

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****SECOND APPEAL (ST) NO. 2761 OF 2016****ALONGWITH****CIVIL APPLICATION NO.236 OF 2016****IN****SECOND APPEAL (ST) NO. 2761 OF 2016****Sarjerao Bhanudas Gulumkar & Anr.****..... Appellants****VERSUS****Mirabaksha Gulab Tamboli****..... Respondent**

Mr.Rishikesh Soni, a/w. Mr.Prabhakar Jadhav for the Appellants.

Mr.V.S.Talkute for the Respondent.

CORAM : R.D. DHANUKA, J.**DATED : 8th FEBRUARY, 2016****P.C.**

By this second appeal, the appellants have impugned the order dated 23rd November, 2015 passed by the Additional District Judge, Malshiras dismissing the application filed by the appellants inter alia praying for condonation of delay of two years and four months in filing an appeal. The learned trial judge has dismissed the suit filed by the appellants on 14th July, 2010 for default. Admittedly the appellants did not apply for restoration of the suit. The counter claim filed by the respondent thereafter was tried separately and was decreed by the trial court on 20th September, 2012. The appellants filed an application for condonation of delay on 12th February, 2015. The appellants filed a writ petition impugning the order passed by the learned District judge which was allowed to be withdrawn.

2. Learned counsel appearing for the appellants invited my attention to the

application filed by the appellants praying for condonation of delay of two years and four months. He submits that since the appellants were suffering from illness, the appellants could not file first appeal within the time prescribed. Another reason recorded in the application for condonation is that the appellants were not aware of the date of decision. The application for condonation of delay was opposed by the original defendant, the decree holder on the ground that the delay was not sufficiently explained. The defendants has already filed execution application in the year 2013. A copy of the said application was served upon the original plaintiffs on 28th March, 2013. Though the appellants were aware of the decree passed in the counter claim atleast on the date of service of the execution application in the year 2013, the appellants preferred to file application for condonation of delay on 12th February, 2015.

3. A perusal of the order passed by the Additional District Judge clearly indicates that insofar as ground of illness raised by the appellants in the application for condonation of delay is concerned, the appellants did not produce any medical records before the learned District Judge. There were two appellants. It was not even indicated which appellants out of two was suffering from illness.

4. Insofar as second ground for seeking condonation of delay raised by the appellants is concerned, the learned District Judge in my view has rightly rejected the explanation of the appellants on the ground that atleast on the date of the service of the execution application in the month of March 2013, the appellants were aware of the decree passed in the counter claim. But the application for condonation of delay came to be filed only on 12th February, 2015.

5. It is submitted by the learned counsel for the appellants that due to the

negligence on the part of the learned advocate representing the appellants, the appellants should not be suffered. Upon inquiry, learned counsel fairly submitted that the appellants have not filed any application for restoration of the suit dismissed for default in the year 2010. He also fairly stated that the same advocate who had appeared before the trial court continued to represent the appellants also before the appeal court.

6. In my view the appellants totally failed to justify the delay of 2 years and 4 months in filing the appeal against the counter claim against the order passed in the counter claim. The appellants have even not explained the delay in challenging the order passed by the learned trial judge dismissing the suit for default in the year 2010.

7. In my view there is thus no merit in this appeal. Appeal is devoid of merits and is accordingly dismissed. In view of dismissal of appeal from order, civil application does not survive and is accordingly dismissed. No order as to costs.

8. At this stage, learned counsel for the appellant states that the statement made by the learned counsel for the respondent shall be continued for a period of three weeks. Learned counsel for the respondent is not in a position to continue the statement made before this court earlier. Application for continuation of the statement is rejected.

[R.D. DHANUKA, J.]