

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

SECOND APPEAL NO. 113 OF 2018

Vivek Kishor Bhandari
Age : 41 years, Occu. Business,
R/o. Panna Chambers,
Swargate Chowk Corner,
Shivaji Road, Pune 411 042.

...Appellant
(Orig. Defendant)

Versus

1. Chaturbhuj Gulabrao Khanchandani,
Age : 62 years, Occu. Business,
R/o. Chitra Talkies Road,
Ahmednagar, Dist. Ahmednagar.
2. Navalbai Ramesh Bhandari,
Age : 64 years, Occu. Household,
3. Nilesh Ramesh Bhandari,
Age : 38 years, Occu. Household
4. Hemendra Ramesh Bhandari,
Age : 46 years, Occu. Household

(Resp. Nos. 2 to 4 residents of naval Bungalow,
Behind Hotel Vaibhav, Burudgaon Road, Ahmednagar)

5. Rupali Ramesh Bhandari,
Sau Rupali Abhay Chandediya,
Age : 40 years, occu. Household,
R/o. Kothrud, Pune.
6. Smt. Ashabai Kishor Bhandari,
Age : 59 years, Occu. Household,
R/o. Plot No. 12, Mahavir Colony,
Sarasnagar, Ahmednagar.
7. Dinesh Kishor Bhandari,
Age : 39 years, Occu. Business,
R/o. Plot No. 12, Mahavir Colony,
Sarasnagar, Ahmednagar.

8. Mayuri Kishor Bhandari,
Sau Mayuri Milind Gugale,
Age : 36 years, Occu. Household,
R/o. Arihant Bungalow, Rameshwar Nagar,
Opp. Pragati Vihar Society,
Shubham Park, CIDCO, Nashik.
 9. Dilip Karamchand Bhandari,
Age : 60 years, Occu. Business,
R/o. Daulat, Kings Gate, Ahmednagar.
 10. Rajesh Karamchand Bhandari,
Age : 54 years, Occu. Business,
R/o. Urban Bank Colony,
Chanaudiya Bungalow,
Burudgaon Road, Ahmednagar.
 11. Mangal Kachardas Bhandari,
Mangal Sharad Gandhi,
Age : 56 years, Occu. Household,
R/o. Flat No. 101, Jivanrang Apartment,
Opp. Income Tax Office, Prabhat Road,
Pune.
 12. Sandhya Kachardas Bhandari,
Sau Sandhya Dilip Khinvsara,
Age : 49 years, Occu. Household,
R/o. Nanapeth, Pimpri Chowk, Pune.
 13. Vimal alias Archana Ajay Nahar,
Age : 66 years, Occu. Household,
R/o. 123, Malviya Nagar, Bhopal.
 14. Sau. Jaya Sureshkumar Gundecha,
Age : 62 years, Occu. Household,
R/o. Ekbote Colony, Near Shardea Clinic,
Shankarseth Road, Pune.
- ...Respondents
(Orig. Plaintiffs)

.....
Mr. L. D. Vakil, Advocate for Appellant
Mr A. D. Ostwal, Advocate for respondent No. 1
.....

WITH
WITH CIVIL APPLICATION NO. 1752 OF 2018
IN
SECOND APPEAL NO. 113 OF 2018

WITH
CIVIL APPLICATION NO. 8744 OF 2018
IN
SECOND APPEAL NO. 113 OF 2018

CORAM : A. M. DHAVALA, J.

DATE OF RESERVING THE JUDGMENT : 19.12.2018.

DATE OF PRONOUNCING THE JUDGMENT : 22.12.2018

JUDGMENT:-

1. One of the legal heirs of defendant (3B) by this appeal challenges rejection of his application by the first appellate Court to condone delay of 1417 days in preferring the appeal. Brief reference to the facts is necessary to decide this appeal.

2. Respondent NO. 1 - Chaturbhuj is the original plaintiff, while the appellant and respondents No. 2 to 14 are the legal heirs of original owners- Kachardas Bhandari and Sarasbai Bhandari. On 21.07.1981, Kachardas and Sarasbai executed agreement to sell in favour of respondent No. 1 - Chaturbhuj whereby they agreed to sell a plot adm. 29,656 sq.ft. bearing plot No. 38 from Survey No. 126B, Kedgaon for a price of Rs. 2.85 per sq.ft. There was a term in the agreement that sale deed was to be executed within six months. The

suit property was to be divided into plots and for that Kachardas and Sarasbai had executed authority in favour of the plaintiff. Since the work of plotting required more time, the limitation for obtaining execution was extended to 12.01.1982. The plaintiff had paid advance amount of Rs. 15,000/-. Chaturbhuj - the plaintiff claimed that, the vendors did not cooperate him in carrying out measurement, hence on 19.04.1982, he issued notice to them. They told him to get the land measured privately. In private measurement, the land was found to be 24,843 sq.ft. The vendors agreed to execute the sale deed but Kachardas died. Thereafter, sons of Kachardas assured to execute the sale deed in favour of the plaintiff. The plaintiff again served them with notice dt. 28.08.82 and thereafter filed the suit on 17.01.1984 for specific performance. Defendant No. 1 - Sarasbai filed written statement. She admitted material facts about the agreement but claimed that the sale deed was to be obtained within six months. The plaintiff did not perform his part of the contract. There was no extension of time beyond three months. It was also claimed that, the plaintiff was not agriculturist. She denied that, the measurement was entrusted to the plaintiff and claimed that the suit was barred by limitation. Defendants No. 2 to 9 are the sons and daughters of Kachardas. They did not file written statement. Later on, defendant No. 1 also died and her legal heirs were brought on record. The suit

proceeded without contest and after 25 years, the suit was decreed and decree for specific performance was passed. The ld. trial Judge recoded that, if there was any obstacle under the revenue laws, the plaintiff would be entitled to get refund of earnest amount of Rs.20,000/- along with *pendente lite* interest @ 10% and future interest @ 6%. This judgment dt. 07.04.2009 was challenged by only one of the legal heirs Vivek out of 14 heirs by filing Second Appeal along with delay condonation application on 22.03.2013. There was delay of 1417 days. The appellant Vivek claimed that he had filed Vakalatnama of Advocate Bhat but his suit was transferred from one court to another. That time, he was settled in Pune and he was not informed about the progress of the suit pending in Ahmednagar court. Hence, he could not file separate written statement. His advocate filed application for withdrawal of Vakalatnama but the court did not accept it. The appellant had no notice about hearing and the decision. Thereafter, the original plaintiff filed execution proceedings and notice of execution was served upon him. Thereafter, he collected the certified copies and filed the appeal along with application for condonation of delay. The dispute relates to immovable property of very high value and if no opportunity is given to him, he would suffer irreparable loss. The application was opposed by the original plaintiff.

3. The ld. first appellate Court rejected the application on following grounds.

- (i) The delay of 1417 days is huge and has not been satisfactorily explained. There are no justifiable reasons to condone the same. The plaintiff has been deprived of fruits of a decree for years together.
- (ii) The execution notice was served upon the applicant and thereafter there was unexplained delay of 203 days in preferring the application for condonation.
- (iii) The defendant had not filed any written statement and was not contesting the suit though it was pending in the trial Court for 25 years.
- (iv) The defendant has not issued any notice to his advocate Bhat and no action had been taken against him for his negligence in his duties.
- (v) There were several other respondents. Only Kishor Bhandari had contested the suit. The applicant had not contested the suit for 24 years.
- (vi) The applicant had not even served respondent Nos. 5 and 13 and the application was rejected against the respondents No. 5 & 3 for want of steps.

. The ld. Dist. Judge-11 rejected the application by saddling costs of Rs. 5,000/-.

4. Mr Vakil, ld. counsel for the appellant submitted that, it was the duty of the advocate of the applicant to inform the applicant

by issuing notice in writing. Since he has not done so, the applicant could not contest the suit. In this regard, he relied on Ashruba Raghu Dambe Vs. Gopalrao Madhavrao Deshmukh & Ors. reported in 2017 DGLS (Bom.) 516. He submitted that, in similar facts and circumstances, this Court has framed substantial question of law and condoned the delay of 4 years 3 months and 16 days. He submitted that, there should be liberal, pragmatic and justice oriented approach while dealing with the application for condonation of delay. The limitation is not meant for destruction of rights of the parties. The applicant could not get opportunity to contest the suit and the properties is worth crores of rupees. He would suffer irreparable loss. Hence, the appeal be allowed and the delay be condoned and the matter be remanded. He showed willingness to pay substantial costs for compensating the other side.

5. Per contra, learned advocate Mr. Ostwal for the original plaintiff submitted that, there is a huge and inordinate delay. There is no explanation. the present applicant/appellant had not contested the suit. He had not filed even written statement. The matter was pending in the lower court for 24 years. He has not taken any action against his advocate. Even after getting notice in execution of decree, he kept mum for 203 days. This court can't use discretion in his

favour. The grounds raised are not genuine but fake and made only for prolonging the matter. In this regard, he relied on

- (i) **Brijesh Kumar v. State of Haryana** AIR 2014 SC 1612

No condonation on sympathetic ground when no sufficient cause is shown. Delay of 10 years was rightly not condoned.

- (ii) **P. K. Ramchandran v. State of Kerala** 1997 (7) SCC 556

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.

- (iii) **Kamalbai Narasaiyya Shrimal vs. Ganpat Vithalrao Gavare** 2007 (1) Mh.L.J. 807

Delay cannot be condoned only because it is not intentional or on the ground of poverty.

- (iv) **Chandrakant Laxman Kulbhaiyya vs. State of Maharashtra** 2015(2) Mh.L.J. 323

Delay can be condoned on satisfaction of existence of sufficient cause. It means a cause which is beyond control of party invoking the section. The court should not exercise the discretion when there was no cause of action for the suit.

- (v) **Sarla Devi v Jagan Nath** 2018 SCC (Online) HP 1541

There was delay of 350 days in taking steps to assail the decision of the trial Court. It disclosed lethargic attitude of the petitioner. Relying on **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy** reported in **2013(12) SCC 649**, the High Court of Himachal Pradesh declined to condone the delay.

- (vi) **Ramlal v. Riwa** AIR 1962 SC 361

On lapse of time, the right accrues to the decree-holder which should not be lightheartedly disturbed. Even when sufficient cause is shown, the court has discretion to condone the delay. The party has no right to claim condonation on showing sufficient cause. The diligence of the party and its *bona fides* may fall for consideration while exercising the discretion.

- (vii) **Rajendra Namdeorao Akre v. Rajkumar Bhalerao Balbudhe** 2016(1) Mh.L.J. 184

If there is no sufficient cause, the delay cannot be condoned by imposition of costs. The requirement of furnishing sufficient cost cannot be dispensed with.

- (viii) **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy** 2013(12) SCC 649
All general principles of condonation of delay elicited.

6. After hearing the learned counsel and considering the factual background, I find that the following circumstances are very crucial.

- (i) The suit was filed against Sarasbai and nine legal heirs of Kachardas. Some of them were residing in Ahmednagar itself. Sarasbai had filed written statement but the other legal heirs had not filed written statement.
- (ii) The agreement to sell and the factual aspects are mostly admitted. Technical defences were raised that, the plaintiff was not agriculturist. What was agreed to be sold was a lot and not a agriculture field. Apart from it, the trial Court had considered the contingency that for some technical reasons like the plaintiff not being agriculturist, the decree

may not be executable and in that case, alternative relief has already been granted.

- (iii) On death of Sarasbai, the legal heirs were brought on record and the total number of defendants were increased to 14. Some of the sons of Sarasbai and Kachardas also died and their legal heirs were brought on record. Son of Kachardas by name Kishor had died and the applicant is one of the sons of Kishor.
- (iv) The application shows no reasons why Vivek could not attend the matter and contest the suit. The application nowhere indicates that, he had any conflicting interest with the other legal heirs and the other legal heirs who could have filed appeal were also prevented by any sufficient cause. When there were 14 legal heirs, some of whom were residing in Nagar itself, it is practically impossible to accept that all of them were prevented by sufficient cause from filing the appeal within time.
- (v) The facts indicate that, the suit was pending in the trial Court for 25 years. The defendants had engaged three different lawyers. One of the legal heirs could have represented the interest of all the legal heirs if he could have contested the matter.
- (vi) The applicant has nowhere stated in his evidence as to how many times he was contacting his advocate and how many times he attended the court during the trial. No doubt, when a party resides at a station away from the place of

court, the party has to rely on the instructions of the advocate but when the matter is pending for 25 years, there can be no justification for a party to completely neglect the pendency of the case against him and claim that it can totally rely on its advocate particularly when many legal representatives were residing in the same city where the suit was pending.

7. The order of the appellate court shows that, even after service of notice of execution proceedings, the applicant did not take steps to challenge the judgment immediately. There is unexplained delay of 203 days after service of such notice. The applicant cannot blame his advocate for this.

8. Reliance on Ashruba's case (supra) is misplaced. The facts in that case are quite different. In that case, RCS No. 66/98 was filed by respondents No. 1 to 4 for recovery of possession. Ashruba was looking after the said suit. He died in 2002. Then his son Babasaheb was looking after the family affairs as a Manager. He also died in 2004. Thereafter, his son Shrikant died in 2008. Due to demise of these three members of family, the entire family was under great shock. Besides, the legal representatives of Vitthal, the respondent had promised the appellant that the suit filed would be withdrawn by them. Possession of the appellant was not disturbed. Hence, the

appellant did not contest the suit and it came to be decreed ex-parte on 01.09.2005. When the TILR issued notices to the appellant, they immediately filed appeal along with application for condonation of delay. This case on facts is not applicable to the present set of facts.

. In Esha Bhattacharjee's case, the general principles are laid down in para 15 & 16. Some of the relevant principles may be stated as follows:

15. From the aforesaid authorities the principles that can broadly be culled out are:
 - i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
 - iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.
 - v) Lack of *bona fides* imputable to a party seeking condonation of delay is a significant and relevant fact.
 - vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.
 - viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.
 - ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of

justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

- x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are: -

- a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.
- b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.
- d) The increasing tendency to perceive delay as a non- serious matter and, hence, lackadaisical propensity came be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters.

9. In somewhat similar facts, the Apex Court has dealt with the issue in following cases.

(i) In **M. K. Prasad vs. P. Arumugam** AIR 2001 SC 2497, the delay of 554 days in preferring the appeal was condoned on the ground that the advocate for the party had not informed him about the progress of the matter and decision in the case.

(ii) In **N. Balakrishnan Vs. M. Krishnamurthy** (1998) 7 SCC. 123. There was delay of 883 days on account of no information

given by the advocate. But, in that case, the party had taken action against the advocate and the Consumer Court has awarded compensation of Rs. 50,000/- to the party. The apex Court condoned the delay subject to costs of Rs. 10,000/-.

10. When the facts of the present case are considered in the light of the guidelines laid down by the Apex Court in above referred judgments, I find that, the conduct of the appellant is blameworthy. Though the matter was pending in the trial court for 25 years, he did not attend the matter and did not file even Written Statement. He led no evidence. It shows that, the grounds raised by him are not bona fide but a device to cause delay.

11. It is also relevant to note here that when the appellant was served with notice of execution, thereafter also he did not take immediate steps and he filed the appeal along with application for condonation of delay after 203 days for which there is no explanation. It is also pertinent to note here that there were as many as 14 dependants. Many of them were residing in Ahmednagar. All of them could have contested the suit and filed appeal. There is no explanation as to why other respondents have not preferred appeal. They are all legal heirs of original defendants. If one of them had some semblance of the cause for not preferring appeal in time, that

will not absolve the duty of other respondents to file appeal in time or to explain sufficient cause for not preferring the appeal.

12. Besides, in this case delay is huge of three years and ten months. Earlier the suit was pending for 25 years which was not attended by the appellant. As held in **Katari Suryanarayana & Ors vs. Koppiseti Subba Rao & Ors.** reported in (2009) 11 SCC 183, the court has to consider that the petitioners are required to be in touch with their advocates. If not every week, they are expected to contact their lawyers once in a year. If a party does not remain in touch for years together, it is a case of gross-negligence which could not be condoned by taking a liberal approach.

13. I rely on the above referred judgment and on **R. B. Ramlingam vs. R. B. Bhvaneshwari** [(2009) 2 SCC 689], wherein it was held that the test of 'sufficient cause' is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of "sufficient cause" delightfully undefined, thereby leaving to the Court a well intentioned discretion to decide the individual cases where circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are

never exhausted. Each case spells out a unique experience to be dealt with by the Court as such.

14. I find no *bona fides* in the application filed by the applicant that he could not attend the court on account of no intimation received from his advocate. The facts indicate that he had no intentions and bona fide desire to attend the matter and he did not attend the matter in trial court for 25 years.

15. In the light of the facts above, this is not a fit case for condonation of delay. Hence, the second appeal is dismissed.

16. In view of dismissal of second appeal, pending civil applications no more survive and the same stand disposed of.

[A. M. DHAVALE]
JUDGE

Punde