

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

SECOND APPEAL NO. 109 OF 2016

1. Shantabai w/o Haribhau
Pandhare
Age 67 years, Occu. Household
 2. Rajabhau s/o Haribhau Pandhare
Age 47 years, Occu. Agri.,
 3. Pradip s/o Haribhau Pndhare,
Age 39 years, Occu. Service
 4. Prakash s/o Haribhau Pandhare,
Age 37 years, Occu. Service,
- All r/o Keshav Nagar, Ambajogai
road, Latur, District Latur .. Appellants

Versus

- . Subhash s/o Virasangappa Gudle,
Age 64 years, Occu. Retired pensioner
r/o Padma Nagar, Latur at Latur,
District Latur .. Respondent

Mr B.R. Kedar, Advocate for appellants
Mr R.K. Ashtakar, Advcoate for respondent

CORAM : SUNIL P. DESHMUKH, J.

DATE : 10th October 2016

ORAL JUDGMENT

1. Heard learned counsel for the parties. Admit.
2. After hearing the learned counsel, the substantial question for consideration in second appeal arises as to,

“Whether appellate court's approach in considering the application for condonation of delay in filing Regular Civil Appeal, in the facts and circumstances of the given case is in tune with the legal position? ”

3. It transpires, Regular civil suit No. 429 of 1995 had been instituted by husband of appellant, father of appellants no. 2 to 4 seeking specific performance of agreement to sell in respect of suit plots (subject matter in both regular civil suit No.429 of 1995 and Regular Civil Suit No.87 of 2013) against original owner of the plots. The suit had been dismissed. During pendency of suit, it appears that the plaintiff had died and, as such, present appellants have been brought on record as his heirs. They had preferred regular civil appeal no. 117 of 2004 against dismissal of regular civil suit no. 429 of 1995. It is being stated that present appellants had been able to prove agreement for sale as well as that their father Haribhau was put in possession of the same. However, the appellate court had considered the litigation to be outside limitation and had dismissed the appeal. Against dismissal of aforesaid appeal, second appeal bearing no.72 of 2009 had been preferred by plaintiffs-present appellants, which has been pending for final hearing in this court on the ground of substantial question of law on limitation.

4. In the intervening period, it appears that regular civil suit no. 87 of 2013 had been preferred by present respondent claiming that said property has been sold by owner to him by registered sale deed and as such, sought injunction against present appellants. It further appears that suit went uncontested, in the sense, defendants (appellants herein) although appeared in the suit, did not file written statement. The suit no. 87 of 2009 eventually had been decreed. It has been contended on behalf of appellants that though advocate had

been engaged to defend the case, he had not informed about the procedure and position of the suit to the defendants and mother was not keeping well. With aforesaid contentions, regular civil appeal was tried to be filed along with delay condonation application, however, delay condonation application had been rejected by the appellate court for the reason that appellants could not show that the intimation had not been given by the advocate to them and further that 200 days' delay had not been properly explained.

5. Learned counsel appearing for appellants contends that there are more than sufficient and cogent grounds, reasons and material available under which injunction would not issue against them but for the lapse as has been referred to in their application, ex-parte decree of injunction has been passed putting in peril their legal, legitimate and rightful possession. It is further submitted that non communication of decision of the suit at the instance of present respondent to appellants by their advocate and their mother being indisposed, caused delay. However, the same had not been properly appreciated by appellate court. Appellants' submission is that veracity of the contentions in the application for condonation of delay neither had been challenged nor had been disputed by respondent and yet the order in the matter came to be passed on hypothetical consideration, declining condonation of delay.

6. Countering aforesaid submissions, Mr Ashtaputre contends that there is huge delay in filing appeal. No proper reasons have been given in support of condonation of delay. He submits that the appellate court has properly considered the application and the contentions on either side. The matter does not call for any further consideration. He submits that the reason given about non receipt of knowledge about the order passed in regular civil suit and the old lady not keeping well, are run away reasons for condonation of delay without substantiation of the same.

7. I have heard learned counsel who have canvassed submissions as aforesaid. It has been contended on behalf of appellants, their possession has been found out and confirmed by the courts in other litigation. Present suit had gone unattended on behalf of the appellants and that passing of decree was not brought to their knowledge and further that appellant no.1 - mother of rest of the appellants was not keeping well, Veracity of said contentions had not been doubted by respondent and this has not been considered by appellate court in proper perspective.

8. However, on behalf of respondent, it is sought to be contended that there was negligence on appellants part and further that the reasons given are not sufficient, as appellants no. 2 to 4 could have approached the court. Though it is thus being pleaded on behalf of respondent, yet keeping at the back of the mind that as far as appellants are concerned, there is finding in their favour in other

litigation. Present suit being simplicitor for injunction and respondent-plaintiff claims right to property through the owner in a subsequent transaction. No gain can be said to have been derived in not prosecuting the matter by appellants-defendants in aforesaid suit. It in fact turns out to be detrimental to their interest since the decree has been drawn against them which they want to challenge.

9. Under the guidelines as are given by apex court in the case of *Collector, Land Acquisition, Anandnag Vs. Mst. Katiji and ors.*, reported in AIR 1987 SC 1353, the second appeal would be required to be positively considered and allowed. The approach of the appellate court that 200 days delay is not properly explained and there is non disclosure of sufficient cause by appellants and about appellants having not produced any material about appellant no.1 not being well, does not appear in tune with legal position. Reasons given for condonation, deserve to be given proper treatment. Further, an opportunity to meet the cause on merit needs to be available rather than getting influenced by delay which in the circumstances appears to have been reasonably explained.

10. The approach of the appellate court in the circumstances may be said to be not in keeping with the general position of law as far as exercise of powers for condonation of delay is condoned. Question referred to hereinbefore stands answered accordingly. Inconvenience caused, however, shall be compensated by awarding costs.

11. The civil application filed for condonation of delay in filing

Regular Civil Appeal 117 of 2004 before the first appellate court stands allowed subject to deposit of an amount of Rs.10,000/- towards costs in the appellate court within a period of six weeks from the date of receipt of writ of this order for onward disbursal of the same to the respondent-plaintiff.

12. The observations made hereinabove shall not affect and/or influence decision of the matter on its merits.

13. Second appeal, as such, stands allowed and is disposed of.

SUNIL P. DESHMUKH,
JUDGE

vvr