

(1)

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

**CIVIL APPLICATION NO. 13949 OF 2013
IN
SECOND APPEAL (ST.) NO. 27960 OF 2013
WITH
CIVIL APPLICATION NO. 13950 OF 2013**

1. Bhivsan Yamaji Kamble; (Died)
1. Sitaram s/o Bhivsan Kamble (Died)
Through L.Rs.
- 1A) Jijabai w/o Sitaram Kamble,
Age: 66 years, Occu: Agri.
- 1B) Ramesh s/o Sitaram Kamble,
Age: 38 years, Occu: Agri.
- 1C) Kamalbai w/o Baburao Solankar,
Age: 38 years, Occu: Agri.
- 1D) Meera w/o Uttam Jarhad,
Age: 31 years, Occu: Agri.
- 1E) Sanjay s/o Sitaram Kamble,
Age: 26 years, Occu: Agri.
2. Eknath s/o Bhivsan Kamble,
Age: 46 years, Occu: Agri.
3. Saluba s/o Bhivsan Kamble,
Age: 43 years, Occu: Agri.
- All R/o. Kanchanwadi,
Tq. and Dist. Aurangabad
4. Sow. Sunita w/o Vijay Vitkar,
Age: 27 years, Occu: Household,
R/o Manjara, Tq. Rahuri,
Dist. Ahmednagar

VERSUS

Pandurang s/o Eknath Patil,
Age: 68 years, Occu: Agri.,
R/o. 12, Anant Housing Society,
Opp. M.G. College, Jalgaon,
Dist. Jalgaon

**..APPLICANTS/APPELLANTS
(Orig. defts.)**

..RESPONDENT(Orig.Plntf.)

(2)

Mr V. D. Hon, Senior Advocate i/b V. B. Jagtap and N. D. Sonawane,
Advocates for applicants/applicants;
Mr S. T. Shelke, Advocate for respondent

CORAM : N.W. SAMBRE, J.

DATE : 23rd June, 2017

ORAL ORDER

Heard.

2. The present applicant/appellant No.1 was defendant in Special Civil Suit No. 291 of 1987, filed before learned 2nd Joint Civil Judge Senior Division, Aurangabad for specific performance of contract i.e execution of registered sale deed in favour of the plaintiff, pertaining to suit property being land Gat No. 45 to the extent of 2.5 acres situated at Kanchanwadi, Tq. & Dist. Aurangabad and for possession of the said portion.

3. The learned Civil Judge Senior Division, vide judgment and decree dated 18th December, 1991 dismissed the suit of respondent-plaintiff, which prompted him to prefer Regular Civil Appeal No. 512 of 2000 before the learned District Judge-1, Aurangabad, which Court vide judgment and decree dated 20th June, 2008 allowed the appeal, decreed the suit for specific performance and directed the execution of sale deed, handing over of possession. Feeling aggrieved thereby, the original defendant preferred this second appeal along with the application for condonation of delay justifying the delay of 1838 days.

(3)

4. Before the present application for condonation of delay was filed, it is required to take note of the fact that the lower appellate Court decreed the suit of original plaintiff i.e. respondent herein on 20th June, 2008, pursuant to which the respondent deposited amount of consideration as ordered on 7th July, 2008 and the sale deed of the suit property was executed on 7th March, 2013 in favour of the respondent along with handing over the possession. The property as such stood mutated in the name of the respondent plaintiff.

5. In the aforesaid background, Mr Hon, learned Senior Counsel for the applicants would invite attention of this Court to the fact that the original defendant, namely, Bhivsen expired on 14th February, 2005 and his legal heirs were brought on record. According to him, the present applicants had engaged service of lawyer so as to represent their interest in the aforesaid appeal. Without any notice or intimation said lawyer has informed the appellate Court 'no instructions' to work out the matter. According to Mr Hon, in view of the provisions of Order III Rule 4 of the Code of Civil Procedure and Section 34 of the Advocates Act, such 'no instructions pursis', without any notice to the applicants, should not have been entertained and acted upon by the lower appellate Court. Hence, the appellate Court has committed an error by accepting such pursis and decreeing the suit without hearing present applicants-defendants.

6. So as to substantiate his contention, Mr Hon would rely upon the judgment of this Court in the matter of **Govind Bhagoji Kamable & ors.**

(4)

Vs. Sadu Bapu Kamable & ors, reported in **2004 (6) BCR 552** and another judgment in the matter of **Dattusing Giridharsing Rajput (Thakur) Vs. Bhagwant Devasthan & ors.**, reported in **2005 (2) BCR 290**. In addition, Mr Hon would urge that for inaction of a lawyer, party should not be made to suffer and would draw support from the judgment of Apex Court in the matter of **Rafiq & anr. vs. Munshilal & anr.** reported in **AIR 1981 Supreme Court 1400(1)**. The learned Senior Counsel would then urge that the date of the knowledge to the present applicants about the judgment and decree of the lower appellate Court is required to be appreciated. According to him, in fact there is no delay. For the first time the applicants came to know about the judgment and decree when applicant No.2 visited to the Talathi of Kanchanwadi for some other work on 16th June, 2013, when he got knowledge about the judgment .

7. According to him, the delay of 1838 days is bona fide and needs to be condoned and the matter deserves to be remitted back to the first appellate Court for deciding it afresh by offering an opportunity of hearing.

8. Per contra, Mr Shelke, learned Counsel appearing on behalf of the respondent would submit that all the applicants had not appeared in appeal before the lower appellate Court. According to him, the original respondent Nos. 1A-Jijabai, 1B-Ramesh, 1C-Kamalbai, 1D-Meera, 1E-Sanjay, respondent No. 4 Sunita have filed their appearances. Rest of the applicants have chosen not to appear before the lower appellate Court and as such they have no cause before this Court to come out with a case that

(5)

the lawyer had not issued notice to them. He would urge that pursuant to the decree passed by the lower appellate Court on 20th June, 2008, the present respondent deposited the amount towards the consideration as ordered on 7th July, 2008 and thereafter got executed the sale deed in his favour through the Court Commissioner on 7th March, 2013 in the execution proceedings. According to him, even in the execution proceedings the present applicants were served, however, they have chosen not to appear in the execution proceedings. According to him, it is only after the sale deed was executed and the mutation entry was carried out, the present applicants have chosen to file appeal by way of afterthought. He claimed that the applicants lack bona fides in preferring application as nothing is left to be decided in the appeal now as the decree is already executed. As such, the application be rejected.

9. Having considered the rival submissions, at the outset judicial note is required to be taken of the fact that judgment and decree questioned in the second appeal was passed on 20th June, 2008, is already executed, as there is sale deed in favour of the present respondent-plaintiff executed by the Court Commissioner after the plaintiff deposited entire consideration. Another aspect of which this Court must take judicial note of the fact that all the appellants, in spite of service did not tender their appearances before the lower appellate Court. It is to be noted that respondent No.2 Eknath and respondent No.3 Saluba had not filed their appearance before the lower appellate Court and as such there is no occasion for these appellants in the first appeal and also before this Court being appellants to

(6)

prefer the application for condonation of delay on the ground that the lawyer had not issued intimation to them.

10. Though Mr Hon has drawn support from the provisions of Order XLI, Rule 30 sub-clause 1 of the Code of Civil Procedure that it was the duty of the Court to issue notice to the applicants No. 1A to 1E and other applicants about hearing of the application, it is to be noted that the Roznama sheet of the lower appellate Court, particularly of 16th and 20th June, 2008 speak of the presence of their lawyer before the Court. The dates i.e. 16th is when the matter was finally heard and 20th when the judgment of the appellate Court was pronounced against the applicants. Apart from above, though the judgment and decree of the lower appellate Court was passed on 20th June, 2008, the inaction on the part of the applicants is writ large, as from 2008 to 2013, the present applicants have neither chosen to contact their lawyer, nor attended the Court proceedings in appeal which was pending against them. Appellants without any justification have come out with a case by blaming their own lawyer. It is an admitted position that the same lawyer had represented the applicants before the Trial Court and it is not that the applicants were unaware about availability of the lawyer either at his office or in the Court premises. Apart from above, the applicants are claiming in the application that they came to know about the judgment and decree of the lower appellate Court on 16th September, 2013, when applicant No.2 visited the Talathi for some other work. When the aforesaid fact was known to the applicants, neither the applicant No.2 nor the other applicants have chosen to take any steps

(7)

against the lawyer for his default and have started blaming him for his inaction. Though the support is drawn by Mr Hon, learned Senior Counsel by relying upon the judgment of the Apex Court in the matter of **N. Balakrishnan vs. M. Krishnamurthy**, reported in **AIR 1998 Supreme Court 322**, however, in paragraph No.14 of the said judgment speaks of initiation of proceedings against the lawyer of the concerned party for the alleged default. In the present case, neither a communication is addressed to the lawyer calling upon him about his default nor any notice or proceedings are initiated. As such, the said judgment will be of hardly any assistance.

11. In my opinion, Mr Shelke, learned Counsel for the respondent has rightly invited attention of this Court to the judgment of this Court in the matter of **Rajendra Namdeorao Akre vs. Rajkumar Bhalerao Balbudhe & anr.**, reported in **2016 (1) Mh.L.J. 184**, particularly paragraph Nos. 10 and 11. Apart from above, the Apex Court in the matter of **P. K Ramachandran vs. State of Kerala & anr.**, reported in **AIR 1998 Supreme Court 2276**, in paragraph No. 6 of the judgment has observed as follow:-

“6. Law of limitation may harshly effect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the delay cannot be sustained. This appeal, therefore, succeeds and the impugned order is set aside.

(8)

Consequently, the application for condonation of delay filed in the High Court would stand rejected and the Miscellaneous First Appeal shall stand dismissed as barred by time. No costs. ”

12. In addition, this Court must draw the support from the judgment of the Apex Court in the matter of **Basawaraj & anr. Vs. Special Land Acquisition Officer**, reported in **(2013) 14 Supreme Court Cases 81**.

13. In the aforesaid background, though in the matter of condonation of delay, the general statement of law speaks of a liberal approach, however, in the factual background, as is narrated herein above, particularly the conduct of the applicants and the fact that the decree under challenge is already executed, in my opinion, no case for condonation of delay is made out. The application, as such, fails, stands rejected. In view thereof, pending civil application stands disposed of.

14. Though request for continuation of ad interim relief ordered by this Court is opposed by Mr Shelke, which is in the nature of not to deal with the suit property in any manner, in my opinion, in the interest of justice, it will be appropriate to continue said ad interim relief for a period of six weeks from today and accordingly the same is continued.

(N.W. SAMBRE, J.)