

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

SECOND APPEAL NO. 121 OF 2016
WITH
CIVIL APPLICATION NO. 1943 OF 2016

Shobha w/o Gulab Rathod

age: 47 years, occup. Agril.,

R/o Masai Tanda, Tq. Ambad,

Dist. Jalna

.. Appellant/
Ori. Deft.No.1

versus

01. Preetabai w/o Madhukar Kale,

Age major, occup. Agril.,

02. Sharad s/o Madhukar Kale,

Age: major, occup. Agril.,

03. Sanjay s/o Madhukar Kale,

Age: major, occup. Agril.,

04. Baiyajibai w/o Bhika Rthod,

Age : major, occup. Household,

05. Kailas s/o Bhika Rathod,

Age: major, occup. Agril.,

All r/o Masai Tanda, Tq. Ambad,

Dist. Jalna,

.. Respondents/

Nos.1 to 3 orig.

Pltffs., Nos. 4 &

5-orig. Defts.

No. 2 and 3

Mr. Harshad H. Padalkar, Advocate for appellant

Mr. S. A. Dhengle, Advocate for respondents no. 1 to 3

CORAM : SUNIL P. DESHMUKH, J.
DATE : 31st August, 2016

ORAL JUDGMENT :

1. Admit. By consent of parties, taken up for final hearing.
2. The present respondents no. 1 to 3 had filed regular civil suit no. 194 of 2010 against present appellant and one Kailas Bhika Rathod, seeking declaration and possession. Said suit had been decreed ex-parte on 20-11-2014 by Civil Judge, Junior Division, Ambad, against which defendants had sought to prefer regular civil appeal. Appeal being delayed by 206 days, they had filed Miscellaneous Application Requiring Judicial Inquiry ["MARJI"] bearing no. 98 of 2015 seeking condonation of delay. However, the appellate court [Ad-hoc District Judge-3, Jalna] rejected the MARJI under impugned order dated 22-01-2016 which gave rise to present second appeal.
3. The question that may be said to be substantial one and which may fall for consideration is, as to whether the appellate court under impugned order dated 22-01-2016 had been right in rejecting MARJI bearing No. 98 of 2015 filed by

original defendants-appellants for condonation of delay of 206 days in preferring appeal on the factual background as has been appearing in the matter by taking up an approach as is reflected in the impugned order.

4. Parties are not at loggerheads that the suit properties parted with by the plaintiffs–respondents no. 1 to 3 herein to the defendants are the part of properties which had fallen to plaintiffs' share in the partition among members of the family.

5. It appears to be the contention of the plaintiffs that the defendants - purchasers have taken over much more land in their possession than due to them under the sale deed and as such are claiming back possession of the properties which were not part of the transaction entered into by the plaintiffs with the defendants. This being the main thrust, the contentions of the parties would be required to be appreciated on such background.

6. The contention of the defendants-appellants is that they had been moving around for eking out their existence earning livelihood from labour work and could not stay continuously at their usual place of residence as is shown in

the proceedings. It is further contended that the suit summons had been served on a person who happens to be father-in-law of applicant no. 1 who had been addicted to bad vices and had also been roaming around and in the circumstances the applicants were unaware of the suit proceedings i.e. regular civil suit no. 194 of 2010 which went ex-parte and was decided against them under judgment and decree dated 20-11-2014 referred to hereinbefore.

7. While the matter had been in execution, by stroke of luck, the appellants happened to be on the address of their residence shown in the proceedings and as such received notice of execution proceedings and it was then they realized that there had been proceedings against them for possession of land in which case they were likely to lose properties purchased by them from the plaintiffs. It is thus they had, on advice, decided to go in appeal against the decree. However, since the appeal got delayed by 206 days, aforesaid MARJI seeking condonation of delay had been filed.

8. Mr. Padalkar, learned counsel for the appellants-defendants contends that the delay caused cannot be attributed or termed to be deliberate or intentional, for,

appellants are no way getting benefitted from causing delay in filing appeal concerning immovable property which they had purchased. As a matter of fact, it is proving to be counter productive. The reasons given in the MARJI are genuine, and the situation may not exactly be as observed by the appellate court and requires lenient approach since the appellants and even their witnesses have a limited literacy level and have little understanding about legal proceedings and overall meanings of legal words. As such, the evidence given by them, in fact, had been with an intention to aid the condonation of delay, however, the same came to be construed pedantically, resulting into an adverse order dismissing the MARJI for condonation of delay.

9. Learned counsel submits that overall position of law shows that an approach in the matter of condonation of delay should be liberal as generally, a litigant would not stand to benefit by delay, much less by intentional delay.

10. Learned counsel for the purpose, relies on a decision of the supreme court in the case of *Collector, Land Acquisition, Anantnag vs. Katiji* reported in *AIR 1987 SC 1353* and submits that the considerations which have weighed with the supreme

court will apply on all fours to present case.

11. On the other hand, Mr Dhengle, learned counsel appearing for respondents no. 1 to 3-plaintiffs contends that the economic condition on plaintiffs' side cannot be said to be better than that of the appellants-defendants as has been contended by them, for, plaintiffs are also searching for and are eking out their existence and were away from the place where the property is located. It is during this period, the defendants have purportedly gobbled up and possessed much more land than due to them under the sale deed executed by plaintiffs in their favour. The intention underlying procrastination by defendants of the litigation, is to enjoy illegal possession over the excess land and thus the suit went uncontested forcing it to go ex-parte and further causing deliberate delay in filing appeal. Learned counsel submits that the appellate court has rightly appreciated the circumstances as have emerged in the proceedings. The appellate court has found that the evidence given by the defendants' witnesses is not reliable, for, the same appears to be evasive and keeping the truth away from the court. In the circumstances, according to learned counsel, no interference is called for in the order impugned.

12. As such, from aforesaid, the situation emerges that on either side, parties may not be said to be having sound financial background. Even the literacy level on either side appears to be pretty limited, however, one may be able to appreciate, in the circumstances, the delay which has been caused in filing appeal is not deliberate or intentional, for, appellants-defendants in any way were unlikely to have any benefit by causing such a delay which would ultimately go against their own interest. Having regard to their limited level of knowledge and literacy, they sought aid through witnesses who too were not conversant with the legal proceedings and in giving evidence according to their limited understanding with an intention to aid the appellant-defendant no. 1. It may be taken into account that service of summons of the proceedings is one thing and the delay in preferring proceedings is another. Service of summons of proceedings proceeding ex parte and a delayed approach against a decision would require different considerations. The matter as such would be required to be looked at objectively. Letting the proceedings go ex parte and the delay in making approach against a decision in this particular matter do not appear to converge.

In the circumstances, the appellate court appears to have given more than due importance to such discrepancies in evidence, in the process, falling oblivious of that an approach to the proceedings concerning delay should be such which would sub-serve cause of justice on merits rather than getting entangled into appreciation of facts ending up in finding loopholes in the same. General position of law shows that the approach to the delay condonation matter should be liberal and not with a view to find holes.

13. Here, looking at the litigants and their general level of understanding of the court, I deem it appropriate that delay deserves to be condoned for the reasons given by the appellants-applicants, for, it does appear that the fact that for eking out their existence they had have to remain away from regular place of their residence does not appear to have been seriously disputed and as such it deserves lenient approach. However, at the same time, it may be not ignored that in the process inconvenience has been caused to the respondents-plaintiffs which requires care to be taken by imposing costs.

14. As such, second appeal stands allowed, answering substantial question of law that approach of appellate court

may not be in consonance with general legal position emerging from the judgments of the supreme court and the high courts that approach in delay condonation matter would be liberal.

15. The impugned order stands set aside on the condition that costs of ₹ 10,000/- shall be deposited by appellant in the first appellate court within a period of six weeks from the date of receipt of writ of this order by the appellate court, to be payable to respondents-plaintiffs. The appeal shall be proceeded with and decided as expeditiously as possible, preferably within a period of six months from the date of receipt of writ of this order.

16. In view of appeal being allowed, civil application stands accordingly disposed of.

SUNIL P. DESHMUKH,
JUDGE

pnd