

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

SECOND APPEAL NO.548/2016

1] Dilip s/o Bander Rao Sarate,
age 48 yrs., occu.agri.,
r/o Wazhar Sarate
Tq. & Dist.Jalna.

2] Anil s/o Bander Rao Sarate,
age 36 yrs., occu.agri.,
r/o Wazhar Sarate
Tq. & Dist.Jalna.

...Appellants..
(Org.deft.nos.2 & 3)

Versus

1] Vinayak s/o Shankarrao Sarate,
age 48 yrs., occu.agri.,
r/o Wazhar Sarate
Tq. & Dist.Jalna.

2] Tatyasaheb s/o Bhaskarrao Sarate,
age 48 yrs., occu.agri.,
r/o Wazhar Sarate
Tq. & Dist.Jalna.

3] Radhabai w/o Kashinathrao Solanke,
age 75 yrs., occu.household,
R/o Kupta, Tq.Selu Dist.Parbhani.

...Respondents..
(No.1 - org.plaintiff
Nos.2 & 3 - org.deft.nos.1 & 4)

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Shri S.Y. Patil, Advocate h/f Shri S.B. Choudhari, Advocate for appellants.

Shri S.S. Patunkar, Advocate for J.P. Legal Associates for respondent nos.1 & 2.

None present for respondent no.3 though served.

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CORAM: SUNIL P. DESHMUKH, J.

DATE: 23.03.2017

ORAL JUDGMENT :

1] Heard learned counsel appearing for the parties.

2] The question that substantially arises for consideration appears to be,

" Whether it can be said that the appellate Court has approached the application for condonation of delay in filing Regular Civil Appeal, as would be required in accordance with position prevailing in respect of delay condonation ? "

3] It is the case of appellants that partition among brothers Vinayak and Bhaskar and their sister Radhabai had taken place around 1992 and accordingly mutation entries were taken in revenue record. Pursuant to partition, the share fallen in favour of sister Radhabai continued to be shown accordingly up to 1997. After death of Bhaskar, in respect of the land which had

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gone to the share of Bhaskar, his son's name viz; Tatyasaheb was recorded.

4] In January, 1997 Radhabai had sold a piece of 10 Acre land from her share in partition to present appellants under a registered sale deed. Since then, appellants have been in possession as owners and possessors. Radhabai sold rest of 15 Acre land to Tatyasaheb in 2006.

5] Subsequently, in 2008 around August, Vinayak instituted proceeding bearing Special Civil Suit No. 89 of 2008 seeking declaration of ownership and possession of the lands dealt with by Radhabai. The suit had been confined to the land which was shown in the name of Radhabai upon partition, on the contention that Radhabai was not member of joint family and was not entitled to receive any share in the ancestral / joint family property. Contending further that there was no partition between plaintiff and defendant no. 4 i.e. Vinayak and Tatyasaheb and that defendants no. 2 and 3 - present appellants were aliens and had not been put in possession pursuant to the sale deed of 1997. It was claimed that Radhabai - defendant no.2 was never in possession. As

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such, injunction had also been sought since she had purportedly executed two sale deeds referred to hereinabove, appellants were arrayed as defendants.

6] The suit came to be decreed under judgment and order dated 24-07-2009 by trial Court directing present appellants to deliver possession of 10 Acre land sold to them as well as defendant no.4 to deliver the land sold to him by Radhabai. The defendants were also restrained from creating third party interest.

7] An appeal bearing Regular Civil Appeal No.126 of 2009 before District Court came to be preferred by Radhabai and Tatyasaheb - defendants no.1 & 4 - respondents no.2 and 3 in this second appeal, posing a challenge to the decree of trial Court. Present appellants were respondents no.2 and 3 in said appeal.

8] During pendency of the appeal, it appears that quite a few events have occurred; a compromise was entered into. The purported settlement was placed on record. Settlement was only between plaintiff and defendant no.4.

9] At that stage, appellants appear to have sensed trouble and it was considered necessary and proper to

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independently file an appeal. As such, present appellants had preferred an appeal alongwith an application for condonation of delay.

10] It appears that the matter had been sent for mediation and a report had come back, mediation having failed in 2012. Subsequently, the appeal came to be dismissed in default of defendant no.1 Radhabai.

11] The delay condonation application had been pending since 2011 and came to be decided on 07-06-2016, which is under challenge in the present second appeal.

12] Learned counsel Mr.S.Y. Patil for the appellants contends, perusal of impugned order would depict that the matter has been very cursorily considered and dealt with, even the record as is subsisting had not been properly scanned and order came to be passed rejecting delay condonation application.

13] Appellants did not file appeal as they carried an impression that as an appeal has been preferred by their vendor, due care would be taken in the same of their interest since defendants no.1 and 4 were purportedly defending Radhabai's actions. It became apparent, no care is being taken to preserve and protect

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their interest, when purported settlement had been placed on record.

14] He submits that the appellate Court laboured under impression, contention taken up in the application for condonation of delay, that the matter would be settled was an understanding given is not borne out from record and such a settlement has not been placed on record. The observations are without reference to the purported compromise which has been placed on record, which had been confined to two and only between relatives viz; the plaintiff and defendant no.4.

15] The Court has not adverted to that, subsequently even defendant no.1 had not further prosecuted the appeal and had let it be dismissed in default. All these circumstances from observations as appearing in the order show that the Court had been oblivious of.

16] He further contends that it ought to have been considered by the Court while the appeal had been pending, present appellants' interest was getting protected and preserved by defendants no.1 and 4 and they had a further chance to defend their case having regard

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to the provisions of Order XLI, Rule 22 of the Code of Civil Procedure and further the Court was empowered to consider, had the hearing been taken place, the entire case anew. All these opportunities were lost by the appellants.

17] The Court has also not noticed while the appellants had immediately sensed trouble to their interest when the purported compromise entered into between the plaintiff and defendant no.4 had been placed on record; and their interest is not being properly getting looked into in the process. As such, they had accordingly applied for delay condonation in preferring appeal.

18] All these aspects do not find appreciation in the impugned order and the Court, instead of taking a liberal view, had viewed the matter from only one angle, and had it looked at it in proper prospective and on merits of the matter and not by technical aspects, the decision would surely had to be in favour of the appellants.

19] Countering aforesaid submissions, Mr. S. S. Patunkar vehemently submits that the tenor of the

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application purports to put entire blame on the plaintiff and defendant no.4. He submits that there is nothing placed on record which would show that the appellants were ever been given any understanding about compromise being entered into. The purported compromise is between plaintiff and defendant no.4. Defendant no.1 had not figured in the same. In the circumstances, the appreciation of the Court that the appellants have not been in a position to show that any understanding had been given to appellants, is not liable to be faulted with. He submits that the plea in this respect is a lame excuse and is devoid of any substance.

20] He further submits that although the appeal had been dismissed in default, yet Radhabai had already moved an application for setting aside said dismissal order. The learned counsel for the appellants, however, points out that even that application has been dismissed also in default.

21] It emerges that the plaintiff is brother of defendant no.1 and uncle of defendant no.4 and that present appellants are not as closely related to them. In the revenue record, title of suit property since 1992

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had been shown in the name of defendant no.1 – Radhabai. A registered transaction parting with the title in respect of 10 Acre land had indeed taken place in 1997. In the mean while even she had parted with rest of the land in her name. It was long after the land had been parted with by sister – Radhabai, the suit had been instituted staking claim to the property.

22] While the suit was decreed, the vendor of the appellants had filed an appeal, which presumably would have taken care of interest of the appellants. However, no sooner the appellants sensed trouble to their interest having regard to the event like settlement, than they had immediately moved and preferred appeal alongwith an application for condonation of delay explaining circumstances under which they had not hitherto preferred appeal. These circumstances to quite some extent appear to be borne out on record since a compromise deed appears to have been lodged in the Court whereunder their interest does not appear to have been taken care of. The appellate Court, as would appear from its observations, despite settlement between plaintiffs and defendant no.4 being placed on record, has considered

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that there is no material placed in this respect.

23] The further events may as well be worthwhile to be referred to that defendant no.1 who was supposed to take care of interest of the appellants and who for some time ostensibly did appear to take such a care, had suddenly become listless and allowed the appeal to be dismissed in default and further it appears that a corrective action had also been for name sake prosecuted and application for setting aside dismissal in default of appeal also came to be dismissed in default. Eventually, it is the appellants are likely to be harmed and damaged and although it appears that they had carried an impression that defendant no.1 is legitimately taking care of their interest and further that they had a chance in the appeal filed by defendant no.1 to defend their case having regard to Order XLI, Rule 22 and Order XLI, Rule 33 of the Code of Civil Procedure, the same as well was getting lost for them under subsequent events.

24] In the circumstances, the decision rendered by the appellate Court without reference to the aspects hereinabove considered and referred to, appears to be deficient and as such calls for a corrective action.

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Even otherwise, looking at the peculiar facts and circumstances involved in the matter, the reasons given by the appellants ought to have been liberally construed as general position for delay condonation stands. Inconvenience in the process caused to other side particularly to the plaintiff can be taken care of by awarding costs.

25] Going by the guidelines as would appear in the decision of the Supreme Court in the case of the *Collector, Land Acquisition, Anantnag v. Mst. Katiji* (**AIR 1987 SC 1353**), it would be expedient to allow the second appeal and set aside the impugned order allowing the application for delay condonation subject to payment of costs of Rs.15,000/- by the appellants to the plaintiff. Substantial question stands answered accordingly. The costs are required to be deposited with the appellate Court within a period of six weeks from today.

26] As such, the second appeal is allowed. The impugned order dated 07-06-2016 passed by learned District Judge-2, Jalna, on Miscellaneous Civil Application No.123 of 2011 stands quashed and set aside. The Miscellaneous Civil Application No.123 of 2011 stands

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allowed subject to payment of costs of Rs.15,000/- within a period of six weeks from today.

27] The appeal preferred by the present appellants against the impugned judgment and decree passed by the trial Court be proceeded with as expeditiously as possible and preferably within a period of nine months after the payment of costs. Costs be allowed to be withdrawn by the plaintiff.

28] The observations made hereinbefore in this judgment are confined to the extent of allowing the present second appeal only and shall not influence and have any efficacy over decision making on merits in the appeal preferred by the appellants.

(SUNIL P. DESHMUKH, J.)