

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

SECOND APPEAL NO. 226 OF 2016
WITH
CIVIL APPLICATION NO. 3385 OF 2016

Pandit s/o Malhari Kale,
Age 58 years, occup. Agril.,
R/o Ghodegaon, Tq. Khultabad,
Dist. Aurangabad

.. Appellant/
Orig.Deft. No.1

versus

1. Chiranjivlal s/o Kanhayalal Bassiye,
Age – 58 years, occup. Business,
R/o Juna Mondha, Nawabpura,
Aurangabad
2. Suresh s/o Mohanlal Bothra,
Age 59 years, occup. Agril.,
R/o Osmanpura, Aurangabad,
3. Nitin s/o Sitaram Paturkar,
Age-51 years, occup. Business,
R/o Mahaveer Chowk,
Aurangabad
4. The Tahsildar, Aurangabad,
Tq. & Dist. Aurangabad
5. The Sub-Divisional Officer,
Aurangabad
6. The Collector, Aurangabad,
Dist. Aurangabad
7. The Commissioner, Aurangabad
8. Kundlik s/o Pundlik Kale,
Age 50 years, occup. Business,

9. Sundarabai w/o Maroti More,
Age : 86 years, occup. Household,
R/o Palkhewadi, Post Takali,
Tq. Gangapur, Dist. Aurangabad

10. Satyabhamabai @ Rukhmanbai,
Kamlakar Borde, age 75 years,
occup. Household, R/o Bhimnagar,
Bhavsingpura, Aurangabad

[appeal has been dismissed against
respondents no. 8 to 10 under
court's order dated 25-04-2016]

11. Asarabai w/o Ambadas Sonawane,
Age-70 years, occup. Household,
R/o Shankarpurwadi, Tq.Khultabad,
Dist. Aurangabad

12. Kesarbai Khandu Sonawne, died

13. Govind s/o Khandu Sonawane,
Age 45 years, occup. Service,
R/o Sillod, Tq. Sillod,
Dist. Aurangabad

[Respondent no. 13 deleted as per
court's order dated 06-06-2016]

14. Surekha Ambadas Sonawane, Age-28 years, occup. Household, R/o Aurangabad [Appeal has been dismissed against respondent no. 14 under Court's order dated 25-04-2016]	..Respondents/ Nos.1 to 3-orig plaintiffs, Nos.4 to 7 orig.Deft. No. 9 to 12, and Nos. 8 to 14-orig. Defts. No. 2 to 8
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Mr. Chandrakant K. Shinde, Advocate for appellants
Mr. A. D. Kasliwal, Advocate for respondents no. 1 to 3

CORAM : SUNIL P. DESHMUKH, J.
DATE : 23rd August, 2016

ORAL JUDGMENT :

1. Admit. By consent of parties, taken up for final hearing.
Heard learned counsel for the parties.

2. The appellant – original defendant no. 1 is before this court against an order passed by District Judge-4, Aurangabad dated 23-02-2016, rejecting Miscellaneous Application Requiring Judicial Inquiry ("MARJI") bearing No. 393 of 2013 by present appellant seeking condonation of delay in filing regular civil appeal against judgment and decree passed by the 4th Joint Civil Judge, Senior Division, Aurangabad on 20-09-2012 under which special civil suit no. 645 of 2010 filed by present respondents no. 1 to 3 has been decreed. [Parties hereinafter are referred to by their original status in the suit proceedings]

3. Plaintiffs had instituted aforesaid suit seeking specific performance of agreement of sale dated 26-07-2007, contending its execution in their favour by defendants no. 1 to 8. It is the case of plaintiff that defendants had agreed to sell

to plaintiff an area admeasuring 15 acre, 12 guntha out of gut no. 135 situated at village Karodi, Taluka and district Aurangabad for a total consideration of ₹ 6,12,000/-. Pursuant to the same, an amount of ₹ 60,000/- had been paid by plaintiff to defendant no. 1. It was further agreed that since said property falls in the category of occupancy class II, a permission would be required for transfer of the same and upon such permission, sale deed would be executed. Permission had been sought, however, the same had been granted by collusion in favour third party and as such the plaintiff had lodged complaint with the Commissioner of Revenue, Aurangabad. The plaintiff contends that defendants deliberately avoided to comply with the terms of the agreement and as such suit ensued.

4. After receipt of summons, defendants 1 to 7 though appeared had not filed written statement. Suit was dismissed against defendant no. 8. A few of the defendants-government authorities did not appear in the suit. One of the authorities upon appearance had failed to file written statement. Defendant no. 9 appears to have contended that the action for permission was in progress.

5. Issues came to be framed. Evidence was led by the plaintiff. Defendants failed to cross examine the witnesses of plaintiff, and as such, the suit came to be decreed under judgment and decree dated 20-09-2012, directing defendants no. 1 to 8 to obtain requisite permission for sale and on such permission being granted, execute sale deed in favour of the plaintiff and further that in case defendants no. 1 to 8 after obtaining permission fail to execute sale deed, the same be executed through court commissioner.

6. It is against aforesaid judgment and decree of the trial court that regular civil appeal had been tried to be preferred by defendant no. 1. However, since that was delayed by a period of about 300 days, MARJI 393 of 2013 had been filed seeking condonation of delay in filing the appeal. The appellate court has rejected said MARJI on 23-02-2016 and thus defendant no. 1 is before this court in second appeal.

7. 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 23-02-2016 had been right in rejecting MARJI bearing No. 393 of 2013 filed by appellant - original defendant no.1 for condonation of delay of

300 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.

8. Learned counsel for defendant no. 1 contends that MARJI makes reference to various aspects involved in the matter and particularly to that the decree is a nullity and that defendant no. 6 Kesarbai had died long back in 1980. Suit is of the year 2010 and further that defendants were deceived by plaintiff and police complaint had been lodged against him. It was defendant no. 1 who had been prosecuting the matter and he had been unaware of the procedure and is a simple and a lay man. He had not been keeping well. It was only upon knowledge of implications of decision being realized, upon advice and consultation after notice of execution proceedings, the defendants as advised have preferred appeal. As such, it is contended that defendant no. 1 could not approach the court challenging the decree immediately. It was further pointed out, there were some more ladies who have interest in property being related to deceased owner and they are not parties to the suit.

9. Learned counsel submits that despite aforesaid being the position, appellate court has dismissed MARJI for condonation of delay in filing appeal.

10. Learned counsel for respondents-plaintiffs contests the claims stating that the defendant had given different dates of getting knowledge of the decision as defendant no. 1 in his cross examination has admitted 03-04-2013 to be the date of knowledge of decision and notice of proceedings for execution of the decree had been received by Kundlik on 29-06-2013 and he had handed over the same to defendant no. 1 - Pandit and further that on 14-07-2013, a complaint had been filed by defendants against the plaintiff with police station, city chowk, Aurangabad. In the complaint, reference had been made to a different date.

11. Defendant no. 1 has relied on quite a few decisions and has emphasized the case of *Collector, Land Acquisition, Anantnag and another vs. Mst. Katiji*, reported in *AIR 1987 SC 1353* and *Ware's Educational Trust vs. Subhash Bhagwan Khedkar*, reported in *2015 (2) Mh.L.J. 870*, particularly guidelines laid down in paragraph no. 3 of former of the two decisions which read thus;

(1) *Ordinarily a litigant does not stand to benefit by lodging an appeal late.*

(2) *Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. Against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*

(3) *" Every day's delay must be explained " does not mean that a pedantic approach should be made. Why not every hour's delay. Every second's delay ? The doctrine must be applied in a rational common sense pragmatic manner.*

(4) *When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*

(5) *There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.*

(6) *It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.*

12. One will have to appreciate that the persons who had sought delay condonation are not only not well-versed in litigation, but also that in general appear to have been guided by advice received from time to time. In the process, they

appear to have got entangled into giving lot of explanation about the things which would normally be not so important in nature. The appellate court also doubted veracity of certificate of illness issued in respect of the person who was in charge of litigation without investigation. Nonetheless, the person who had been in charge of the litigation, had produced some material indicating that he was not keeping well and the court has thus fallen into error in taking up a role of expert above the person who had issued the certificate.

13. There appears to be 300 days delay. Parties, specially defendant no. 1 - appellant before this court appears to come from a rural background and educational level in the family appears to be very limited. It appears that implications of the proceedings have not been properly understood and appreciated nor they appear to have been given to understand the same properly. It is in these circumstances and specially when it has been stated that the defendant no. 1 who had been looking after the litigation had not been keeping well and material had been adduced in respect of the same, the appellate court could have, in stead of going about the same with a stickler's approach, taken into account general position of law in respect of condonation of delay

especially looking at the same from the background of the status of the parties and technicalities ought not to have been given overbearing importance whereunder the power conferred may lose its purpose and its non-exercise resulting to be subversive, rather than exercise of power sub-serving the cause.

14. Defendant No.1-appellant has denied execution of agreement in favour of plaintiffs and has further stated that defendant no. 6 Keshwarbai Khandu Sonwane died in 1980 and defendant no. 8 is an imaginary woman. In the face of such contentions, it appears that the cause will have to be decided with reference to factual position. Further, otherwise a genuine cause is likely to be lost, if the evidence emerges showing substance in the contention of defendant no.1. Besides, there are contentions that other women folk left behind by original property owner.

15. It is a matter concerning immovable property ad-measuring about 15 acre, 12 guntha situated close to Aurangabad city almost forming its outskirts. Owners have received paltry sum of ₹ 60,000/- and have got themselves entangled into the litigation.

16. It is stated that the property is worth much more than it is shown under the agreement. About 8 to 10 person's interest in the property is involved.

17. Although it is contended by plaintiffs that there is discrepancy in respect of the date of knowledge, so called discrepancies do not appear to form so much material so as to decline the condonation of delay. Defendant no. 1 in his evidence has referred to that he got knowledge about the judgment and decree against them around March-April, 2013 and around end of June, 2013 a notice of execution had been received by his brother Kundlik and thereafter complaint was lodged. It is further being explained that, defendant no.1 who was looking after the matter had not been keeping good health.

18. In the circumstances, taking overall view of the matter, in stead of getting swayed by discrepancies occurring in seeking condonation of delay, in my estimate, the matter will have to be approached a little liberally. If the delay has caused some inconvenience to the other side, the same can be taken care of by awarding costs. In the circumstances, a cause of justice may be saved in stead of the same getting

washed out under a technical approach. It will also have to be appreciated that there does not appear to be any intention underlying causing delay nor it can be said to be deliberate, for, there are no gains at all for defendants, by causing such a delay. This aspect may also receive its due in the present peculiar facts and circumstances. The question referred to above stands answered accordingly.

19. It has been brought to the notice of this court that defendant no. 1 has already deposited a sum of ₹ 1,00,000/- in this court pursuant to the orders passed by this court on 16-03-2016 which, to a large extent, indicates the way in which the matter was to be approached by this court.

20. I am, therefore, inclined to allow second appeal taking into account purport underlying the citations relied on by defendant no.1. In view of aforesaid, second appeal is allowed. The amount of ₹ 1,00,000/- be transferred to the trial court.

21. Amount of ₹ 25,000/- from the sum of ₹ 1,00,000/- may be appropriated towards costs. Said amount of ₹ 25,000/- may be allowed to be withdrawn by plaintiffs.

22. At this stage learned counsel for parties submit that since regular civil appeal would get registered and in all likelihood the matter would be remanded to the trial court and as such, in stead of spending time away in the process, it would be in fitness of things that the matter be remanded to the trial court for adjudication, afresh.

23. Having regard to the facts and circumstances as aforesaid, it appears to be a fair proposal. Accordingly, the judgment and decree dated 20-09-2012 passed in special civil suit no. 645 of 2010 by the 4th Joint Civil Judge, Senior Division, Aurangabad is also set aside. The matter is restored to the file of trial court, Aurangabad, letting opportunity to parties to lead evidence, including the one as had been suggested by appellant for filing written statement.

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

25. At this stage, learned counsel Mr. Kasliwal for plaintiffs requests for direction for early disposal of suit. Both the learned counsel fairly state that the parties would appear before the trial court on 03-10-2016. From then onwards, the

trial court may dispose of suit as expeditiously as possible, preferably within a period of four months from the date of receipt of writ of this order.

SUNIL P. DESHMUKH,
JUDGE

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