

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.105 OF 2017
(Ramakant Vasant Mhatre Vs. Shashikant Vasant Mhatre and
another)
WITH
CIVIL APPLICATION NO.2045 OF 2017

Mr.V.D.Salunke h/f Mr.S.N.Patne, Advocate for the appellant.
Mr.Y.S.Choudhari, Advocate for respondent Nos. 1 and 2.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 01/02/2018

PER COURT :

1. The appellant is aggrieved by the compromise decree dated 04/05/2012 delivered in RCS No.444/2012, to which he is not a party, by which the suit has been decreed in terms of the compromise purshis which contains the modalities of the compromise. Appellant is also aggrieved by the judgment of the Appellate Court dated 23/09/2016 by which Delay Misc.Appl.No.11/2016, filed by the appellant, seeking condonation of delay of about 3 years and 10 months, in preferring the second appeal, has been rejected on the ground that the appeal may not be maintainable and the delay is quite large.

2. I have considered the strenuous submissions of the learned

Advocates for the respective sides. Learned Advocate for the respondents has defended the impugned judgments and orders and prays that this appeal be dismissed with costs.

3. I find that the substantial question of law involved in this proceeding is as under :-

"Whether the Appellate Court, while dealing with an application for condonation of delay, could have taken the litigating sides by surprise by concluding that the appeal itself was not maintainable u/s 96(1) of the CPC and hence there is no reason to condone the delay ?"

4. The learned Advocate for the appellant has relied upon the following 2 judgments :-

[1] *Banwari Lal Vs. Chando Devi (Smt) (Through LR's) and another [(1993) 1 SCC 581]*

[2] *S.P.Chengal Varaya Naidu (Dead) by LR's Vs. Jagannath (Dead) by LR's and others.*

5. Learned Advocate for the respondents has relied upon the judgments of this Court in the following matters :-

[1] *Zaitunbi w/o Md.Hanif Karigar and another Vs. Parveen w/o Sayyeduddin Razak and others [2013(2) All MR 682]*

[2] *Ramesh s/o Shama Kumbhar and another Vs. Sudhakar*

s/o Budha Kumbhar and others [2013(3) All MR 196].

6. There is no dispute that the regular civil suit was filed by respondent No.1 herein against his mother, who is respondent No.2 herein. Issue involved is with regard to ancestral property and self acquired property. As such, whether such a property could have been partitioned without arraying the appellant herein, who is the real brother of the original plaintiff and the biological son of the original defendant, who has been left out from the suit proceedings ? Another brother by name Vikrant and 2 married sisters by name Aruna and Anita have been left out from the proceedings by the plaintiff. So also the father has left a will deed in favour of defendant / mother who is still alive today. Whether partition could have been a matter of adjudication in a suit when the mother was alive.

7. The appellant had approached the First Appellate Court raising a ground that though he is the biological brother of the plaintiff and biological son of the defendant, he has been left out from the suit proceedings. Though the plaintiff has canvassed in the plaint that his mother is a gullible person and may have turned senile, has entered into a compromise in the said suit and by the said terms of

compromise, the Trial Court has permitted that the suit property be recorded in the name of the plaintiff by carrying out mutation entries so as to enter his name in the record of rights column.

8. As such, issue before the Appellate Court was as to whether the delay deserves to be condoned or not. Delay application should have therefore been considered on its own merits, rather than going into the pleadings of the appellant in the first appeal and whether the said appeal could have been maintained.

9. In that view of the matter, I am of the opinion that the Appellate Court should have dealt with the application for condonation of delay by considering the grounds set out therein and should have left the issue of maintainability of the appeal open since it was not a stage at which it could have considered the said issue. Moreover, the Appellate Court, without considering the provisions of the CPC, has delivered the impugned judgment concluding that the compromise judgment and decree is not binding upon the appellant and hence he would not have a reason to challenge the said judgment. In my view, the Appellate Court could have avoided entering into that aspect and should have delivered an order on the application for condonation of delay.

10. In the light of the above, the impugned judgment cannot be sustained.

11. In so far as the condonation of delay is concerned, the Hon'ble Apex Court has laid down the law in paragraph No.3 of its judgment in the matter of Collector, Land Acquisition Anantnag and another Vs. Mst. Katiji and others [(1987) 2 SCC 107], which reads as under :-

"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."

12. The Hon'ble Apex Court has also dealt with an issue of condonation of delay in the matter of Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and others. [2013(12) SCC 649] and has culled out certain principles while considering the request for condonation of delay.

13. It is thus settled that in such matters of condonation of delay, the Court considering the application, has to assess whether the delay was deliberate or inordinate or whether the applicant has delayed the matter with an ulterior or oblique motive or whether laches are attributable to his conduct. So also, if no laches are attributable and the conduct of the appellant is clean, the Court has to consider whether an irreparable harm, manifest inconvenience and grave prejudice would be caused to either of the parties.

14. In the instant case, since the delay of 3 years and 10 months cannot be said to be inordinate, it needs to be assessed as to why the said delay was caused. The appellant herein is an employee in a private industrial sector and is residing in Dombiwali. The original

plaintiff and the defendants are also residing in the same building at Dombiwali. As the property was situated at Rahata, a suit was preferred by the original plaintiff at Rahata and the appellant herein submits that he did not have the knowledge of the same. In the circumstances in which he gathered the knowledge, he has moved the Appellate Court by filing the miscellaneous application for condonation of delay.

15. In the above factual matrix, I am of the view that this appeal can be partly allowed and costs can be imposed on the appellant. Learned Advocate for the respondents graciously submits that the said costs can be donated to the Advocate Associations' Bar Library, High Court, Aurangabad.

16. In the light of the above, I answer the substantial question of Law as per my conclusion in paragraph Nos.9 and 10 hereinabove. The second appeal is partly allowed to the extent of the condonation of delay by imposing costs of Rs.10,000/- , which the appellant shall deposit with Advocate Associations' Bar Library, High Court, Aurangabad within a period of 2 weeks from today. Delay Misc.Appl.No. 11/2016 stands allowed.

17. Learned Advocate for the respective sides fairly state that they would appear before the Court of the learned District Judge at Kopargaon on 23/02/2018. The Appellate Court will register the appeal by then and formal notices are not required to be issued. Needless to state, all the contentions of the litigating sides including the objections with regard to the maintainability of the appeal are kept open for the Appellate Court to consider.

(RAVINDRA V. GHUGE, J.)