

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 539 of 2017

1. Shobhatai Prabhakar Pakhare,
age 54 years occupation agriculture
R/o Mohiniraj Nagar, Bet Kopargaon,
Kopargaon Taluka Kopargaon District Ahmednagar.
2. Prabhakar Kisan Pakhare,
age 59 years occup. agriculture R/o as above

Appellants No.1 & 2 through General Power of
Attorney holder Rajendra Prabhakar Pakhare,
age 35 years occupation agriculture
R/o Mohiniraj Nagar, bet Kopargaon,
Kopargaon Taluka Kopargaon Dist. Ahmednagar.

... APPELLANTS.

(Original Defts. No. 2 & 1)

VERSUS

1. Wamanrao Appa Gursal (DIED)
Through legal representatives :
 - 1/A. Madhukar S/o Wamanrao Gursal,
age 53 years occupation agriculture
R/o Dauch (Kh) Taluka Kopargaon Dist. Ahmednagar
 - 1/B. Babasaheb S/o Wamanrao Gursal
(Absconding) (Original plaintiffs)
2. Daulat S/o Vithoba Gursal,
age 52 years occupation agriculture
R/o Jeur Kumbhari Tal. Kopargaon Dist. Ahmednagar
3. Appasaheb S/o Darku Gursal,
age 54 years occupation agriculture
R/o Jeur Kumbhari Tal. Kopargaon Dist. Ahmednagar.

(Orig. Defts. No.3 & 4)

...RESPONDENTS

Mr. Subodh P. Shah, Advocates for appellants

Mr V.B. Jagtap, Advocate for respondent No.1/A.

Mr K.B. Jadhav, Advocate for respondent No.2

CORAM : NITIN W. SAMBRE, J.

DATE :29th September, 2017

ORAL ORDER :

The present appellants are defendants No.2 and 1 respectively in Regular Civil Suit No. 177 of 2006 filed by respondents No. 1/A and 1/B, who are original plaintiffs, for possession and permanent injunction.

2. The suit came to be decreed, vide judgment and decree dated 5th May 2012, delivered by the II Joint Civil Judge (Junior Division), Kopergaon, against which Misc. Application was filed by the appellants after a period of 1527 days, alleging exparte decree. The Civil Judge (J.D.), Kopergaon rejected the said application on September 8, 2016.

3. The appellants filed an appeal alongwith Misc. Civil Application No. 34 of 2016 disclosing delay of 1577 days in preferring an appeal on October 1, 2016. The said appeal came to be dismissed on August 4, 2017.

4. It is against this judgment and order of dismissal of appeal as a consequences of refusing to condone delay by the Appellate Court, the present Second Appeal is preferred.

5. It is the case of the present respondents/plaintiffs that they are owners of land Gat No. 143/1 of which on the Western side land Gat Nos. 129/2 and 129/4 owned by the present appellants, so also, land Gat No. 144 on the Northern side is located. The claim is that present appellants encroached on the land of the respondents/plaintiffs to the extent of 9R.

6. The appellants/defendants No.1 and 2 filed their written statement at Exh. 24 alleging that the dimension given by the plaintiffs in the suit in regard to the location of plaintiffs' land and the land of defendants is incorrect. It is claimed that no encroachment was made and dismissal of suit was sought.

7. The Trial Court framed the issues at Exh. 37 and answered all of them in favour of the plaintiffs/respondents, based on the evidence of plaintiffs' witness No.1 Cadesterial Surveyor, P.W.2 plaintiff No.1 at Exh. 66, other documentary evidence viz. map prepared by P.W.1 Exh. 59, etc.

8. It is required to be noted here that initially suit was not for possession, however, it is claimed that present appellants/defendants No.1 and 2 some eight days before filing of the suit, destroyed the boundary marks and tried to encroach on the land of the respondents/plaintiffs, as was permitted under Order below Exh. 50.

9. Though subsequent thereto, Misc. Application was filed for setting aside the said decree at belated stage of 1527 days, said application was rejected on September 8, 2016.

10. At belated stage, an appeal came to be filed alongwith application for condonation of delay, wherein it is claimed that delay of 1527 days be condoned, which application came to be rejected on August 4, 2017.

11. In the aforesaid backdrop, the learned Counsel for the appellants/original defendants No.1 and 2 Shri Shah would invite attention of this Court to the provisions of Section 3 of the Limitation Act. According to him, Section 3 provides for bar of limitation as the proceedings instituted, preferred after prescribed period, is liable to be dismissed even if the defence of limitation was not set up. According to him, even in the present case though in the written statement Exh. 24 the appellants have not set up defence of limitation, it is the duty of the

Court to look into issue of limitation. He would draw attention of this Court to the judgment of the Apex Court in the matter of **State Bank of India Vs. B.S. Agriculture Industries (I)**, reported in (2009) 5 **Supreme Court Cases 121**, particularly paragraphs No. 12, 13 and 14, so as to canvass that the limitation being a jurisdictional fact, need not be pleaded and it is for the Court to determine whether suit is barred by limitation irrespective of such plea being not raised by the parties. He would then urge that in the present case, Article 64 of the Limitation Act is attracted, wherein limitation of 12 years is prescribed from the date of dispossession . He submits that since the date of dispossession is not brought on record including that of earlier dispossession, appeal needs to be entertained.

12. In addition, learned Counsel Shri Shaha would urge that the Lawyer, who was representing interest of the present appellants, was appointed in the District Judiciary, and as such, appellant was not aware of the procedure to be followed in such an eventuality. According to him, it is only after appropriate advice given by Lawyer in execution proceedings viz. Regular Darkhast No. 35 of 2013 the appellant has initiated proceedings of appeal. He would invite attention to Exh. 34 of the execution proceedings for that purpose, a *Vakalatnama* signed by the appellants engaging Lawyer. In addition, he would urge that the appellant being layman, rustic female, residing in the village, is not

aware of the Court proceedings, and as such, the Court below has failed to appreciate the same. So as to substantiate his contentions, he has invited attention of this Court to the judgment of the Apex Court in the matter of **N. Balakrishnan Vs. M. Krishnamurthy** reported in (1998) 7 **Supreme Court Cases 123**, particularly paragraphs 8, 10, 12 and 13. He submits that delay condonation is a discretionary relief and the Court below has failed to adhere to the guidelines delivered in aforesaid judgment. According to him, as such, the Appellate Court committed an error. He urged that even if First Appeal is dismissed, this Court can appreciate question of law in the Second Appeal, based on the findings recoded by the learned Trial Court.

13. Per contra, the learned Counsel for the respondents opposed the claim. He would invite attention of this Court to the amended plaint, particularly, amended paragraphs No. 2 and 4 of pleadings made in the plaint. He submits that it is specifically stated in paragraphs 2 and 4 of the plaint as regards when the appellants have tried to take possession of the suit property and pursuant to the act of the appellants, the plaint was required to be amended incorporating plea for dispossession. He submits that a specific statement is made that by breaking open boundary marks, appellants are trying to encroach on the suit property, and as such, the prayer for possession was incorporated.

He specifically relies upon the cause of action as occurred, just before eight days of filing of the suit. He would then urge that plea as was raised by the respondents/plaintiffs in the plaint was established through the evidence of the Cadesterial Surveyor. Upon measurement, it was noticed that there was encroachment to the extent of 9R. He would urge that evidence of respective parties so appreciated, as present appellants have failed to cross-examine witnesses of the plaintiffs or lead any oral or documentary evidence. In addition, he would invite attention of this Court to the order of the Appellate Court refusing to condone delay. According to him, the evidence of the appellant before the First Appellate Court at Exh. 23 and her witness Rajendra at Exh. 24 speaks voluminous about conduct of the appellant after her Advocate was appointed in the District Judiciary. According to him, the appellant in categorical terms admitted about knowledge of such appointment, the invitation to Advocate for felicitation at the hands of husband of appellant, the visit of said Advocate after becoming member of District Judiciary being relative and inquiry made by said officer about the status of the litigation. According to him, there was sufficient knowledge to the appellant about the status of her Lawyer and steps to be taken for engagement of new Lawyer. In addition, he would urge that the appellant has admitted about pendency of three other litigations of her family in the Court. He specifically relies upon such admissions given by

the appellant, which according to him falsifies grounds justifying the delay. He would then urge that notice of the Regular Darkhast was served on the present appellants, which was initiated in 2013 and appellants for the first time engaged a Lawyer on 3rd October 2013 vide Exh. 12, change of another Advocate, vide Exh. 19 on 30th June 2015 and further change of Lawyer in Darkhast, vide Exh. 34, on October 4, 2016. According to him, the same speaks of knowledge to the appellants about the decree being passed against them. He prayed for dismissal of the appeal.

14. In the aforesaid background, if the rival claim of the respondent is ascertained, it is required to be noted that the appellants have raised a plea of limitation. According to him, the respondent/plaintiff has failed to demonstrate that there was earlier dispossession and the date on which respondent/plaintiff was dispossessed. If said submissions are analysed in the backdrop of the contents of paragraph 2 and paragraph 4 of the plaint, which demonstrate cause of action and other pleadings, it could be easily inferred that the event of dispossession, just eight days before filing of the suit, took place which was a basis for suit.

15. Apart from above, it is to be noted that before the learned

Trial Court, the present appellants filed their written statement vide Exh. 24, however, had chosen not to cross-examine the plaintiff or his witnesses or to produce any documentary evidence to falsify claim of the plaintiff. As such, it could be easily inferred that the plea of respondent/plaintiff about possession and dispossession as is raised in the plaint, was very much established through the pleadings, oral and documentary evidence. Apart from above, evidence of P.W.1 Cadesterial Surveyor went unchallenged, as such, the factum of encroachment was proved on merits.

16. In the wake of above, the claim of the appellants that the suit was time barred, is liable to be rejected. It is also required to be noted that the suit was filed immediately after waiting for eight days qua conduct of present appellants of destroying boundary and encroaching upon land of the plaintiff. As such, the suit has to be held within a period of 12 years pursuant to the provisions of Article 64 of the Limitation Act.

17. In view of above, the issue of limitation is answered against present appellants.

18. This takes me to the next submission of the appellants as to whether the delay as is claimed before the Court below of 1577 days

was properly explained or not. The observations made by the lower Appellate Court while rejecting application for condonation of delay is required to be appreciated. The appellant has examined herself in support of plea for condonation of delay at Exh. 23, appointment of Advocate, who was later on appointed in the District Judiciary. She in clear terms in her cross-examination has admitted that said Advocate was her relative and her husband had felicitated him for being selected and appointed as a Judge by inviting him at his residence for felicitation. It is also brought on record that there are other three litigations of the appellants pending in the Court, from which it can be inferred that appellant was aware about Court procedure and she is not rustic villager claiming absence of knowledge about Court proceedings. She in categorical terms in her cross-examination has admitted that whenever said Advocate used to visit her being her relative, he used to inquire about the status of this case. All these admissions given in cross-examination speak of the fact that the appellant was well aware of the fact that she has to engage a Lawyer so as to replace her earlier Lawyer and pursue the litigation. Apart from above, it is pertinent to mention here that after having received the summons in Regular Darkhast - Execution Proceedings in 2013 the appellant has engaged services of Lawyer on October 3, 2013 and twice thereafter changed her Advocate, from which her knowledge about Court proceedings can be inferred. In

the aforesaid backdrop, the claim of the appellants that the delay was properly explained and this Court is duty bound to decide the claim of the appellants on merit, instead of rejecting, does not hold any substance.

19. In the backdrop of above, support drawn by the learned Counsel for the appellants from the judgment of the Apex Court, particularly, in the matter of **State Bank of India**, cited supra, on the issue of duty of the Court to examine the issue of limitation and on the judgment of Apex Court in the matter of **N. Balakrishnan**, cited supra, on the issue of liberal approach of the Court in condoning delay, will be of hardly any assistance.

20. As consequences of above, Second Appeal fails and stands dismissed.

21. Needless to say that interim relief, if any granted, stood vacated.

22. In the facts and circumstances of the case, costs deposited by the appellants, be returned to appellants.

(**NITIN W. SAMBRE, J.**)

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