

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 527 OF 2014
IN
REJECTED CASE NO. 852 OF 2012

Mahadeo Dattu Mali

... Applicant

Versus

Subhash Mahadeo Mali & Ors.

... Respondents

Mr. A.B. Tajane for the Applicant.

Mr. Umesh Mankapure for Respondent Nos. 1 and 2.

Mr. Akshay Kulkarni i/b.Mr. A.M. Kulkarni for Respondent No. 10.

CORAM : S.J. KATHAWALLA, J.
DATED : 23RD JUNE, 2017

P.C.:

1. The above Civil Application is taken out by the Applicant seeking restoration of Second Appeal (ST) No. 28792 of 2010 and Civil Application No. 1876 of 2010, which were dismissed for non prosecution by an Order dated 14th March, 2012. The Applicant has also prayed that delay of one year and 346 days in filing the present Civil Application be condoned.

2. The Applicant - Mahadeo Dattu Mali is original Defendant No. 1 in Regular Civil Suit No. 1 of 1992 filed by the original Plaintiffs - Subhas Mahadev Mali and Rahibai Mahadev Mali (Respondent Nos. 1 and 2) for partition and possession. The said Suit filed by the original Plaintiffs was allowed by a Judgment and Decree of the

Trial Court dated 15th November, 1997. By the said Judgment and Decree, the Trial Court also rejected the claim of Defendant No. 8 that he was bonafide purchaser of a part of the Suit property for value without notice, and directed cancellation of the Sale Deed of 1998 executed in his favour.

3. On 5th January, 1998 Defendant No. 1 filed Regular Civil Appeal No. 26 of 1998 challenging the Decree dated 15th November, 1997. Thereafter, the original Defendant Nos. 5 to 7 also filed Appeal challenging the Decree dated 15th November, 1997. All the Appeals including the Appeal filed by the Applicant came to be dismissed on 6th February, 2009. However, the Appeal filed by the original Respondent No. 8 was allowed and the Order cancelling the Sale Deed of 1998 was set aside.

4. Being aggrieved by the order passed by the First Appellate Court dismissing his Appeal, the Applicant filed Second Appeal being (ST) No. 28792 of 2010 before this Court along with Civil Application No. 1876 of 2010 seeking condonation of delay of 568 days in filing the Second Appeal. Since the Advocate for the Applicant repeatedly failed to remain present, the Civil Application No. 1876 of 2010 seeking condonation of delay in filing Second Appeal (ST) No. 28972 of 2010 was dismissed on 14th March, 2012. As set out hereinabove, the present Civil Application is filed by the Applicant seeking restoration of Civil Application No. 1876 of 2010 as well as the Second Appeal and for condonation of delay in filing the present Application.

5. According to the Applicant, he was never informed by his Advocate that the

Civil Application No. 1876 of 2010 and the Second Appeal (ST) No. 28792 of 2010 filed on his behalf were dismissed on 14th March, 2012. He came to know about this fact only in the last week of December-2012 from one of the villagers, who informed him that some Order against him was passed by the High Court. Thereafter, the Applicant sent his nephew to the residence of the Advocate for the Applicant at Baludi, Taluka - Sangola, District - Solapur in the first week of January-2013 to enquire about the matter. The Advocate for the Applicant returned the papers to the nephew of the Applicant. According to the Applicant, he is an illiterate person not having any knowledge of law. Due to poverty and illiteracy, he could not approach the Advocate representing him before the High Court. Again, since certain settlement talks were being held, he was hopeful that the matter will get settled between the family members.

6. The Applicant has submitted that though some steps were taken by the Respondents in execution, since he is not literate he was unable to give any information about the same to his Advocate. The Applicant has also submitted that the daughter of his sister died on 27th December, 2013, because of which he could not approach this Court immediately. It is only in January-2014, when he visited one of his relatives at Pandharpur and informed him as to what had transpired, that the said relative suggested the name of the present Advocate at Mumbai. Thereafter, the Applicant arranged funds required for filing the present proceedings and handed over the papers to his present Advocate on 20th February, 2014. The Advocate for the

Applicant on 25th February, 2014 applied for certified copies of the proceedings / orders, which were received only on 6th March, 2014. Thereafter, the present Application is filed. The Applicant has in this Application also stated that from the very same order, one of the Defendants namely Shri Dhurpa had filed Second Appeal (ST) No. 21378 of 2010 and had taken out Civil Application No. 1690 of 2010 seeking condonation of delay. By an Order dated 25th June, 2012 the said Civil Application was rejected on merits. A Review Petition was filed, which too was dismissed.

7. An Additional Affidavit is also filed on behalf of the Applicant in support of the Civil Application.

8. Defendant Nos. 1 and 2 and Defendant No. 10 have filed their respective Affidavits in Reply. They have opposed the Civil Application on the ground that the reasons stated by the Applicant are inadequate and the Second Appeal as well as the Civil Application were dismissed because the Applicant had slept over his rights. It is submitted that the Advocate who was earlier appearing for the Applicant, had also filed the Second Appeal for Shri Dhurpa. The Application filed by Shri Dhurpa seeking condonation of delay in filing the Second Appeal was dismissed on merits. The reasons given in the said Civil Application are identical to the reasons given in the Civil Application filed by the Applicant seeking condonation of delay in filing the Second Appeal, which has been dismissed for want of prosecution.

9. I have considered the submissions advanced on behalf of the Applicant as well as the Respondents, who have appeared before the Court and / or who have filed

their Affidavits before the Court. I have no doubt that the Applicant is poor and is not literate. He has stated that he came to know about the dismissal of the Civil Application taken out for condonation of delay in filing the Second Appeal only in December-2012. He has also pointed out that since he is not literate, he did not understand that the execution proceedings, had commenced. In between, his sister's daughter also passed away and it is only in 2014 when he visited one of his relatives at Pandharpur and informed him what had transpired, that the relative suggested that he should contact the present Advocate. He contacted his present Advocate only after he could arrange the required funds. Again after he contacted his present Advocate at Mumbai, the Advocate applied and obtained certified copies of the Orders. Thereafter his Advocate immediately filed the present Civil Application. I am therefore satisfied that sufficient grounds are made out for condonation of delay in filing the above Civil Application for reliefs sought therein. In my view, an opportunity should be given to the Applicant to make his submissions on merits in Civil Application No. 1876 of 2010, seeking condonation of delay in filing the Second Appeal, which Application is dismissed for want of prosecution on 14th March, 2012. In view thereof, I pass the following order :

- i. The Order dated 14th March, 2012 is set aside and the Second Appeal (ST) No. 28792 of 2010 along with Civil Application No. 1876 of 2010 are restored to file. It is clarified that Civil Application No. 1876 of 2010 shall be decided on its own merits, and the Applicant shall not be allowed to contend that the same ought to be

allowed in view of this Order.

- ii. All contentions of the parties are kept open.
- iii. The above Civil Application is accordingly disposed off.

(S.J.KATHAWALLA, J.)