

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****CIVIL APPLICATION NO. NO. 1439 OF 2015****IN****SECOND APPEAL (ST) NO.23217 OF 2015****Jagdevitai Channayya Swami****..... Applicant****VERSUS****Suryakant Shankar Sanake & Ors.****..... Respondents**

Mr.Rajesh Datar for the Applicant.

Mr.R.S.Alange for the Respondent nos. 1 to 6.

CORAM : R.D. DHANUKA, J.**DATE : 30th SEPTEMBER, 2016****P.C.**

By this civil application, the applicant seeks condonation of delay of 5 years, 6 months and 21 days in filing the second appeal. The applicant was the original plaintiff in the suit filed by him for partition and separate possession. The suit was decreed in favour of the applicant on 11th April, 2005. The respondents filed an appeal before the learned District Judge which came to be allowed on 5th November, 2009.

2. The applicant herein filed review application before the learned District Judge and applied for condonation of delay in the said review application. The review application was pending before the learned District Judge from 3rd April 2010 till 9th June, 2015. The review application was ultimately dismissed by the learned trial judge. The applicant thereafter filed this second appeal.

3. Mr.Datar, learned counsel for the applicant invited my attention to the order

passed by the learned District judge dismissing the review application. He submits that the review application was filed by the applicant on the ground that certain submissions of the applicant were not considered by the learned District Judge in the impugned decree and judgment. He submits that the review application was pending for about five years before the learned District Judge. The learned District Judge ultimately rejected the said review application on various grounds. He submits that the review application was prosecuted before the learned District Judge in good faith and with due diligence and on the premise that the applicant had good chances of succeeding in the said review application.

4. Learned counsel for the respondents on the other hand invited my attention to the observations made by the learned District Judge in the order rejecting the review application stating that instead of filing second appeal, the review petitioner had filed review petition and has adopted shortcut method for the purpose of re-hearing the appeal on merits which cannot be permitted under Order 47 Rule 1 of the Code of Civil Procedure.

5. There is no dispute that the review application is dismissed with such observations made by the learned District Judge. The fact remains that the review application remained pending on the file of the learned District Judge from 3rd April 2010 till 9th June, 2015. The grounds raised by the applicant in the review petition are ultimately not accepted by the learned District Judge.

6. The applicant was advised to file review application instead of filing the second appeal immediately which came to be rejected on merits. I am of the view that the applicant cannot be entirely blamed for the pendency of the said review application during 3rd April 2010 till 9th June, 2015. If the period taken during the

pendency of the review application is considered, there is delay of 5 years 198 days. In view of the substantial delay arising out of the pendency of the review application, the applicant did not file the second appeal. In my view interest of justice would be met with if the applicant is directed to pay the cost of Rs.15,000/- which shall be paid by the applicant to the respondents within four weeks from today.

7. It is made clear that if the cost as awarded is not paid within four weeks from today, this order allowing the condonation of delay to stand vacated forthwith. If cost is paid and if the second appeal is numbered, place the second appeal on board as per **CMIS date**.

[R.D. DHANUKA, J.]