

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 506 OF 2012

Kailas s/o Rajaram Koli,
Age : 34 years, Occu.: Service,
R/o.: Gojedara Nehar,
Gangasagar Apartment, A-1, 105,
Parvat Gram, Tq. Chourasi,
Dist. Surat (Gujrath)

APPELLANT
(Orig.Deft.No.4)

VERSUS

1. Bhaskar Gansing Tayade (Koli),
(Since deceased, through his L.Rs.)

1-A. Smt.Jijabai Bhaskar Tayade,
Age : 50 years, Occu.: Agri.,

1-B. Manohar Bhaskar Tayade,
Age : 36 years, Occu.: Agri.,

1-C. Vinayak Bhaskar Tayade,
Age : 28 years, Occu.: Agri.,

1-D. Sau. Laxmibai Kailas Zalte,
Age : 34 years, Occu.: Household,

1-E. Sau. Sunanda Gorakh Sapkale,
Age : 30 years, Occu.: Household,

1-F. Sau. Chhayabai Yogesh Koli,
Age : 25 yeas, Occu.: Household,

All R/o. at village Kandari,
Tq. Bhusawal, Dist. Jalgaon

2. Smt. Mandabai Ghansing Tayade,
(Since deceased, through her L.Rs.
i.e. R.No.1, 3 to 8 are already
on Record)

3. Eknath Gansing Tayade
(Since deceased, through his L.Rs.)

3-A. Ushabai Eknath Tayade,
Age : 36 years, Occu.: Household,

3-B. Mohan Eknath Tayade,
Age : 8 years, Occu.: Education,

3-C. Dipali Eknath Tayade,
Age : 16 years, Occu.: Education,

3-D. Sapna Eknath Tayade,
Age : 12 years, Occu.: Education,

3-E. Sarla Eknath Tayade,
Age : 10 years, Occu.: Education,

(Nos.3-B to 3-E minors under
Guardian of 3-A Ushabai)

4. Vasant Gansing Tayade,
Age : 56 years, Occu.: Agri.,

5. Jagan Gansing Tayade,
Age: 49 years, Occu.: Agri.,

6. Chagan Gansing Tayade,
(Since deceased, through his L.Rs.)

6-A. Smt. Ashabai Chagan Tayade,
Age : 46 years, Occu.: Household,

6-B. Umakant @ Prakash Chagan Tayade,
Age : 24 years, Occu.: Agri.,

6-C. Premchand @ Raju Chagan Tayade,
Age : 19 years, Occu.: Agri.,

6-D. Bharti Anil Salunke,
Age : 22 years, Occu.: Household,

All r/o. Vilage Kandari,
Tq. Bhusawal, Dist. Jalgaon

7. Suman Deoram Sonawane,
Age: 51 years, Occu.:Household,

8. Vimal Gansing Tayade,
Age : 43 years, Occu.: Household,
All r/o Kondari, Tq. Bhusawal,
Dist. Jalgaon
- Res.Nos.1, 2, 4
to 8 Ori.Plaintiffs)**
9. Narayan Bansi Koli,
(Since deceased, through his L.Rs.)
- 9-A. Jijabai Naayan Tayade,
Age : 46 years, Occu.: Household,
- 9-B. Pandhari Narayan Koli,
Age : 9 years, Occu.: Education,
- 9-C. Mangala Narayan Koli,
Age : 7 years, Occu.: Education,
- 9-D. Savita Narayan Koli,
Age : 5 years, Occu.: Nil,
- (Nos.9-B to 9-D minors under
Guardian of No.9-A Jijabai)
All R/o. Chandsar, Tq. Dharangaon,
Dist. Jalgaon
10. Shantabai Bansi Koli,
Age : 51 years, Occu.: Household,
R/o. Kathora, Tq. Yawal,
Dist. Jalgaon
11. Vasanti Bansi Koli,
Age : 46 years, Occu.: Household,
R/o. Dhanora, Tq. Chopda,
Dist. Jalgaon
12. Santosh Rajaram Koli,
Age: 36 years, Occu.: Service,
R/o. Wed Road, Trilok Society,
Plot No.267, Surat, (Gujrath),
13. Ashabai Pramod Koli,
Age : 43 years, Occu.: Household,
R/o. Gododara Nehar, Gangasagar
Apartment, A-1, 105, Parvatgram,
Tq. Chourasi, Dist. Surat (Gujrath),

14. Sunita Sahebrao Koli,
Age : 38 years, Occu.: Household,
R/o.: Gate, Tq. Raver,
Dist. Jalgaon

**..RESPONDENTS
(Ori.Plaintiffs)
(Nos.9 to 14 added
as Respondents)**

(Legal heirs of R.No.1 and R.No.6 are brought
on record vide Courts order dated 02.08.2016 in
Civil Application No.5253/15)

Mr.Vijay B. Patil, Advocate for the appellant
Mr.R.T. Nagargoje, Advocate for Respondent Nos.1-A to
1F, 3-A to 3-E, 4, 5, 6-A to 6-D, 7 and 8.
Mr. S.A. Ambilwade, Advocate for respondent Nos.9-A to
9-D, 10 to 14

**CORAM : SANGITRAO S. PATIL, J.
DATE : 17th JULY, 2017**

ORAL ORDER :

Heard.

2. **Admit.**

3. With the consent of the learned counsel for the
contesting parties, the Second Appeal is taken up for
final hearing.

4. The appellant (defendant No.4) has challenged
the order dated 21.06.2012 passed in Misc. Civil
Application No.202 of 2011 by the learned District

Judge-1, Jalgaon, whereby his prayer for condonation of delay of 334 days in filing the appeal against the ex-parte judgment and decree dated 27.08.2010 passed in Regular Civil Suit No.33 of 2002, came to be rejected.

5. It is the case of the appellant that he appeared at his own before the trial Court in Regular Civil Suit No. 33 of 2002 and engaged an Advocate on his behalf to contest to suit. He is serving at Surat and therefore, he resides at Surat. He does not reside at village Thorgavhan. The suit summons was not served on him on the address of Thorgavhan. After he engaged an Advocate on his behalf in the suit, he did not receive any communication from the Advocate. Therefore, he was not aware of the ex-parte judgment and decree that was passed by the trial Court on 27.08.2010. When he visited his village on 30.06.2011, he came to know about the ex-parte decision in the suit from the villagers. On the same day, he visited the Court and on inquiry, found that the suit was decreed ex-parte. He immediately filed an application for certified copies of judgment and decree and got them on the same day. He approached his Advocate and instructed to file an appeal. Then after collecting the necessary documents, he filed an appeal

on 19.08.2011 along with the application for condonation of delay. It is stated that the dispute pertains to immovable property in which the appellant has a valuable rights. The delay in filing of appeal is not deliberate or unintentional. In case the delay is not condoned, the appellant would be put to suffer irreparable loss.

6. The learned counsel for the appellant submit that generally the address that is given in the cause-title of the plaint, is reproduced by the Advocate of the parties while filing address purshis in the Court. Accordingly, the address of the appellant as mentioned in the cause-title of the plaint, was recorded in the address purshis that was filed before the trial Court. However, as a matter of fact, the appellant was serving at Surat and his residential address was also that of Surat. Therefore, only because of his Advocate mentioned the address of the appellant as that of Thorgavhan, he cannot be said to be the resident of village Thorgavhan. Therefore, according to him, the learned District Judge was not right in throwing out the case of the appellant merely on the ground that the appellant has given address of village Thorgavhan and not that of Surat. He submits that the appellant had filed the documents to

show that he was residing at Surat. Only because his address was shown of village Thorgavhan in the address memo, the appellant should not have been made to suffer by rejecting his application of condonation of delay. The learned counsel relying on the judgments in the cases of (i) **Sonerao Sadhashivrao Patil and another Vs. Godawaribai w/o Laxmansingh Gahirewar and others** 1999 (2) **Mh.L.J. 272, (ii) Shivaji Shivlingappa Kadge and others Vs. Chief Officer, Municipal Council, Kannad** 2005 (3) **Mh.L.J. 681** and (iii) unreported judgment of this Court in the matter of **Nimba Fakira Suryawanshi Vs. Santosh Traders, Prop. and owner Dilip Gulabchand Chhajed** in **Second Appeal No.169 of 2010** decided on 21.09.2010, submits that the impugned order may be quashed and set aside and delay may be condoned in the interest of justice.

7. As against this, the learned counsel for the contesting respondents (original plaintiffs) submits that the appellant has given false address before the trial Court. Therefore, the learned District Judge has rightly refused the discretionary relief in favour of the appellant. He submits the reasons shown by the appellant for condonation of delay are not satisfactory

and sufficient. Relying on the judgment in the case of **Pundlik Jalam Patil (D) by Lrs. Vs. Exe.Eng.Jalgaon Medium Project and another 2008 (17) SCC 448** and relying on unreported judgment in the case of **Sunil Balak Pal and others Vs. Sudhakar Madhukar Chaudhary and others in Civil Application for Condonation of Delay No.11150 of 2009**, decided by the Gujarat High Court on 06.04.2010 and 29.04.2010, submits that the discretion in the matter of condonation delay cannot be exercised in favour of the party who makes false statements and does not come before the Court with clean hands.

8. Considering the rival contentions of the parties, the following substantial question of law arises for my consideration.

“Whether the appellant has made out a sufficient cause for condonation of delay in filing the appeal, as contemplated under Section 5 of the Indian Limitation Act, 1963 ?”

9. As seen from the judgment of the trial Court the dispute relates to the agricultural land bearing Block No.23 of village Tembhi and the lands bearing Block Nos.135 and 167 of village Nimgaon, Taluka Yawal, District Jalgaon. Indisputedly, the suit summons was not

served on the appellant on his address that was furnished before the trial Court. Even then, the appellant himself appeared before the trial Court. This fact itself indicates that he was very much interested in contesting the suit to vindicate his rights in respect of the suit lands. He engaged an Advocate. However, it is the specific case of the appellant that his Advocate did not inform him about the progress of the suit and because of lack of communication from his advocate, he could not attend the Court for defending himself. When the appellant appears before the trial Court at his own, it cannot be said that he neglected to attend the Court deliberately with any ulterior motive. He was very much interested in contesting the suit. Had he been communicated any date on which, he was supposed to attend the Court and take any steps, he certainly would have attended the Court. In the circumstances, the reason given by the appellant for his absence before the Court on the effective date of hearing i.e. non-communication from his Advocate, appears to be probable and acceptable.

10. The appellant has come with a specific case that he was not made aware of the ex-parte decision of

the suit by anybody. Only on 30.06.2011 when he visited his native place, he came to know about the ex-parte decision of the suit through the villagers. Thereafter, he obtained the certified copies of the judgment and decree and approached his Advocate with instructions to file an appeal. It is, thus, clear that after knowing about the ex-parte decision of the suit, the appellant took prompt steps to approach his advocate with a request to file an appeal. Thus, the delay in filing the appeal, in the above circumstances, cannot be said to deliberate and intentional. The reason shown by the appellant for the delay is quite sufficient and satisfactory.

11. In the cases of **Shivlingappa Kadge and others** (supra) and **Sonerao Sadhashivrao Patil and another** (supra), there is reference of the case of **Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others, AIR 1987 SC 1353**, wherein the following guidelines have been given which are required to be born in mind while interpreting the concept of "sufficient cause":-

"1. Ordinarily, a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained", does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

12. The contention of the learned counsel for the contesting respondents that the appellant has made false statement in respect of his registered address and therefore, in view of the judgment in the case of **Pundlik Jalam Patil (D) by Lrs.** (supra), no discretion can be exercised in favour of the appellant, cannot be accepted. The appellant produced documentary evidence before the District Court, showing that he was serving and residing at Surat. There was no reason for the appellant to make false statement in respect of his address. He had appeared at his own before the trial Court. He was not going to be benefited by showing his wrong address.

13. As seen from paragraph No.7 of the judgment of the learned District Judge, address memo was filed on behalf of defendant Nos. 4 and 5, wherein both of them shown as residents of Thorgavhan, Taluka Raver. It seems that because of the common address shown in the address memo for defendant Nos. 4 and 5, there has been mistake and the appellant (defendant No.4), also came to be shown as the resident of village Thorgavhan alongwith defendant No.5. In my view, this mistake is not so

serious as to deny discretionary relief in favour of the appellant, particularly when he established sufficient cause that because of non-communication of the progress of the suit, he could not attend the Court from Surat. In the circumstances, the judgments cited on behalf of the contesting respondents would not be helpful to deny the discretionary relief to the appellant. On the contrary, in view of the judgments referred to above, cited on behalf of the appellant, liberal view will have to be taken, the delay will have to be condoned and the appellant will have to be extended an opportunity to challenge the legality and correctness of the judgment of the trial Court by filing an appeal before the District Court. No prejudice would be caused to the contesting respondents, if such opportunity is given to the appellant. The contesting respondents would have an opportunity to resist the appeal on merits.

14. The appellant is entitled to get the discretionary relief under Section 5 of the Indian Limitation Act, 1963. However, the appellant will have to be ordered to pay certain amount by way of costs to the contesting respondents. In my view, it will be reasonable and proper to direct the appellant to pay

Rs.3,000/- (Rupees Three Thousand) to the contesting respondents by way of costs. In the result, I pass the following order:-

O R D E R

- (i) The Second Appeal is allowed.
- (ii) The delay in filing the appeal before the District Court is condoned.
- (iii) The appellant shall deposit Rs.3,000/- (Rupees Three Thousand) in the District Court on or before 05.08.2017 for being paid as costs to the contesting respondents.
- (iv) The learned District Judge shall register the appeal on depositing the costs by the appellant and dispose it of according to law.
- (v) Second Appeal is accordingly disposed of.

Sd/-
[**SANGITRAO S. PATIL**]
JUDGE