

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

**CIVIL APPLICATION NO. 2703 OF 2016
IN
SECOND APPEAL STAMP NO. 6628 OF 2016**

Smt.Sanobai Rangnath Aher,
Age : 73 years, occ.: Nil,
R/o : Yesgaon, Taluka :
Kopargaon, District :
Ahmednagar, Through its
Power of Attorney Holder,
Shri Baburao Rangnath Aher,
Age : 45 years, Occupation :
Agriculture, R/o : Yesgaon,
Taluka : Kopargaon, District :
Ahmednagar.

.. APPLICANT

VERSUS

- 1) Karbhari Punja Aher,
Age : 65 years, Occ :Agriculture,
- 2) Dattatraya Punja Aher,
Age : 65 years, Occ :Agriculture,
R/o : Yesgaon, Taluka Kopargaon,
District : Ahmednagar

..RESPONDENTS

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Mr.Sanket S.Kulkarni, advocate for applicant.

Mr.S.S.Chapalgaonkar, advocate for respondents.

CORAM : SANGITRAO S. PATIL, J.

DATE : 01st AUGUST, 2017

PER COURT :

Heard the learned Counsel for the parties.

2. The learned Counsel for the applicant/appellant submits that though the applicant/appellant had engaged an Advocate to defend herself in Regular Civil Appeal No.103 of 2006, the learned Advocate did not appear before the First Appellate Court when the appeal was fixed for hearing. The Trial Court had dismissed the suit for recovery of possession of the alleged encroached portion of the land from the respondents. However, due to absence of the learned Counsel for the applicant/appellant before the First Appellate Court, the said decree came to be reversed and the suit came to be decreed, whereby the applicant has been directed to hand over possession of 16 R. of land as shown by the surveyor in the map to the respondents. He submits that it is only when the notice of

execution was received by the applicant, she came to know that some order has been passed against her. She was not feeling well due to various age related ailments. Therefore, her son visited the Court and enquired about the progress in the appeal, whereon he came to know that the appeal was allowed on 11.07.2013. She required sometime to collect money for filing the appeal. In the circumstances, there has been delay of 823 days in filing the Second Appeal. He submits that the delay is not deliberate or intentional. Valuable rights of applicant in respect of the immovable property are involved in this matter. The applicant has already deposited the amount of Rs. 10,000/- as per order of this Court to show her bona fides to contest the litigation. He, therefore, submits that the delay in filing the Second Appeal may be condoned.

03. On the other hand, the learned Counsel

for the respondents submits that the notice of execution was served on the applicant in the month of July, 2015 and thereafter, on 24.07.2015, the Executing Court passed an order directing appointment of T.I.L.R. to hand over possession of the encroached portion of land to the respondents. He submits that the son of the applicant was looking after the suit as well as appeal. It was not difficult for him to keep track of the appeal. He submits that the Advocate for the applicant is stated to have informed about the decision of the appeal by a letter, but the said letter is stated to have not been received by the applicant. He submits that it is very easy to blame the Advocate in such matters. There is no sufficient cause shown by the applicant for condonation of delay. Hence application may be rejected.

04. As seen from para No. 6 of the judgment of the First Appellate Court, the learned Advocate, who was representing the applicant did

not appear when the appeal was fixed for hearing. There is nothing on record to show that the learned Advocate for the applicant actually informed about the decision of the appeal to the applicant at any point of time prior to service of notice of execution on her. It is a common knowledge that in appeal physical presence of a party is not necessary and the party generally relies on the communication made by its Advocate. If the learned Advocate for the applicant did not appear before the First Appellate Court when the appeal was called for hearing, the applicant cannot be blamed. Likewise, if there is no communication by the learned Advocate for the applicant about the decision of the appeal, the knowledge of the decision cannot be attributed to the applicant. It is further clear that after receiving the notice of the execution of the decree in the month of July-2015, the appellant got knowledge about the order passed by the First

Appellate Court. Naturally, she must have instructed her son to inquire with the Advocate concerned, about the progress in the appeal, since she was not physically fit to approach the Advocate or inquire about her appeal in the Court. Her son, who is her power of attorney in the present matter, must have approached the Court and the Advocate to inquire about the fate of the appeal. After coming to know that the appeal was decided against the applicant, the applicant certainly must have taken sometime to collect money and approach the Advocate for giving instructions to file Second Appeal. In the above circumstances, delay was bound to be there in filing the Second Appeal. The reasons given by the applicant for delay are quite sufficient and satisfactory.

05. The dispute pertains to immovable property, wherein valuable rights of the applicant

are involved. The applicant cannot be said to have committed delay deliberately or intentionally, since she was going to lose her valuable property in execution of the decree that is passed against her. In the circumstances, I think fit to allow the application for condonation of delay. However, the respondents also will have to be duly compensated in terms of money while extending the relief in favour of the applicant. In my view, it will be reasonable and proper to direct the applicant to pay Rs. 15,000/- as costs to the respondents.

06. In the result, I pass the order :-

ORDER

- i) Civil application is allowed.
- ii) Delay in filing in the Second Appeal is condoned subject to payment of costs Rs. 15,000/- by the applicant to the respondents on or before 21st August 2017.

iii) The amount of Rs. 10,000/-already deposited by the applicant in this Court, is allowed to be withdrawn by the respondents towards appropriation of the amount of costs that has been ordered to be paid by the applicant.

iv) On depositing the balance amount of Rs. 5,000/- in the Court, the respondents would be at liberty to withdraw the amount of Rs. 5,000/- also.

v) The stay granted to the execution of the impugned decree shall stands vacated, in case the balance amount of Rs.5,000/- is not deposited on or before 21.08.2017.

vi) Civil application is disposed of accordingly.

sd/-

[SANGITRAO S. PATIL, J.]

shp