

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

**SECOND APPEAL NO.201 OF 2012
WITH
CIVIL APPLICATION NO.3540 OF 2012**

1. Ashruba s/o. Raghu Dambe (died)

1/A. Shivaji Asruba Dambe,
Age : 42 years, Occ. Agri.,

1/B. Kalyan Asruba Dambe,
Age : 40 years, Occ. Agri.,

1/C. Alka Babasaheb Dambe,
Age : 40 years, Occ. Household,

1/D. Prashant Babasaheb Dambe,
Age : 27 years, Occ. Agri.

1/E. Dropadabai w/o. Asruba Dambe,
Age : 70 years, Occ. Household,

2. Uttam Raghu Dambe,
Age : 40 years, Occ. Agri.,

3. Attam Raghu Dambe,
Age : 47 years, Occ. Agri.

4. Haribhau Rama Dambe,
Age : 72 years, Occ. Agri.,

All r/o. Yellamb Ghat,
Tq. Dist. Beed

5. Devidas Rama Dambe (died)
through Lrs.

5/A. Parwatibai Devidas Dambe

Age 70 years, Occ. Household,
r/o. Jatalwadi,
Tq. and Dist. Beed

5/B. Asrabai Narayan Amate,
Age : 57 years, Occ. Household,
r/o. Jatalwadi,
Tq. and Dist. Beed

5/C. Sunandabai w/o. Madhav Yadav,
Age : 53 years, Occ. Household
r/o. Jaalwadi, Tq. and Dist. Beed.

5/D. Babasaheb Devidas Dambe,
Age : 40 years, Occ. Agri.,
r/o. Jatalwadi,
Tq. and Dist. Beed

5/E. Chaturbhuj Devidas Dambe,
Age : 38 years, Occ. Agri.
r/o. Jatalwadi,
Tq. and Dist. Beed

5/F. Bharat Devidas Dambe,
Age : 35 years, Occ. Household,
r/o. Jatalwadi,
Tq. and Dist. Beed

..Appellants
(Orig.Defendants)

Vs.

1. Gopalrao s/o. Madhavrao Deshmukh,
Age 77 years, Occ. Pensioner,
r/o. Yellamb Ghat, Tq. and Dist. Beed,
at present Parli Vaijnath
Tq. Parli Vaijnath, Dist.Beed
2. Anant s/o. Madhavrao Deshmukh,
Age : 48 years, Occ. Agri.
r/o. Yellamb Ghat,
Tq. and Dist. Beed

at present Parli Vaijnath
Tq. Parli Vaijnath, Dist. Beed

3. Vilas s/o. Ramchandra Deshmukh,
Age : 43 years, Occ. Service,
r/o. Panchayat Samiti Beed,
Tq. and Dist. Bee,
4. Vidhya w/o. Shripadrao Joshi,
Age : 40 years, Occ. Household,
r/o. Parli Vaijnath,
Tq. Parli Vaijnath, Dist. Beed
5. Padmabai w/o. Ramchandra Deshmukh,
Age : 68 years, Occ Household,
r/o. Nagar Road, Beed
6. Sindhubai w/o. Manoharrao Kulkarni,
Age 43 years, Occ. Household,
r/o. Dhondipura, Beed
7. Umabai w/o. Shankarrao Tekale,
Age : 50 years, Occ. Household,
r/o. Washi, Tq. Washi,
Dist. Osmanabad
8. Subhash s/o. Keshavrao Deshmukh,
Age : Major, Occ. Service,
r/o. Kaij, Tq. Kaij,
Dist. Beed
9. Prakash s/o. Keshavrao Deshmukh,
Age : Major, Occ. Service,
r/o. Khadkeshwar,
Aurangabad
10. Leela w/o. Babanrao Khiste,
Age : 58 years, Occ. Household,
r/o. Umapur, Tq. Georai,
Dist. Beed.

- 11.Mandabai w/o. Narharrao Garge,
Age : 53 years, Occ. Household,
r/o. Lahuri, Tq. Kaij,
Dist. Beed
- 12.Trivenibai w/o. Kashinathrao (Deleted - Resp.
Deshmukh, Age : 53, Nos.13 to 17 are
Occ. Household, the L.Rs. of
r/o. Chapkhana Galli, Resp. No.12.)
Beed As per Court's
order dt.21.4.14)
- 13.Murlidhar s/o. Kashinathrao
Deshmukh, Age : Major,
Occ. Business,
r/o. Chitalbast-Rashtrapati
Road, Hyderabad (A.P.)
- 14.Damodhar s/o. Kashinathrao
Deshmukh, Age : Major,
Occ. Service, r/o. Chapkhana
Galli, Beed
- 15.Madhusudan s/o. Kashinathrao
Deshmukh, Occu. Service,
R/o.Georai, Tq. Georai,
Dist. Beed
- 16.Govind s/o. Kashinathrao
Deshmukh, Age : Major,
Occ. Service,
r/o. Georai, Tq. Georai,
Dist. Beed.
- 17.Mukund s/o. Kashinathrao
Deshmukh, Age : Major,
Occ. Business,
r/o. Subhash Road,
Beed

- 18.Vinayak s/o. Pandurang
Deshmukh, Age : Major,
Occ. Service,
r/o. Pilkhana,
Hyderabad (A.P.)
 - 19.Vinayak s/o. Pandurang
Deshmukh, Age : Household,
Occ. Service,
r/o. Pilkhana,
Hyderabad (A.P.)
 - 20.Manorama w/o. Manoharrao
Joshi, Age : Major,
Occ. Household,
r/o. Wadwani, Tq.Wadwani,
Dist.Beed
 - 21.Vimal w/o. Murlidharrao Dani,
Age : Major, Occ.Household,
r/o. Ashti, Tq.Ashti,
Dist.Beed
 - 22.Maina w/o. Balkrishnarao Joshi,
Age:Major, Occ.Household,
r/o. Chikalhana,
Aurangabad
 - 23.Mangal w/o. Shrinivasrao Joshi,
Age : Major, Occ. Household,
R/o. Kada, Tq. Ashti,
 - 24.Rajni w/o. Uttamrao Wazarkar,
Age : Major, Occ. Household,
r/o. Shahunagar, Beed,
Dist. Beed
 - 25.Laxmi w/o. Balkrishna Tekalr,
Age : Major, Occ. Household,
R/o. Washi, Tq.Washi,
Dist Osmanabad
- ..Respondents
(R.Nos.1 to 4-orig
Plfts.)(Resp Nos.
5 to 25 – Orig.
Deft. Nos.7 to 26)

Mr.Girish Naik (Thigale), Advocate for appellants

Mr.S.G.Chapalgaonkar, Advocate for respondent nos.1
and 2

CORAM : SANGITRAO S. PATIL, J.

RESERVED ON : JULY 31, 2017

PRONOUNCED ON : AUGUST 10, 2017

JUDGMENT :

The original defendant nos.1 to 5 in R.C.S. No.66 of 1998 have preferred this appeal against the order dated 10.02.2012 passed in Misc. Civil Application No.64 of 2010 passed by the learned Principal District Judge, Beed, whereby the said application, seeking condonation of delay in filing the appeal, came to be rejected.

2. The learned Counsel for the appellants submits that respondent nos.1 to 4 (original plaintiffs) had filed the above-numbered suit seeking partition and separate possession of the lands bearing survey Nos.115/A and 118/A situate within the local limits of village Yellam Ghat, Tq. and Dist.

Beed. The said lands were previously owned by one Narayan Deshmukh. The predecessors-in-title of the appellants were the tenants of the said lands. Accordingly, they were declared as tenants by the competent authority. One Vitthal, who was the son of Narayan Deshmukh filed R.C.S. No.164 of 1977 to recover possession of the said lands against the deceased Ashruba and other appellants. In that suit, a compromise was arrived at and the land ad-measuring 4 Acres 7½ Gunthas out of Survey No.115/A and the land ad-measuring 6 Acres and 3½ Gunthas out of survey No.118/A, were agreed to be sold by Vitthal in favour of appellant nos.4 and 5 and the father of the deceased Ashruba. Accordingly, Vitthal executed the sale deeds in their favour in the year 1978.

3. The learned Counsel further submits that respondent nos.1 to 4 filed R.C.S. No.66 of 1998 for partition of the said lands and for recovery of possession of their shares therein. The deceased Ashruba was looking after the said suit. He died in

the year 2002. Thereafter, his son Babasaheb was looking after the family affairs as a Manager of the family. He also died in 2004. His son Shrikant died in the year 2008. Due to the demise of these three members of the family, the entire family was under a great sorrow. He further submits that the legal representatives of Vitthal had promised the appellants that the suit filed against them would be withdrawn. The possession of the appellants over the suit lands was not disturbed by anybody. In the circumstances, the appellants could not contest the suit and it came to be decreed *ex-parte* against them on 01.09.2005. He submits that it is only when the T.I.L.R. issued notices to the appellants on 07.01.2010, as per the directions of the Collector for partition of the above-mentioned lands, that they actually got knowledge of the execution proceedings on 02.02.2010. Thereafter, they approached the Advocate and filed the appeal with an application for condonation of delay of 4 years, 3 months and 16

days. He submits that the appellants showed sufficient cause for the delay in filing the appeal. Appellant no.2 examined himself in respect of the cause for the delay in filing of the appeal. Respondent nos.1 to 4 did not produce any evidence to controvert the evidence of appellant no.2. The delay was not deliberate or intentional. Therefore, according to him, the learned Judge of the first appellate Court should have taken a liberal view and should have condoned the delay in filing the appeal, considering the fact that the dispute relates to immovable property, wherein valuable rights of the appellants are involved. In support of this contention, he relied on the following judgments :-

(i) N.Balakrishnan Vs. M. Krishnamurthy, (1998) 7 SCC 123;

(ii) Namdeo s/o Kishan Sakhare Vs. Sow. Dwarkabai w/o Jija Sakhare & others, (Second Appeal No.502 of 2009, High Court of Bombay, Bench at Aurangabad, decided on 08.12.2010);

(iii) Pravinchandra Dhanjibhai Kotak Vs. Murli Agro Products Limited, 2005 (5) Bom. C.R.172;

(iv) Ramjas Foundation and another Vs. Union of India and others, (2010) 14 SCC 38;

4. On the other hand, the learned Counsel for respondent Nos.1 to 4 strongly opposed this appeal. He submits that no sufficient cause was shown by the appellants for the inordinate delay of more than four years in filing the appeal. He submits that though the appellants were aware of pendency of the suit, they did not bother to participate in the proceedings of the suit and allowed it to be decreed *ex-parte*. He submits that the appellants had shown total lethargy and utter negligence in contesting the suit that was filed against them by respondent Nos.1 to 4. According to him, the appellants are not entitled to get any discretionary relief in the matter of condonation of delay. The valuable rights accrued to

respondent Nos.1 to 4 because of the inordinate unexplained delay on the part of the appellants, cannot be taken away in the absence of any sufficient cause for the delay, even by awarding costs. In support of this contention, he cited the following judgments:-

(i) Vasant Vithal Gawand Vs. Shantaram Tukaram Gawand (since deceased) by his L.Rs. Prakash Shantaram Gawand and others, 2016 (1) Mh.L.J. 89;

(ii) Gotiram Laxman Pawar Vs. Pravin Babasaheb Borde and others, 2012 (3) Mh.L.J. 464;

(iii) Basawaraj and another Vs. Special Land Acquisition Officer, (2013) 14 SCC 81;

(iv) Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai (2012) 5 SCC 157;

5. Considering the rival contentions raised by the learned Counsel for the appellants and that of respondent nos.1 to 4, the following substantial question of law arises for my determination :-

Whether the appellants have established sufficient cause for delay in filing the appeal before the first appellate Court as contemplated under Section 5 of the Limitation Act ?

6. Admit the appeal. On admission, the learned Counsel for the respondents 1 to 4, who only are contesting respondents, waives notice on their behalf. With the consent of the learned Counsel for the contesting parties, heard the appeal finally.

7. Here a reference may be made to the judgment in the case of **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and ors.,**

2013 STPL (Web) 737 SC, wherein the Hon'ble the Apex Court, after considering various previous judgments, including some of the judgments cited by the learned counsel for the parties, has been pleased to formulate the principles governing the question of condonation of delay. These principles are common in all the judgments cited by the learned counsel for the parties. Therefore, I do not think it proper to consider each of the judgments cited by them individually. It would be sufficient if the principles laid down by the Hon'ble the Apex Court in paragraphs 15 and 16 of the judgment in the case of **Esha Bhattacharjee (supra)** are considered, which read as under:-

15. From the aforesaid authorities the principles that can broadly be culled out are:-

(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are

not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical consideration should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona-fides imputable to a party seeking condonation of delay is significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be

vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessary to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are :-

(a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring

the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(d) The increasing tendency to perceive delay as a non-serious matter and hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters.

8. In the present case, there is positive evidence of appellant No.2 that the deceased Ashruba was looking after the suit. He died in the year 2002.

After his demise, his son Babasaheb was looking after the suit. He also died in the year 2004. His son Shrikant died in the year 2008. Due to the demise of the three members of the family, the entire family was under the shadow of sorrow. Moreover, nobody had ever disturbed their possession over the suit land. The legal heirs of Vithal, who had executed sale deeds in respects of the suit lands in favour of appellant nos. 4 and 5 and the deceased Ahsruba also had assured that the suit would be withdrawn. In the circumstances, the appellants could not pay attention to the suit and ultimately, it came to be decreed *ex-parte*. He deposes that the appellants came to know about the *ex-parte* decree passed in the suit only when they received the notice dated 07.01.2010 from the T.I.L.R. and after receiving that notice, they immediately approached the Advocate and filed the appeal. According to him, the delay was not as a result of any negligence on the part of the appellants. Appellant no.2 has been cross-examined on

behalf of respondent nos.2 to 4. The fact that the appellants came to know about execution of the *ex-parte* decree passed in R.C.S. No.66 of 1998 only after they received the notice dated 07.01.2010 from the T.I.L.R., has not been challenged in his cross-examination. Even the above-mentioned reasons given by appellant no.2 also have not been challenged in his cross-examination. Respondent nos.1 to 4 did not examine any of them to controvert the evidence of appellant no.2. In the circumstances, the evidence of appellant no.2 ought to have been accepted by the learned Judge of the first appellate Court. The evidence of appellant no.2 disclosed sufficient cause for the delay in filing the appeal. However, the learned Judge of the first appellate Court took a hyper-technical view and wrongly discarded the positive and controverted evidence of appellant no.2 without assigning any reason in the impugned order, as to why he was not inclined to believe the evidence of appellant no.2. The impugned order is totally

silent about the evidence appellant no.2. In paragraph 11 of the impugned order without considering the evidence on record, the learned Judge opined that the delay has not at all been explained satisfactorily.

9. In my view, the order passed by the learned Judge of the first appellate Court without at all considering the evidence appellant no.2, is *ex-facie* perverse. The learned Judge of the first appellate Court has not even framed proper points for determination. The points framed by him are as under :-

“(i) Whether petitioners have established that the delay of 4 years 3 months and 16 days is neither intentional nor deliberate ?

(ii) Whether delay is required to be condoned ?

(iii) What order ?”

10. In fact, it was necessary for the learned Judge of the first appellate Court to frame a point, whether the appellants established sufficient cause for the delay in filing the appeal. The said point has not at all been framed by the learned Judge. As such, he misdirected himself and did not consider the case of the appellants in its proper perspective. The negative finding in respect of point no.1 above, would indicate that the learned Judge of the first appellate Court was of the view that the delay was intentional and deliberate. Admittedly, the dispute involved in the suit pertains to immovable property. If the *ex-parte* decree passed against the appellants is executed, they are going to loose possession of the immovable property. If that be so, it will be difficult for one to accept that the appellants intentionally or deliberately would allow the decree to be passed *ex-parte* against them and further deliberately cause delay in filing the appeal.

11. If the facts of the present case are tested on the touch-stone of the afore-mentioned principles laid down by the Hon'ble the Apex Court, I am of the view that this is a fit case, in which a liberal and pragmatic view will have to be taken to do substantial justice to the parties, since the appellants have established sufficient cause for delay in filing the appeal. The order passed by the learned Judge of the first appellate Court being not legal, proper and correct, is liable to be quashed and set aside, of course, subject to payment of costs to respondent nos.1 to 4, so that they also would be duly compensated.

12. In my view, it will be reasonable and proper to direct the appellants to pay Rs.5000/- to respondent nos.1 to 4 as costs.

13. In the result, I pass the following order :-

(i) The appeal is allowed.

- (ii) The impugned order is quashed and set aside.
- (iii) The appellants shall deposit costs of Rs.5,000/- in the first appellate Court, for being paid to respondent nos.1 to 4 within four weeks from today.
- (iv) After the appellants deposit the amount of costs, the first appellate Court shall register the appeal after verifying that it complies with other formalities.
- (v) Civil Application stands disposed of.

[SANGITRAO S. PATIL]
JUDGE