

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

CIVIL REVISION APPLICATION NO. 53 OF 2014

Ashok Popat Patil

..... **APPLICANT**

V E R S U S

Vasudeo Popat Patil & Ors.

..... **RESPONDENTS**

.....

Mr. Girish Rane, Advocate for Applicant.

Mr. G.A.Nagori, Advocate for R.Nos. 1,5 & 7.

Mr. S.S.Rathi, Advocate for R.No. 2 & 3.

Mr. S.R.Patil, Advocate for R.No. 6.

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CORAM : T.V.NALAWADE, J.

DATE : 3rd MAY, 2016

ORAL ORDER :-

. The proceeding is filed to challenge the Order made by the District Judge – 1, Amalner in M.C.A. No. 9/2013. The said application was filed for condonation of delay of 7 years 2 months and 15 days caused in filing Appeal against the Judgment and Decree of R.C.S. No. 45/1996. The application filed for condonation of delay by present respondents Smt. Sarla and Smt. Ganga is allowed by the District Court and so the original plaintiff Ashok Patil has challenged the said order. Both sides are heard.

2. R.C.S. No. 45/1996 was filed by Ashok Patil for

relief of partition and possession of 3 properties and he had claimed 1/4th share in all the 3 properties. The Suit came to be partly decreed and 1/4th share came to be given in land G.No. 1654 and in western half portion of CTS No. 166. In the said Suit, Smt. Sarla and Smt. Ganga were party defendants as sisters of plaintiff and some of the defendants. Initially they had showed intention to contest the Suit by adopting Written Statement of contesting defendants, but then they filed pursis and submitted that they had no objection to give the decree of partition. They had contended that no partition had taken place between the 2 branches of Popat and Rava, the predecessors of plaintiff and defendant No. 4.

3. The Suit was contested by defendant No. 4 Narayan Rava Patil and the Court held that there was partition in the 2 branches and one property had gone to the share of predecessor of Narayan defendant No. 4 and so the decree was given in respect of the remaining 2 properties. This decision was challenged by the plaintiff Ashok by filing R.C.A. No. 12/2006. It can be said that this challenge was only in respect of 3rd property viz. G.No. 1660 as share was not given to the plaintiff in that property. The Appeal came to be dismissed on 05/08/2011.

4. It appears that the decision of the Appeal was challenged by 2 sisters of Ashok by filing Second Appeal No. 463/2012. As they had not challenged the decision of the trial Court and as no share was given to them by the trial Court, this Court held that Second Appeal was not

maintainable. The matter was taken up to the Supreme Court, but the Supreme Court did not interfere in the order made by this Court in Second Appeal No. 463/2012. In view of this circumstance, C.A. No. 9/2013 was filed by 2 sisters of Ashok for condonation of aforesaid delay. In the application filed for condonation of delay, they contended that due to the representation made by Ashok that they will be getting their share in the suit property in the Suit itself, they did not turn up to the Court. They contended that it was represented to them that the Advocate of Ashok would represent them also. They contended that only after the decision of R.C.A. No. 12/2006, they realized that they were deceived. They contended that they had never relinquished their right in suit property in favour of anybody including Ashok and so the Court ought to have separated their share also. They contended that due to these circumstance, delay of 7 years 2 months and 15 days was caused in filing First Appeal.

5. Learned counsel for the plaintiff Ashok submitted that as the matter was taken up to the Supreme Court by 2 sisters of Ashok and the Supreme Court refused to interfere in the order made by this Court, the District Court ought not have condoned the delay. This submission is not at all acceptable. This Court had dismissed the Second Appeal only due to the reason that no Appeal was filed in the District Court by 2 sisters of Ashok when in the decree the trial Court had not given their share to them and trial Court had believed that there was relinquishment of the shares by the sisters. Thus, it was necessary for the 2 sisters of Ashok to file Appeal but they did not file Appeal in the District Court

and they directly filed Second Appeal in this Court. The Appeal of Ashok was only in respect of one property and so it can be said that he had not challenged the shares given to him in respect of the other 2 properties mentioned above.

6. It is not disputed that initially 2 sisters of Ashok had shown intention to contest the matter, to oppose the claim of Ashok, but subsequently they filed pursis of aforesaid nature. Pursis does not show that they had informed to the Court that they had relinquished their right in the suit property in favour of anybody. Further in a Suit by filing such pursis, the parties who are entitled to have share, can not relinquish their rights in the immovable properties. The procedure laid down for relinquishing the rights in the property needs to be followed and unless that is done, their right does not come to an end. Thus, there is arguable case in favour of sisters of Ashok.

7. In view of the aforesaid circumstances, it can be said that the sisters have created probability that they were deceived and they did not turn up to the Court as they were thinking that in partition suit the Court will carve out the shares of each successor of their father. It can be said that in law also it was necessary for the Court to carve out shares of each successor of father of plaintiff and his sisters. That was not done. Sisters filed Second Appeal in the year 2012 with application for condonation of delay. It can be said that it was a wrong proceeding filed in the Court as Appeal, but the proceeding was wrong and the forum was also wrong. It was filed almost immediately after the decision of the First

Appeal. It can be said that there was no collusion between sisters of Ashok and Ashok and so for the present purpose, their contentions need to be considered that they were thinking that they will get share in the suit property along with Ashok. It became clear after the decision of the First Appeal that they will not give anything though they ought to have challenged the decision of the trial Court in strict sense. Thus, the delay is huge but there are aforesaid circumstances and the sisters of Ashok have created the probability in respect of their case that they were deceived. This Court has already observed about the entitlement of sisters of Ashok to get the share and for that they need to be given opportunity to challenge the decision of the trial court.

8. Condoning the delay u/s 5 of the Indian Limitation Act is a matter of discretion. There is one more Section viz. Section 14 giving a ground to the parties like sisters of Ashok to say that due to mis-conception, they prosecuted wrong proceeding. Thus, in respect of some period, there is explanation like filing of Second Appeal and in respect of remaining period there is explanation that they were deceived by Ashok. In view of these circumstances, District Court has held that sufficient cause is shown. The appellate Court is not expected to lightly interfere in the finding given by the trial Court by using discretionary power. This Court sees no reason to interfere in the order made by the District Court though delay is huge.

9. In the result, Civil Revision Application stands dismissed.

10. Learned counsel for the applicant prayed for stay to the proceeding for some time as he wants to challenge the decision of this Court. But, in view of the aforesaid circumstances, this Court holds that no stay can be granted. So, the stay is refused.

[T.V.NALAWADE, J.]