

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

**61 SECOND APPEAL NO. 254 OF 2016
WITH CA/4030/2016 IN SA/254/2016**

SUKHDEO DHUDKU MORE AND ORS

..Appellants

VERSUS

YASHWANT LATU PATIL AND ORS

..Respondents

...

Advocate for the Appellants : Shri B.R. Waramaa

...

CORAM : P.R. BORA, J.

Dated: JULY 09, 2018

PER COURT :

1. Heard Learned Counsel for the appellants. The respondents though duly served, none of them has entered appearance in the matter.

2. The learned Counsel for the appellants submitted that, the appellants had filed Regular Civil Suit No.74 of 2002 in the Court of 2nd Jt. Civil Judge, Jr. Division, Amalner, seeking declaration and injunction against the present respondents. The said suit came to be dismissed on 27.01.2012, whereupon the appellants preferred Regular Civil Appeal No.43 of 2012 before the District Court at Amalner. The learned Counsel submitted that, the said appeal was admitted by the learned District Judge on 14.06.2012. The learned Counsel further submitted that, on 25.11.2013 neither the appellants nor their Counsel could remain present before the Court, when the said appeal was called out by the Court. The learned Counsel further submitted

that, by that time the respondents were also not served and reports of the summonses issued to the said respondents were also not received. The learned Counsel submitted that, on the said date the learned District Judge-1, Amalner passed the following order.

"Respondent is not served yet. Reports are not returned. No steps taken since long. Today nobody to represent appellant. Hence dismissed."

3. The learned Counsel for the appellants further submitted that, since the appeal was dismissed for not taking due steps by the appellants, the appellants filed Misc. Civil Application No.2 of 2014 praying for restoration of the appeal. The learned Counsel further submitted that, since delay of 10 days had occurred in filing the restoration application, Misc. Civil Application No.2 of 2014 was preferred before the District Court. The learned District Judge-1 Amalner vide order passed on 21.01.2016 dismissed the said application and refused to condone the delay and consequently the restoration application stood rejected. Aggrieved by, the applicants have preferred the present Second Appeal.

4. The learned Counsel for the appellants further submitted that, in the application for condonation of delay, the appellants have sufficiently explained as to why they could not file the restoration application within the stipulated period. The learned Counsel further submitted that, in the relevant period

the appellant, who was looking after the litigation i.e. appellant no.1 Sukhdeo More could not take the necessary steps. The learned Counsel further submitted that, it was also contended in the said application that, in the meanwhile X-max vacation came and that was the another reason that the restoration application could not be filed within the stipulated period of limitation. The learned Counsel further submitted that, the learned District Judge has adopted a too technical approach and has dismissed the application for condonation of delay. The learned Counsel submitted that, law is well settled that if the delay is for just reasons it has to be liberally condoned. However, Court below has lost sight of the said principle.

5. I have carefully perused the impugned order dated 21.01.2016. As has been observed by the learned District Judge, when there were seven persons shown as the appellants, even in absence of appellant no.1 Sukhdeo, the other appellants could have certainly taken the necessary steps for filing the restoration application within the stipulated period of limitation. The Court has further observed that, while dismissing the first appeal, the then Court had also observed that, no steps were taken since long by the appellants. It was, therefore, the conclusion arrived at by the First Appellate Court that the appellants / applicants were not diligent in prosecuting their appeal.

6. It appears to me that, the learned District Judge -1

adopted a too technical approach. There are catena of Judgments of the Hon'ble Apex Court as well as this Court, wherein it is consistently held that, the matters are to be decided on merits and not to be thrown on technicalities.

7. In the present matter, admittedly, the delay which was caused in filing the restoration application was of 10 days. The reasons which were assigned were not liable to be outrightly rejected. It is a matter of common knowledge that, though there may be several plaintiffs or appellants, all of them may not be involved in litigating the matter and attend the Court in the said matter. It always happens that, one of such appellants or plaintiffs looks after the matter and he only knows the progress in the said matter. The learned First Appellate Court, however, failed in appreciating the aforesaid aspect and has dismissed the application for condonation of delay adopting a technical approach. The order, therefore, deserves to be quashed and set aside and the appellants deserve to be given an opportunity to agitate their appeal on merits. Hence, the following order.

ORDER

- (i) The order dated 21.01.2016 passed in Misc. Civil Application No.2 of 2014 as well as the order passed on 25.11.2013 in Regular Civil Appeal No.43 of 2012 stand quashed and set aside.

(ii) Regular Civil Appeal No.43 of 2012 stands restored to its original file. The applicants / appellants shall take all prompt steps to serve the unserved respondents by all possible modes and proceed with the matter as expeditiously as possible.

. Second Appeal, thus, stands allowed in the aforesaid terms.

. Pending Civil Application No.4030 of 2016 stands disposed of.

(P. R. BORA, J.)