

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

14 CIVIL APPLICATION NO. 4924 OF 2016
IN SAST/9533/2016 WITH CA/4926/2016 IN
SAST/9533/2016

MALLIKARJUN MADHAVRAO MATOLE
VERSUS
SHANKAR MADHAVRAO MATOLE AND OTHERS

Shri. S.B. Gastgar, Advocate, for applicant.

Shri. S.M. Vibhute, Advocate, for respondent No.1.

Shri. V.D. Gunale, Advocate, for respondent Nos.5 to 7.

CORAM: T.V. NALAWADE, J.

DATE : 19th JULY 2016

ORDER:

1) The application is filed for condonation of delay of 481 days caused in filing second appeal against the judgment and decree of District Judge-1 Nilanga delivered in Regular Civil Appeal No.50/2009. This appeal was filed by the original plaintiff, Mallikarjun of Regular Civil Suit No.248/1996 which was pending in the Court of the Civil Judge, Senior Division, Nilanga. In the suit filed by Mallikarjun for relief of perpetual injunction, counter claim was filed by defendant No.2, Shankar, present

respondent, for declaration of ownership of the suit property and for relief of recovery of possession. The suit was withdrawn by Mallikarjun but the counter claim was prosecuted by Shankar and it is decreed in his favour. This decision was challenged in first appeal but the first appellate Court dismissed the appeal and delay is caused in challenging the decision given by the District Court. Heard both the sides.

2) Condonation of delay is a discretionary relief. There is huge delay of 481 days and the counter claim in which decree of possession is given was of 1996. In such cases not only sufficient cause is required to be shown but the applicant/appellant needs to make out some arguable case for the main matter.

3) It is the case of the present applicant that he was under impression that as he had withdrawn the suit, it was not necessary for him to participate in further proceeding and so he did not turn up to the Court and the counter claim came to be decided against him. It is contended that these circumstances are not considered by

the first appellate Court. It is contended that the property was also alienated by him to defendant Nos.5 and 6 and they also alienated the property in favour of present respondent No.7 and so he was under impression that they will file appeal against the decision of the District Court and so he did not challenge the decision of the District Court immediately.

4) The counter claim was filed against the present appellant, brother of Shankar and also the purchasers from the present appellant. It is the case of Shankar that the suit property, Plot No.27 which is part of Survey No.284 situated at Nilanga and which has size of 50 ft and 40 ft had fallen to his share in partition. It is his case that name of Mallikarjun was continued due to previous transaction of joint Hindu family but Mallikarjun was not owner of the property but he sold the property to other defendants.

5) To the aforesaid counter claim written statement was filed by Mallikarjun and he had contended that partition had taken place. He had contended that it

was his self acquired property and he had sold the property to defendant Nos.5 and 6. The suit proceeded ex parte as against defendant Nos.5 to 7, purchasers. The aforesaid circumstances show that right from beginning the purchasers did not show interest in defending the matter and it is Mallikarjun who was contesting the matter even when the matter was decided in favour of Shankar by trial Court. The purchasers did not prefer appeal and only Mallikarjun filed appeal against the decision of the trial Court. Due to these circumstances it cannot be believed that Mallikarjun was thinking that the purchasers may challenge the decision given by the District Court.

6) So far as the point of arguable case is concerned, it can be said that there is record like memorandum of partition showing that the suit plot was allotted to the share of Shankar. This document was signed by Mallikarjun also. Prior to that document, i.e. prior to 1988, the property was standing in the name of Mallikarjun and it is clear that he sold the property by using this circumstance to defendant Nos.5 and 6 in the

year 1996. The counter claim was filed immediately by Shankar. The fact that the purchasers did not contest the matter and the suit was also filed by Mallikarjun in respect suit property are sufficient to infer that Mallikarjun wanted to create complications. The Courts below have considered record of partition which was signed by Mallikarjun and on that basis counter claim is decreed. In view of these circumstances, this Court holds that Mallikarjun did not come with clean hands before District Court and in this Court and he is not entitled to get discretionary relief. Thus on both counts no relief can be granted to the present appellant. In the result, the application filed for condonation of delay stands rejected. Other civil application is also disposed of.

Sd/-
(T.V. NALAWADE, J.)

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