified ground for condoning the delay. It was the submission of Mr. C. G. Gavnekar that the reasons put forth by the Appellant vide averments made in paragraph 5 which are sought to be supported by the evidence of the Appellant himself and his witness Yogesh Gawand, cannot be said to constitute sufficient cause having regard to the fact that the Appellant i.e. original Defendant No.2 is a resident of Mumbai and that he has property also in village Awas in Alibag, District Raigad. It was therefore the submission of Mr. C. G. Gavnekar that the Lower Appellate Court has without considering the aforesaid aspects has condoned the delay and thereby has exercised discretion when the same was not warranted.

8. Per contra, the Learned Counsel for the Respondent No.2 herein i.e. Appellant Ms. Gauri Godse would support the impugned order.

The Learned Counsel would reiterate the case of the Defendant No.2 i.e. Appellant before the Lower Appellate Court and would contend that in absence of any information from the advocate, the Appellant became aware of the suit being decreed only sometime in the year 2014 when the said Yogesh Gawand informed the Appellant of the decree being passed. The Learned Counsel sought to place reliance on the evidence of Yogesh Gawand which was adduced in support of the said application for condonation of delay, wherein the said witness according to the Learned Counsel has mentioned the circumstances which resulted in him informing the Appellant of the decree passed in the suit. The Learned Counsel also sought to make submissions as regards the merits of the challenge in the Appeal.

9. Having heard the Learned Counsel for the parties, I have considered the rival contentions. The question that is posed in the above Writ Petition is whether the Respondent No.2 herein i.e. Appellant before the Lower Appellate Court had made out a case for condonation of delay. The foundation for the said Civil Misc. Application No.150 of 2014 has already been referred to in the earlier part of this order. The reasons if any are found in paragraph 5 of the said Civil Misc. Application, which reasons as indicated above are to the effect that the Appellant had engaged an advocate who according to him did not give him proper guidance as

regards filing of Written Statement in the suit, who also did not inform him of the decision of the suit. The said case as set out in paragraph 5 of the application was sought to be supported by the evidence of the Appellant himself and his witness Yogesh Gawand. In so far as the evidence of the Appellant is concerned, he has stated in his examination-in-chief that he visits Alibag often and he has property in village Awas which is part of Taluka Alibag and close to the suit properties. In his evidence he has sought to reiterate the case set out by him in paragraph 5 of the application namely that it is Yogesh Gawand who has informed him about the decreeing of the suit. In so far as the evidence of said Yogesh Gawand is concerned, he has deposed that he was the middleman for the transaction between the Appellant and the Defendant No.1 i.e. Shantaram Gawand along with one other person. He has stated that he had gone to pay land revenue in the office of the Talathi on 07.11.2014 on behalf of the Appellant when he came across the 7/12 extract of the lands in question, wherein the name of the original Plaintiff was entered and on inquiries it was revealed that the suit filed by the Plaintiff was decreed pursuant to which the entry was made in the 7/12 extract. It has also come in his evidence that except the Appellant he has not paid the land revenue in respect of the land owned by any other person.

10. At this stage, it is required to be noted that the Appellant is a

resident of Nepeansea Road, Mumbai and also owns property in Awas village Taluka Alibag which is a weekend destination for many of the well to do persons from Mumbai. The suit properties are situated in the close vicinity in Taluka Alibag. The Appellant is therefore a person of means and the fact that the Appellant has chosen to purchase another property pending the instant suit shows that he is a person conversant with the legal niceties as immediately after purchasing the property he has chosen to file an application for his impleadment in the suit in the year 2010. The Appellant therefore by no means can be said to be a lay person or a person who can be said to be totally ignorant of the legal procedure. It is on the touchstone of the aforesaid facts that the issue would have to be considered. At this stage, it would be gainful to refer to the judgment of the Apex Court in Basawaraj's case (supra). The Apex Court has after referring to various judgments which are an exposition as to what constitutes "sufficient cause" has summarised the law on the issue in paragraph 15 of its judgment. The said paragraph 15 is reproduced hereinunder :-

"15. The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bona fide on his part in the facts and

circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature.”

11. The Apex Court therefore has held that in case a party is held to be negligent or lacking in bona fides or not acted diligently or inactive, there cannot be justified ground to condone the delay. In the instant case, as indicated above, the Appellant has sought to put the blame on his advocate. It is the case of the Appellant that the advocate did not give him proper guidance in respect of the filing of the Written Statement and also did not inform him about the decision in the suit. The said reason coming from a person of the standing of the Appellant who has all the wherewithal at his disposal cannot be accepted. The question that begs an answer is what prevented the Appellant from making inquiries with his advocate as regards the developments in the suit. It is very easy to blame the advocate for whatever has transpired in the litigation. There is absolutely no explanation forthcoming on the said aspect. It has to be borne in mind that the Appellant is an educated person staying in an up market area of Mumbai and also owning property at village Awas in

Taluka Alibag which is a weekend destination of the well to do persons from Mumbai. It has also come in the evidence of the Appellant that he visits Alibag very often. The standard applicable to him obviously would be different than say a lay villager. It is also required to be noted that apart from purchasing the suit property *pendent-lite*, the Appellant also did not whilst the suit was pending in the Trial Court take steps to file his Written Statement nor there is anything on record to show that he made any inquiries with his advocate about the suit. Such a conduct cannot be countenanced of a person belonging to the Appellants standing. The conduct of the Appellant is therefore one of gross negligence and also indolence. The Appellant it seems has chosen to file the Appeal as per his own convenience. A Court vested with the power of considering whether discretion has been properly exercised cannot loose sight of such conduct. The evidence of the witness of the Appellant Yogesh Gawand also does not inspire confidence. As indicated above, the witness Yogesh Gawand has stated that he was the middleman for the transaction that took place between the Defendant No.1 and the Appellant i.e. Defendant No.2. How he had chosen to pay the land revenue on behalf of the Appellant only in the year 2014 also creates a doubt as there is no record of the said Yogesh Gawand having paid the land revenue for any anterior period after the Sale Deeds were executed in favour of the Appellant. The evidence of the

said witness therefore seems to be somehow adduced to support the application. The explanation put forth by the Appellant therefore does not constitute sufficient cause. The Lower Appellate Court in my view, has exercised discretion when the same was not warranted having regard to the facts and circumstances of the case. The payment of costs cannot be a panacea for the delay, when it is not properly explained. The above Writ Petition would accordingly have to be allowed. Resultantly, the impugned order dated 28.07.2015 is quashed and set aside. The Appeal which is suffering from the said delay would accordingly stand dismissed. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute, with parties to bear their respective costs.

12. At this stage, the Learned Counsel for the Respondent No.2 seeks stay of the instant order so as to enable the Respondent No.2 to approach the Apex Court. In the facts and circumstances of the case, the instant order is stayed for a period of four weeks from date.

[R.M. SAVANT, J]