

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

SECOND APPEAL NO.226 OF 2016

Ramrao s/o Shamrao Choudhary (Dead)
Thr. LRs. Mirabai wd/o Ramrao Choudhary and ors. ... Appellants

-vs-

Mandakini @ Indutai w/o Rambhau Kolhe and ors. ... Respondents.

Shri A. R. Patil, Advocate for appellants.
Shri Prashant Gode, Advocate for respondents.

CORAM : A.S.CHANDURKAR, J.
DATE : AUGUST 22, 2017

P.C.

The learned counsel for the parties have been heard on the following substantial question of law :

“ Whether the Appellate Court was justified in the facts of the present case in rejecting the application for condonation of delay ? ”

2. The appellants are the legal heirs of the original defendant against whom the respondent No.1 had filed suit for declaration that the Will deed dated 28/06/1974 was null and void with a further prayer for partition and separate possession. This suit was decreed ex-parte on 07/12/1982. The legal heirs of the defendant on getting knowledge of this decree filed a further appeal along with an

application for condonation of delay on 10/08/2015. The application for condoning delay was opposed by the original plaintiff. By the impugned order this application has been rejected. Hence this appeal.

3. Shri A. R. Patil, learned counsel for the appellants submitted that the decree passed by the trial Court was an *ex-parte* decree. As per the said preliminary decree passed by the trial Court, till the date the plaintiff was in possession the defendants had the right to challenge the said decree. According to him the defendants continued in possession till filing of the appeal and therefore it could not be said that there was delay on their part in filing the appeal. Only after the Tahsildar issued notice in the execution proceedings that the legal heirs got knowledge and they filed the appeal. It was submitted that considering the nature of dispute a liberal approach needs to be adopted and by condoning the delay, an opportunity to contest the proceedings on merits deserves to be granted. In that regard the learned counsel placed reliance on the following decisions :

- (i) *Roshanlal Kuthalia and ors. vs. R. b. Mohan Singh Oberoi* (1975) 4 SCC 628.
- (ii) *N. Balakrishnan vs. M. Krishnamurthy* (1998) 7 SCC 123.
- (iii) *Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nagar Academy and ors.* (2013) 12 SCC 649.
- (iv) *M. P. Steel Corporation vs. Commissioner of Central Excise* (2015) 7 SCC 58.

4. Shri P. Gode, learned counsel for the respondent No.1 supported the impugned order. According to him, the defendant and after his death the legal heirs were duly noticed in the execution proceedings and they had taken various steps to contest the same. The legal heirs had full knowledge about the decree passed by the trial Court but they did not take steps to challenge the same for a period of almost thirty two years. He referred to various documents on record to indicate participation and knowledge of the defendants of the decree passed by the trial Court. He further submitted that these facts were not mentioned in the application for condonation of delay.

5. Perusal of the documents placed on record indicate that though the decree was passed by the trial Court by treating the defendants as *ex-parte*, subsequently in the execution proceedings i.e. Regular Darkhast No.78 of 1983 a Commissioner was appointed for measuring the property. As per his report dated 14/12/1983 the judgment-debtor Ramrao was present when the commission was sought to be executed. The documents also indicate service on other defendants in the execution proceedings. On 22/11/1994, the judgment-debtors moved the executing Court praying that all necessarily documents be supplied to them. From the aforesaid it is thus clear that the defendants had full knowledge of the decree for partition much prior to filing of the appeal.

Merely on the basis of notice dated 16/06/2015 issued by the Tahsildar, it could not be said that the legal heirs got knowledge for the first time. These facts are however not mentioned in the application for condonation of delay.

6. After considering the ratio of various decisions relied upon by the learned counsel for the appellants, I do not find that the appellate Court committed any error by refusing to condone the delay of almost thirty two years. In absence of any sufficient explanation for not filing the appeal earlier, said order cannot be faulted. Accordingly substantial question of law is answered by holding that the appellate Court was justified in refusing to condone the delay.

Second appeal is therefore dismissed. No costs.

JUDGE