

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

SECOND APPEAL NO.224 OF 2018 WITH
CIVIL APPLICATION NO.4002 OF 2018

Somnath s/o Popat Patil

...APPELLANT

VERSUS

Bhagwan s/o Popat Patil & ors.

...RESPONDENTS

.....
Shri Girish Nagori, Advocate for appellant
Shri Girish Rane, Advocate for respondent No.1
.....

CORAM: A.M. DHAVALÉ, J.

DATED : 1st November, 2018.

ORAL ORDER :

1. Heard Advocate Mr. Nagori for the appellant and
Advocate Mr. Rane for respondent No.1.

2. Popat Sandu Patil is the common ancestor of the
parties. He had two sons, Bhagwan and Somnath and 5
daughters, of which one was dead and her legal representatives
were brought on record. Admittedly there was partition between
Popat and his two sons and the suit properties were allotted to
deceased Popat. Popat died on 4.11.2009 and one son Bhagwan

filed suit against other son and daughters claiming 1/7th share. Defendant No.1 Somnath appeared in the suit but did not file written statement. The suit proceeded without written statement against the defendant No.1 and exparte against remaining defendants. The plaintiff had claimed that the defendant No.1 was making a false claim of exclusive right on the basis of a Will which was strongly denied. Since the defendant No.1 did not file written statement, there was no evidence on the point of Will and, therefore, the suit was decreed on 6.10.2016.

3. The defendant No.1 claims that on 23.6.2017 he went to Dharangaon Court for enquiry and then learnt that the suit was decreed against him much earlier. He obtained certified copies and as per advice received, he preferred First Appeal along with application for condonation of delay of 7 months and 13 days. His application shows that, he had no legal knowledge about necessity to produce the documentary evidence, necessity to file written statement and necessity to prefer appeal within time. He also submitted that, he was suffering from Arthritis. His two sons were residing outstation for service purpose and hence there was delay of 7 months and 13 days which should be condoned.

4. The original plaintiff (respondent No.1) contended that, defendant No.1 had appeared on 8.11.2014 and thereafter

he did not take any steps for a period of one year 10 months and 28 days. He denied the grounds raised by the applicant. Learned first appellate Court relied on number of rulings to dismiss the application on 6.3.2018. Hence this Appeal.

5. After considering the arguments advanced, I find that, the appellant (defendant No.1) is not finding any fault with the Judge for deciding the matter against him. It is his case that, for the reasons recorded above, he could not contest the suit and file the appeal in time. In such case, whether there was sufficient cause or not can be considered only after recording of evidence which can take place in application under Order 9 Rule 13. If defendant No.1 seeks to set aside the exparte decree only on the ground that he was prevented by sufficient cause from attending the Court, his remedy lies under Order 9 Rule 13 and not by Second Appeal. No doubt Second Appeal against exparte decree is maintainable, but in that case he has to show some fault on the part of the trial Court, like, the decision on merits even in his absence could have been passed or that he was not given opportunity of hearing. Thus, when the appellant has filed the first appeal, the same itself was not maintainable. Besides, there was delay of 7 months and 13 days which was preceded by total inaction for a period of one year 10 months and 28 days while the matter was pending in the trial Court. The appellant is residing at

Salve, while the trial was conducted at Dharangaon, which is a Taluka place at a distance of 10 to 15 Kms. He may be visiting Dharangaon for his weekly requirements, but he completely ignored the requirement to attend the matter in the trial Court and instead of filing application under Order 9 Rule 13, he filed the first appeal with application for condonation of delay of 7 months and 13 days. This is not a very small delay which could have been considered liberally. The grounds given by the applicant to condone the delay are not sound. Ignorance of law cannot be pleaded as ground for condonation of delay. The applicant has not made any complaint against his Advocate. He has produced a certificate that he was suffering from Arthritis, but his pleading discloses that he suffered Arthritis during rainy season i.e. in the months of June and July. There is no satisfactory explanation for not filing appeal from October 2016 to May 2017 and no explanation for absence in trial Court from November 2014 to October 2016. The question of condonation of delay is a question of fact.

7. The learned first appellate Court has relied on several judgments, giving reasons to come to a conclusion that the delay was not satisfactorily explained. In **Zafar Ali Late Akbar Ali & ors. Vs. Smt. Shakim Akhatar w/o Akbar Saheb [2010 (1) LJSOFT 172]**, it is held that :-

"Though prayer for condonation of delay may be considered liberally, depending on case but it does not mean that the merit of the main appeal/ case cannot be looked into. In an appeal where only argument is as regards appreciation of evidence, and which does not involve substantial questions of Law, it has no merit. In a meritless case the respondent cannot be vexed through application for condonation of delay only."

7. Since I am exercising the jurisdiction under Section 100 of the Civil Procedure Code, it is necessary to consider whether this can be treated as Second Appeal when the First Appeal itself was not maintainable. When the defendant has not filed written statement and has not produced Will and not led any evidence, in the light of Order 8 Rule 5 and Order 8 Rule 10, there can be hardly any challenge to the findings recorded by the trial Court that the Will was not proved. If the Will was not proved, the shares determined by the trial Court are correct.

8. Learned Advocate for the respondent has relied on **P.K. Ramchandran Vs. State of Kerala & anr. [AIR 1998 SC**

22761, wherein it is laid down that :-

"Law of limitation may harshly affect 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."

9. Learned counsel for respondent also relied on **Balwant Singh (Dead) Vs. Jagdish Singh & ors. [AIR 2010 SC 3043]**. Though it relates to condonation of delay for setting aside abatement, the principles for requirement of sufficient reasons for condonation of delay has been referred.

10. The appellant has not given sufficient reasons to explain the substantial period of delay of around 233 days. The rejection of the application by the first appellate Court cannot be termed as perversity or decision by ignoring the material evidence. Particularly when the first appeal itself was not maintainable, the delay cannot be condoned.

11. Hence, no substantial question of law is raised. Hence, the Second Appeal deserves to be dismissed in limine and is accordingly dismissed in limine. In view of dismissal of the Second Appeal, Civil Application No.4002/2018 does not survive

and same is also dismissed.

12. There is no necessity to grant any liberty to file application under Order 9 Rule 13. The statutory remedy can be always availed by the applicant. Needless to say that, if such application is filed, it shall be considered on its own merits.

(A.M. DHAVALA)
JUDGE

fmp/