

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

SECOND APPEAL NO. 101 OF 2013
WITH
CIVIL APPLICATION NO. 1195 OF 2013

Gopal s/o Kishanrao Patil
Age 53 years, Occu. Service,
R/o. A 203, Balwant Niwas, Bhikardas
Maruti Road, Sadashiv Peth, Pune 30

... Appellant/
(Orig. Defendant No.4)

Versus

1. Nivarti s/o Krushna Motade
Age: 65 years, Occu. Agri.,
R/o Pangaon, Tq. Renapur, Dist. Latur Orig.Plaintiff
2. Gajanan Kishanrao Patil
Age 58 years, Occu. Agri.,
R/o Pangaon, Tq. Renapur, Dist. Latur
3. Shivaji Kishanrao Patil
Age 48 years, Occu. Agri.,
R/o as above.
4. Anant Kishanrao Patil
Age 43 years, Occu. Agri.,
R/o Surya Nagar, Latur
5. Shrihari Kishanrao Patil, Pangaonkar
Age 40 years, Occu. Agri.,
R/o C/o Vasant Pathak,
Pathak Galli, Azad Chowk, Latur
6. Radhabai w/o Kishanrao Patil
Age 78 years, Occu. Nil
R/o A 203, Balwant Niwas, Bhikardas
Maruti Road, Sadashiv Peth,
Pune 30

7. Chabubai w/o Bhaurao Deshmukh
Age 55 years, Occ. Household
R/o Shirala, Tq. Parli, Dist. Beed
 8. Meerabai Uttamrao Barse
Age 49 years, Occu. Household
R/o Edu. Colony, Ahmedpur,
Dist. Latur
 9. Maltibai Sakharampant Joshi, Vahegaonkar,
Age 43 years, Occu. Household
R/o Jayakwadi Project, Paithan, Aurangabad
 10. Sakhubai Anil Joshi
Age 45 years, Occu. Household
R/o C/o P P Joshi, Sane Guruji Nagar,
Bhusawal, Dist. Jalgaon
 11. Limbaji Narsing Lonkar
Since deceased, through his L.Rs.
 - A. Narsing Limbaji Lonkar
Age 40 years, Occu. Agri.
 - B. Sow. Suksham w/o Kishan Paithankar
Age 55 years, Occu. Household
 - C. Sow. Rukhmin Dattatraya Dhawadkar
Age 45 years, Occu. Household

All R/o Pangaon, Tq. Renapur, Dist. Latur
 12. Jagannath Kishanrao Patil
Age 55 years, Occu. Service
R/o Chintamani Niwas, Jintur Road,
Laxmi Colony, Parbhani
- ... Respondents/
Orig.Plaintiff & Deft.Nos. 1 to 12.

.....

Mr. Dhananjay Deshpande, Advocate for appellant

Mr. V. D. Gunale, Advocate for respondent No.1

.....

CORAM : SUNIL P. DESHMUKH, J.

DATE : FEBRUARY 17, 2016

ORAL JUDGMENT :

1. Heard learned counsel for the parties.

2. This second appeal is preferred by applicant No.2 (original defendant No.4) against rejection of application i.e. Miscellaneous Application No.171 of 2012 by the Principal District Judge, Latur on 01-11-2012 refusing to condone delay in filing regular civil appeal against *ex-parte* judgment and decree dated 03-11-2011 in Regular Civil Suit No. 13 of 2008, passed by the Civil Judge, Junior Division, Renapur.

3. Respondent No.1 - Plaintiff's case is that, the property concerned in the present suit had been alienated to him in 1966 by father of present appellant. Around 1973, suit bearing No. 249 of 1973 came to be filed by present appellant and other defendants against their father for partition and separate possession of property, including the property alienated in favour of present respondent No.1. The suit was decreed and shares were determined and the share which had come to their father was to be appropriated to property sold by him to present respondent. The matter was carried upto the Apex Court. It had been made clear all through in the decree that alienation of the property by father of

present appellant to respondent No.1 would not be affected by shares of present appellant and his brothers.

4. It is the contention of respondent No.1 that decree in aforesaid suit was not scrupulously followed and he had been unlawfully dispossessed from the property purchased by him. Under the circumstances, he had instituted Regular Civil Suit No. 537 of 1996 in the court of Civil Judge, Junior Division, Latur which, upon its transfer to the court of Civil Judge Junior Division Renapur, had been renumbered as Regular Civil Suit No. 13 of 2008.

5. The present appellant appeared to have been served in said suit. However, he, though caused appearance, had failed to file written statement. Since 1996, the suit had been pending for over 15 years without any decision. In the circumstances and since there was no written statement filed, proceedings had been ordered to be proceeded with *ex-parte*. Suit came to be decreed accordingly on 03-11-2011.

Whether delay deserves to be condoned in present case ?

6. Upon becoming aware of the decree, it is the contention of appellant that, he could not make immediate approach under regular civil appeal due to his mother's deteriorating health for which she was required to be hospitalised and looked after with

great care. In the circumstances, there had been delay of 8 months in approaching appellate court against decree of the trial court. Therefore, miscellaneous application No. 17 of 2012 was filed seeking condonation of delay in filing regular civil appeal.

7. Present respondent No.1 opposed the application referring to that applicants No. 1 and 2 were resident of Latur and Parbhani and respondents No. 2 to 5 and their mother had been resident of Pangaon. No particulars of the hospitalisation of their mother have been given. The matter had been pending for 15 years. In the circumstances he prayed that delay may not be condoned.

8. The appellate court has in the order impugned, after having observed that the matters of condonation of delay need to be given liberal approach and may not be looked into pedantically and much importance should not be given to technicality in such matter, also referred to historical background as given herein above about earlier litigation. However, it appears that in later part of the order, the appellate court has observed that liberal approach cannot be taken, observing that no particulars of hospitalisation or about period of hospitalisation and as to why several sons of ailing mother could not immediately approach in appeal against the judgment and decree of the trial court. In the circumstances, it appears that the appellate court considered it proper not to grant the application and accordingly rejected it.

9. Learned counsel Mr. Deshpande appearing for appellant submitted that the suit as has been filed in 1996 by present respondent is not tenable in the face of decree of partition and separate possession as has been passed in earlier suit filed in 1973 and confirmed upto the Apex Court. On the face of the same, suit by present plaintiff ought to have been thrown out at the threshold. The trial court has been absolutely in oblivion of effect of execution of decree in the earlier litigation and went on to allow the present suit. He further contends that despite the suit having been directed to be proceeded with *ex-parte*, it is not appellant's or defendants' fault that the suit had been pending for 15 years. The plaintiff has to blame himself for the same. Further, after having become aware of the decision in the suit, regular civil appeal had been preferred with application for condonation of delay and the reasons given for the same are genuine, the applicants are not going to gain any benefit by causing deliberate delay in making approach to the appellate court. He further contends that it had been referred to in the application that the mother of the applicant had been ill even while regular civil appeal with application for condonation of delay had been filed and said fact had not been disputed by the respondent. In the circumstances, inconvenience, if any, caused to other side, can be met with and taken care of by imposing reasonable cost. He thus submits, pedantic approach has been taken by appellate court while rejecting the application.

10. On the other hand, Mr. Gunale, learned counsel for respondent No.1 vehemently submits that, suit had been pending for a period of fifteen years, the appellant had absolutely neglected the same and when it came to litigation bearing fruits for respondent-plaintiff, the application had been moved belatedly for condonation of delay in filing regular civil appeal. No credence can be given to the reasons given in application for condonation of delay. He submits that, only desire of present respondent No.1 - plaintiff is to get back the land which he has purchased and from which he has been unlawfully dispossessed. He therefore, submits that there is no substance in the second appeal and same be dismissed.

11. Having heard learned counsel for parties for quite some length and this being second appeal, it will have to be taken into account that the suit filed in 1996 had been pending for 15 years. Further, the impugned order indeed is *ex-parte*. For these fifteen years, appellants can hardly be blamed and considered responsible. The appellants seeking condonation of delay in filing regular civil appeal appear to be stuck at various places and it is to be noted that age of respondent No.6 - the mother of appellant is indicative of that it is quite possible that she may not have been keeping well. In the circumstances, having regard to the contentions on either side it would be better to fall in line of liberal approach and I deem

it expedient and in the interest of justice to allow the application subject, of course, to imposition of certain costs on the appellant.

12. The law, as far as condonation of delay is concerned, is clear that liberal, and not pedantic approach be taken and that delay condonation application may be dealt with strictly only in the cases where it appears that a litigant is deliberately attempting to derive benefit by causing undue delay. Present matter does not appear to be falling in such category. Mr. Gunale, though opposes, is not in a position to point out that the appellant has gained any benefits from delay caused.

13. As such, question referred to above earlier stands answered in affirmative. Second appeal stands allowed. Impugned order dated 01-11-2012 passed by the Principal District Judge, Latur, rejecting Miscellaneous Application No. 171 of 2012 seeking condonation of delay in filing regular civil appeal is set aside. Said application stands allowed, subject to payment of costs of Rs. 20,000/-. The amount of costs be deposited in the appellate court within a period of eight weeks from the date of receipt of writ of this order by the appellate court. Amount so deposited shall be allowed to be withdrawn by respondent No.1. Regular civil appeal also, in the circumstances, be prosecuted and decided expeditiously, preferably within a period of six months. Appellant is expected to do all the requisites in this respect.

14. In view of disposal of second appeal, pending civil application does not survive and stands disposed of.

(SUNIL P. DESHMUKH, J.)

sms
