

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

35 SECOND APPEAL NO. 46 OF 2014
WITH CA/15361/2016 IN SA/46/2014

BHASKAR MARUTI SURVE
VERSUS
VATSLABAI SAHEBRAO KADLAG AND OTHERS

.....

Advocate for Appellant : Mr. V. D. Sapkar h/f
Mr. Chaudhari Nitin K. & Mr. Tambade Pradeep G.
Advocate for Respondent Nos. 1 to 4 : Mr. R. D. Bhalerao

.....

CORAM : V. K. JADHAV, J.
DATED : 9th APRIL, 2018

PER COURT:-

1. Heard finally with consent at admission stage.
2. Being aggrieved by the order dated 25.06.2013 passed below Exhibit 1 in Delay Misc. Application No.12 of 2010 by the District Judge-2, Sangamner, the appellant/original defendant no.1 has preferred this Second Appeal.
3. Respondent no.1 herein has instituted Regular Civil Suit No. 57 of 2003 for declaration and a decree of perpetual injunction in respect of the suit property. The learned 2nd Joint Civil Judge, Junior Division, Sangamner, by judgment and

decree dated 27.06.2009, decreed the suit with costs and thereby declared respondent no.1 herein that she is having 3/6th share in the suit property and further declared that the partition deed dated 21.06.2002 executed by defendant nos. 1 and 2 is illegal and further restrained defendant no.1 (present appellant) from alienating, transferring or creating any third party interest in the suit property till the plaintiff's 3/6th share is partitioned by metes and bounds and she is put in possession of her 3/6th share. Being aggrieved by the same, the appellant has preferred an appeal before the first appellate court alongwith Delay Misc. Application No. 12 of 2010 for condonation of delay of near about one year caused in preferring the appeal. The learned District Judge-2, Sangamner, by the impugned order dated 25.06.2013, rejected the said application with costs of Rs.2,000/- each to respondent nos. 1, 2 and 3 therein. Hence this Second Appeal.

4. The learned counsel for the appellant submits that during pendency of the suit, the original defendant no.2, who happened to be the father of respondent no.1/plaintiff, died. Before his death, the original defendant nos. 2 and 3, who are the parents of the present appellant and also respondent no.1/plaintiff, have

filed pursis Exhibit 36 in the suit relinquishing their claim in favour of respondent/plaintiff in the suit property. The learned counsel submits that the trial court has simply given reference to the death of the father without making any observation as to what is the effect of his death. Even the trial court has declared the alleged partition deed dated 21.06.2002 as illegal. The learned counsel submits that in view of the same, there is no iota of evidence as to declaration of the share of respondent no.1/plaintiff, though it was a suit instituted for partition and separate possession of the suit property. The learned counsel submits that apart from this, the counsel appearing for the appellant, nor communicated the further dates in the pending suit, nor the result thereof. Consequently, the appellant got knowledge of the said judgment and decree passed by the trial court only after he received notice from the concerned Talathi for mutating the suit property on the basis of the decree passed by the trial court. The learned counsel submits that the appellant has immediately filed an application for obtaining certified copies of the judgment and decree passed by the trial court. He has received the certified copies on 04.05.2010 and since there was summer vacation, after the summer vacation was over, due

to financial problems, the appellant preferred the appeal after some days in the month of July 2010 itself alongwith the application bearing Delay Misc. Application No. 12 of 2010. The learned counsel submits that though the appellant has given sufficient reasons explaining the delay caused in filing the appeal, the first appellate court has not considered the same, leave apart the law points involved in the matter. The learned counsel submits that the appellant may be given one more opportunity to contest the appeal on merits by condoning the delay caused in filing the appeal before the first appellate court.

5. The learned counsel for the respondent/original plaintiff submits that the first appellate court has considered in detail as to when the appellant has received notice from the concerned Talathi in respect of mutation on the basis of the judgment and decree passed by the trial court and also considered salary certificate of the appellant to find out whether he was really suffering from financial problems so as to prefer an appeal belatedly. The learned counsel submits that the appellant has failed to show sufficient cause to condone the inordinate delay of one year. The appellant was not diligent in defending his suit

before the trial court and consequently, the trial court has passed “No WS” order against the appellant and accordingly decided the suit as nobody has contested it.

6. On perusal of the contents of Delay Misc. Application No. 12 of 2010, it appears that the appellant came to know about the judgment and decree passed by the trial court in the suit only after he received notice from the concerned Talathi in respect of the mutation entry to be taken on the basis of the said judgment and decree. There is some two/three days gap as to when the appellant has received the said notice. However, the fact would remain that the appellant got knowledge about the judgment and decree passed by the trial court only after receipt of notice from the concerned Talathi. It is also part of record that thereafter, on 26.04.2010 itself (the Talathi has issued notice on 22.04.2010), the appellant filed an application for obtaining copies of the judgment and decree passed by the trial court and received the same on 04.05.2010. Though the first appellate court has considered the salary of the appellant as about Rs.10,000/- per month, the same is not sufficient to draw a conclusion that financial condition of the appellant was sound

and as such, he could have preferred an appeal immediately thereafter. The learned counsel for the appellant submits that the appellant is a labour in the Irrigation Department. The learned counsel for the respondent/plaintiff, at this stage, submits that the appellant is doing money lending business and the respondent/plaintiff has placed certain documents on record to substantiate the same. However, apart from that, the matter relates to the immovable property and it further appears that the trial court has decided the suit without any contest. It also appears that the trial court has not considered the effect of death of the father while passing the judgment and decree. It is also not clear that even though the earlier deed of partition was not accepted by the trial court, on what basis the trial court has declared the respondent/original plaintiff as the owner of 1/6th share in the suit property. It is also part of record that the parents have filed pursis Exhibit 36 before the trial court in the pending suit that they have relinquished their share in favour of the respondent/plaintiff. Even then the trial court has declared the respondent/plaintiff as the owner of the property to the extent of her 1/6th share. In view of the same, the substantial questions of law are involved in this matter. The appellant

should get one more chance to contest the appeal on merits.

Hence the following order:

ORDER

- I. Second Appeal No. 46 of 2014 is hereby allowed.
- II. The order dated 25.06.2013 passed by District Judge-2, Sangamner in Delay Misc. Application No. 12 of 2010 is hereby quashed and set aside.
- III. Delay Misc. Application No. 12 of 2010 is hereby allowed subject to costs of Rs.5,000/- to be paid by the appellant before the first appellate court within a period of four weeks from the date of this order.
- IV. In consequence of the order as above, the appeal preferred by the appellant before the first appellate court be restored and the first appellate court shall dispose of the appeal in accordance with law.
- V. In view of disposal of the Second Appeal, pending Civil Application also stands disposed of.

(V. K. JADHAV, J.)

vre/