

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

SECOND APPEAL NO. 769 OF 2017
WITH
CIVIL APPLICATION NO.14890 OF 2017
IN
SECOND APPEAL NO.769 OF 2017

BAPURAO SHIVAJI SURYAWANSHI (DIED) LRS KONDABAI AND OTHERS
VERSUS
SHANKAR SHAHUJI SURYAWANSHI

...
Advocate for the Appellants : Shri Kadam Vikram S..
Advocate for the Respondent : Shri Amit A. Mukhedkar.
...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 19th December, 2017

Per Court:

1 By the consent of the parties, since the sole Respondent has already appeared in the matter, the Second Appeal is taken up for disposal at admission stage. Consequentially, the Civil Application is disposed of as being infructuous.

2 I have considered the strenuous submissions of Shri Kadam, learned Advocate for the Appellants/ original Defendants and Shri Mukhedkar, learned Advocate for the sole Respondent/ original Plaintiff.

3 Shri Kadam has placed reliance upon the following judgments of this Court:-

- (a) Smt.Shewantabai wd/o Kashinath Kumbhare (D) and others vs. Purushottam s/o Mahadeorao Ambatkar, 2015 (7) ALL MR 425.
- (b) Atmaram s/o Gauba Chavan and others vs. Kumarika Murlidhar Dalvi, Second Appeal No.24/2014 (Aurangabad Bench), judgment dated 23.11.2016.

4 Shri Mukhedkar has relied upon the following judgment of this Court:-

- (a) Mahendara P. Shah vs. Gurupreet Kamaljeet and others, 2015 (5) Mh.L.J. 207.

5 The substantial question of law involved in this appeal pertaining to the delay caused, is as to "*whether, the court dealing with the application for condonation of delay should adopt a pragmatic approach or take a pedantic view*".

6 There is no dispute that the Trial Court had decreed Regular Civil Suit No.555/2003 by judgment dated 07.09.2015. These Appellants moved Miscellaneous RJE No.164/2016, while filing the regular civil appeal for challenging the judgment and decree of the Trial Court, for condonation of delay. The delay caused in filing the regular civil appeal was of about 461 days. All the Appellants are the original Defendants

before the Trial Court. By the impugned order, the first Appellate Court has rejected the application and has declined to condone the delay for the reasons specifically recorded in paragraphs 7, 8 and 9 as has been pointed out by Shri Mukhedkar.

7 In the matter of Mahendara P. Shah (supra) relied upon by the Respondent/ original Plaintiff, where the delay was of about 2200 days, it is observed in paragraph 15 as under:-

"15. In case of *Brijesh Kumar (supra)*, the Apex Court has observed that while exercising discretion by the Court, condition precedent, namely, sufficient cause for delay must be satisfactorily and convincingly explained. Inordinate delay caused by inaction or negligence lacking bone fides (sic "bona fides") would disentitle claimant from protection under Section 5 of the Limitation Act, 1963. "

8 The Honourable Supreme Court in the matter of the *Collector, Land Acquisition, Anantnag v/s Mst.Katiji*, **AIR 1987 SC 1353**, while dealing with the issue of delay, has observed in paragraph 3 as under:-

"3. The legislature has conferred the power to condone delay by enacting Section 51 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on merits. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not

appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

"Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

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 legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that

it was the State which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even handed manner. There is no warrant for according a stepmotherly treatment when the State is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore, set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides."

9 The Honourable Supreme Court, in the matter of *Esha Bhattacharjee v/s Managing Committee of Raghunathpur Nafar Academy*, **(2013) 12 SCC 649**, has culled out certain principles for considering the applications for condonation of delay and which can be summarized as

follows:-

- (a) Whether, laches can be attributed to the conduct of the applicant?
- (b) Whether, the delay caused is deliberate or inordinate?
- (c) Whether, refusal to condone the delay would close the doors of litigation on the applicant and would leave him remedy-less for challenging the judgment and decree of the court below?
- (d) Whether, costs can be imposed to reduce the rigours of litigation being suffered by the non-applicants?

10 In the instant case, the suit preferred by the Plaintiff was for partition and separate possession with regard to the immovable properties. Delay caused in filing the appeal was of 461 days. The reason cited by the Petitioners was that the wife of Defendant No.1/2 was suffering from cancer and was admitted in a hospital and he was required to take care of her health and ensure that she would get proper treatment. Though all medical papers are not placed on record, there are certain documents which indicate that she was suffering from cancer.

11 Shri Mukhedkar has rightly contended that out of several defendants, it was only with regard to Defendant No.1/2 that his wife was quite unwell. The certified copy of the judgment and decree of the Trial

Court was obtained by one of the Defendants on 30.09.2016. The Regular Civil Appeal was filed by the Defendants on 13.12.2016. In this backdrop, other defendants could have preferred the regular civil appeal and could have obtained the signature of Defendant No.1/2.

12 This argument is countered by the Appellants contending that Defendant No.1/2 was the "Karta" of the family and he alone was looking after the entire litigation.

13 Notwithstanding the above, it cannot be ignored that in the matters involving the issue of partition and separate possession of the immovable properties, a valuable right of appeal would be lost if the delay is not condoned. A pragmatic view and practicable approach has to be adopted by the courts dealing with such applications keeping in view the facts as are recorded above. These Appellants/ Defendants would have no remedy at all if the delay of 461 days is not condoned and more so, when the said delay cannot be branded as being inordinate. Imposition of costs would suffice for reducing the rigours of litigation suffered by the Respondent/ Plaintiff.

14 In the above backdrop, in the alternative, the learned Advocate for the Respondent prays that heavy costs may be imposed on these Appellants and Rs.2000/- may be donated to the High Court Legal Services Sub Committee, Aurangabad Bench, Aurangabad.

15 Considering the above, this Second Appeal is partly allowed.

The substantial question framed, stands answered. The impugned order dated 17.06.2017 is quashed and set aside. Miscellaneous RJE No.164/2016 is allowed.

16 Delay of 461 days is condoned by directing the Appellants to deposit costs of Rs.20,000/- (Rupees Twenty Thousand) before the first Appellate Court on or before 15.01.2018 and the Respondent/ original Plaintiff shall withdraw the said amount without conditions. The Appellants shall further deposit an amount of Rs.2,000/- (Rupees Two Thousand) with the High Court Legal Services Sub Committee, Aurangabad Bench, Aurangabad on or before 15.01.2018 and produce a copy of this receipt before the Appellate Court for evidencing the deposit.

17 The litigating sides shall appear before the first Appellate Court on 15.01.2018 and copy of this order shall be placed on record of the Appellate Court by the Appellants.

18 Needless to state, all contentions of the litigating sides with regard to the regular civil appeal are kept open.

19 If the Appellants fail to deposit the amounts as directed above, this order shall stand recalled and then, the Second Appeal shall stand dismissed.