

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

**CIVIL APPLICATION NO. 2339 OF 2017
IN
SECOND APPEAL STAMP NO.160 OF 2016**

1. Gausabi w/o Rahimuddin Kazi (Died)

2. Sadik s/o. Rahimuddin Kazi
Age: 61 years, Occu.: Nil,
R/o. Dhondrai, Tq. Georai,
Dist. Beed.

...APPELLANT
Applicant
(Original Plaintiff No.2)

VERSUS

1. Baba S/o. Moinuddin Kazi (Died)
Through L.R. (Wife)
Sunnabee W/o Baba Kazi
Age: 60 years, Occu.: Household,
R/o. Dhondrai, Tq. Georai,
Dist. Beed,

2. Khurshid S/o. Moinuddin Kazi
Age: 70 years,
Occu.: Agriculturist,
R/o. As above

...Respondents
(Original Defendants)

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Advocate for Applicants : Mr. M.S. Indani
Advocate for Respondent Nos. 1 & 2 : Mr. S.A.G. Kreshi

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CORAM : P.R. BORA, J.
Dated: June 27, 2018

PER COURT :-

1. Heard Shri M.S.Indani, learned Counsel appearing for the appellant - applicant and Shri S.A.G.Qureshi, learned Counsel, appearing for the respondents.

2. The appellant has preferred present Appeal challenging the order passed in Regular Civil Appeal No.210/1979 on 16/06/1981 by learned District Judge, Beed. Since delay has been caused in filing the appeal, the appellant has filed the present application seeking condonation of delay so occasioned. The delay caused is of 12,523 days.

3. Learned Counsel for the applicant submitted that Regular Civil Suit No.146/1976 was filed by the present applicant and his deceased mother seeking declaration and injunction in respect of survey No.68(E) admeasuring 2 Acres 22 Gunthas situated at village Dhondrai, taluka Georai, district Beed, and the said suit was decreed vide judgment delivered by the Civil Judge, Junior Division, Georai, on 3rd of October, 1979. Learned Counsel further submitted that against the judgment and decree so passed by the learned Civil Judge, the original defendants i.e. present respondents filed Regular Civil Appeal No.210/1979 in the District Court at Beed. Learned Counsel submitted that in the said matter, learned Advocate Shri U.D.Chapalgaonkar was representing the present applicant as well as his deceased mother.

4. Learned Counsel further submitted that since the present applicant and his mother had engaged Counsel to represent them in Regular Civil Appeal, they were awaiting instructions from their Counsel as about the progress in the aforesaid Civil Appeal. Learned Counsel submitted that in the meanwhile, in the year 2009, the mother of the present applicant i.e. original plaintiff no.1 Gausabi died. Learned Counsel further submitted that after the death of Gausabi, the present applicant, namely, Sadik learnt that the decree which was passed in their favour in Regular Civil Suit No.146/1976 was not executed by that time. Applicant Sadik, therefore, filed an application before the Civil Court, Junior Division, at Georai, seeking condonation of delay which has occasioned in filing the execution proceeding bearing Miscellaneous Civil Application No.34/2015. Learned Counsel for the applicant further submitted that in the said application the respondents filed their reply and from the averments in the said reply, applicant came to know that Regular Civil Appeal No.210/1979 was disposed of on the basis of compromise in the year 1981.

5. Learned Counsel submitted that applicant Sadik, when collected information as about the said appeal, he was shocked to know that the compromise deed, on the basis of

which Regular Civil Appeal No.210/1979 was shown to have been disposed of, was bearing his thumb impression. Learned Counsel submitted that applicant Sadik is literate and used to put his signature below the documents, and not his thumb impression. Learned Counsel submitted that it was also noticed by applicant Sadik that the Counsel, who has signed the said deed of compromise, showing to be representing the respondents therein i.e. applicant Sadik and his mother, was never engaged by applicant Sadik, or his mother Gausabi. Learned Counsel submitted that the compromise decree allegedly passed in Regular Civil Appeal No.210/1979 was, thus, passed by playing fraud on applicant Sadik and his mother Gausabi, thus, was not binding on them.

6. Learned Counsel further submitted that after having learnt that the decree in Regular Civil Appeal No. 210/1979 has been obtained by present respondent by playing fraud on the applicant and his mother, the applicant has preferred present Second Appeal within shortest possible time after obtaining certified copies of the relevant documents. Learned Counsel submitted that the delay caused in filing the Second Appeal is, thus, for genuine and bona fide reasons, and not intentional, or deliberate. Learned Counsel, therefore, prayed for condonation

of delay and to provide an opportunity to the applicants to agitate their appeal on merits.

7. S.A.G.Qureshi, learned Counsel appearing for the respondents, strongly opposed the submissions made on behalf of the applicant. The respondents have also filed their affidavit in reply denying the averments made in the application for condonation of delay. The respondents have denied the allegation that any fraud was committed in showing Regular Civil Appeal No. 210/1979 to have been disposed of by way of compromise between the parties. Learned Counsel further submitted that the order passed by the first appellate Court in Regular Civil Appeal No. 210/1979 on 16/06/1981 explicitly demonstrates that the present applicant and his mother, as well as the present respondents, all were present before the learned District Judge, and have verified the terms of compromise before the learned District Judge. Learned Counsel submitted that the compromise decree passed in aforesaid Regular Civil Appeal has been acted upon not only by the present respondents but, by the present applicant also. Learned Counsel, therefore, prayed for rejecting the application.

8. After having considered the submissions made by

the learned Counsel appearing for the applicant and on perusal of the documents placed on record, it does not appear to me that any case is made out by the applicant for condoning the huge delay of more than 34 years in filing the Second Appeal.

9. From the averments in the application it is clear that applicant Sadik was also aware of filing of Regular Civil Appeal No.210/1979 in the District Court at Beed against the judgment and decree passed in Regular Civil Suit No. 146/1976 passed in their favour. In no case, it can be accepted that though the Civil Appeal was filed in the year 1979, applicant Sadik or his mother Gausabi, till the date she was alive i.e. till the year 2009, would not have ever taken information as about the progress in the said Second Appeal. Even if it is accepted that hearing in the Appeal does not take place immediately and a considerable long period is required for final disposal of the appeal, it is difficult to digest that in the long span of more than 30 years, applicant Sadik or his mother till the date she was alive, would not have even once contacted their Counsel to know the progress in the Regular Civil Appeal. Had the applicant not taken any pain to know the progress in Regular Civil Appeal No.210/1979 and were awaiting for long 30 years for the instructions from their Counsel who was representing

them in the District Court in the Regular Civil Appeal, in that case also the applicant has to blame himself for not showing due diligence; in other words, showing gross negligence and inaction, which has dis-entitled him from claiming any discretionary relief.

10. 'Sufficient cause' within the meaning of Section 5 of the Limitation Act must be a cause which was beyond the control of the party invoking the provisions of Section 5 and the test to be applied would be to see as to whether it was a bona fide cause inasmuch as nothing could be considered to be bona fide which is not done with due care and attention. In the instant matter, if the applicant had not bothered to know as to what happened to the First Appeal filed against him in the District Court for a period of 30 years, it has to be held that he did not show due care and attention and, in such circumstances, the plea taken by the applicant that he was bona fide believing that the appeal was pending, cannot be considered to be a sufficient cause for condoning the delay.

11. It is further interesting to note that the applicant filed the execution proceeding for execution of the decree passed in Regular Civil Suit No.146 of 1976, in the year 2014

and since the same was not filed within the period of limitation, also filed an application seeking condonation of delay which had occasioned in filing the execution proceeding. It is the contention of the applicant that only when the respondent filed his say to the said application for condonation of delay that he came to know that Regular Civil Appeal No.210/1979 was shown to have been disposed of on the basis of compromise arrived at between the parties way back in the year 1981. It is the further contention of the applicant that thereafter when the applicant took the further information it was noticed by him that a fraud was committed while disposing of Regular Civil Appeal No. 210/1979, since he was shown to have affixed his thumb impression below the alleged terms of compromise; when he used to put his signature, and not his thumb impression.

12. I need not to enter into the aforesaid controversy since the basic question is how the Civil Judge entertained the application so preferred by the present applicant for condonation of delay which has occasioned in filing the execution proceeding and issued notice to the respondents when there is no such provision in Limitation Act or under the Code of Civil Procedure. Section 5 of the Limitation Act

specifically prescribes that any appeal or application, other than an application under any of the provisions of Order XXI of Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or applicant satisfies the Court that he had sufficient cause for preferring the appeal, or not making application within such period. It is, thus, evident that the provisions of Section 5 of the Limitation Act cannot be made applicable to the applications under Order XXI of the Code of Civil Procedure. Article 136 of the Limitation Act prescribes period of twelve years for execution of any decree (other than a decree granting mandatory injunction) or order of any Civil Court. The impugned decree which was sought to be executed by filing the execution proceeding was, admittedly, passed in the year 1978. Admittedly, the execution was not filed within the period of twelve years.

13. The material on record reveals that when the applicant filed an application before the Civil Judge seeking condonation of delay occurred in filing the execution proceeding, he was having knowledge of the fact that Regular Civil Appeal No.210/1979 was preferred against the judgment passed by the trial Court before the first appellate Court. It is averred by the applicant in the said application that his mother

i.e. original plaintiff no.1 did not file any execution proceeding in her lifetime for the reason that the appeal was preferred against the judgment of the trial Court before the District Court. For not filing of the execution proceeding earlier, if the aforesaid was the reason then, it must have been further explained by the applicant as to without taking any information, whether the Regular Civil Appeal has been disposed of or is still pending, how he preferred the aforesaid application before the Civil Court. Applicant has not provided any such explanation.

14. Thus, viewed from any angle, no case is made out by the applicant to condone the inordinate delay of about 34 years in filing the Second Appeal before this Court.

15. Further, the contention of the applicant that, when the compromise was recorded before the District Court, neither his mother nor he was present before the Court and further that his thumb impression shown to have been affixed below the said compromise was fraud played by the respondents also cannot be accepted. The record shows that below the deed of compromise, the then learned District Judge has made an endorsement that the parties were present before him and that the terms of compromise were verified by the parties. I see no

reason to disbelieve the endorsement made by the learned District Judge. The objection raised by the applicant, alleging fraud in recording of the compromise, is also, thus, liable to be turned down.

16. For the reasons stated above, Civil Application (No.2339/2017) stands rejected. Consequently the Second Appeal on stamp also stands dismissed.

(**P.R. BORA**)
JUDGE

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