

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 12 OF 2017

Sampat @ Sambhaji Pandurang Gaikwad & Ors. V/s. Ramchandra Tukaram Kulkarni (Since deceased) Through LRs. & Ors.	...	Appellants Respondents
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- Mr.T.S. Ingale a/w. Mr.Nikhil Pawar for the Appellants.
- None for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 3rd JULY, 2018.

P.C. :

1] Heard learned counsel for the Appellants.

2] This Second Appeal is directed against the judgment and order dated 11/04/2016 passed by the Adhoc District Judge-1, Sangli in Civil Misc. Application No.366 of 2013.

3] The said Civil Application was preferred by the present Appellants for condonation of delay of 9 years 4 months and 6 days in preferring the First Appeal against the judgment and decree passed in Regular Civil Suit No.262 of 1994 decided on 10/08/2004 by the Jt.

Civil Judge, Junior Division, Miraj, District Sangli.

4] The submission of learned counsel for the Appellants is that it was a suit for specific performance of the agreement. Though, the Appellants had appeared in the suit and filed written statement, however, thereafter they could not remain present, as it was represented to them that that their presence was not necessary. As a result, the suit came to be decided and decreed in their absence. When they came to know about it, initially they filed M.A. No.74 of 2011 under Order-9 Rule-13 of the Code of Civil Procedure for setting aside the exparte decree. The said application came to be rejected by the trial Court on 24/02/2012. Against the said order, the Appellants preferred the Writ Petition, which also came to be dismissed holding that the proper remedy for the Appellants is to file the appeal against the exparte decree, as the Appellants had appeared in the suit and resisted the suit by filing the written statement. The said Writ Petition came to be dismissed in September 2013 and immediately, thereafter in December 2013, the Appellants preferred this Application before the First Appellate Court for condoning the delay, which has occurred in preferring the First Appeal.

5] According to learned counsel for the Appellants therefore the Appellate Court should have considered the time consumed in

prosecuting the remedy which the Appellants were prosecuting in good faith by filing an application for setting aside the exparte decree. According to learned counsel for the Appellants, if the said period is excluded from consideration, then there is not much of delay as to reject the application for condonation of delay.

6] Secondly, it is submitted that the length of delay is not relevant or cannot be the sole criteria, as held by the Hon'ble Apex Court in the case of *N. Balakrishnan Vs. M. Krishnamurthy, (1998) 7 SCC 123*. According to him, the acceptability of explanation for the delay is the sole criteria. The word "sufficient cause" are therefore required to be construed in a liberal manner; especially in a case of litigation pertaining to the immovable property. Hence, according to him, this is a fit case, where the Appellate Court should have condoned the delay and allowed the Appellants' appeal to contest the suit which pertains to the specific performance of the agreement relating to the immovable property.

7] In my considered opinion, even if the submission advanced by learned counsel for the Appellants is accepted that some time was consumed in prosecuting the remedy of setting aside the exparte decree by filing the application and after rejection thereafter by preferring the Writ Petition and that period is excluded from

consideration and even if utmost liberal approach is adopted, in that case also, it is pertinent to note that the very application for setting aside the exparte decree bearing M.A. No.74 of 2011 was filed in the year 2011 i.e. after the lapse of about 7 years from passing of the judgment and decree by the trial Court. At the most, the Appellants could have been entitled for the benefit of this period from the date of this application for setting aside the exparte decree till their Writ Petition was rejected; but so far as the earlier period from the date of passing of the decree by the trial Court till the application was filed in the year 2011 under Order 9 Rule 13 of C.P.C., there is absolutely no convincing or reliable explanation. Conversely, as observed by the Appellate Court, the Appellants have come before the Court with conflicting versions. If they had appeared in the trial Court and filed written statement, contested the suit, then there is no explanation why they did not thereafter remain present in the said suit. Secondly, they had also appeared in the execution proceeding.

8] As a matter of fact, as observed by the Appellate Court, even the sale-deed, in pursuance of the decree of specific performance passed by the trial Court, is also executed in the year 2012 itself. In such situation, when absolutely no satisfactory cause is made out or proper explanation is given for this inordinate delay of 7 years from

the year 2004 to 2011, no fault can be found, if the Appellate Court has rejected the Appellants' application for condonation of this delay, in order to set-aside the decree, which was ultimately passed on merits, after considering the contentions raised by the Appellants in their written statement.

9] This Second Appeal therefore holds no merits, hence stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]