

VPH

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL (St.) No. 7650 OF 2018
IN
CIVIL APPLICATION No. 272 OF 2018

Pattherao Narsu Patil
@ Rajaram Dnyanu Patil ... Appellant
Vs.
Sou. Gangubai A. Lad & Ors. ... Respondents

Mr. Satyajeet A. Rajeshirke, for the Appellant / Applicant.
Mr. Sandip S. Koregave, for Respondent Nos. 1 & 2.

CORAM : A. M. DHAVALE, J.
DATE : OCTOBER 3, 2018

ORAL JUDGMENT:-

1. Heard the learned advocate for the Appellant and the learned advocate for Respondent Nos. 1 and 2. Considering the narrow controversy involved, this matter is taken up for final hearing at the admission stage.

2. Special Civil Suit No. 17 of 2000 was filed by the two sisters against the present Appellant, challenging his status as the adopted son of their parents and prayed for the decree for

partition. Though they failed to prove their claim that there was no adoption, the trial court granted decree for partition. It was held that suit properties were ancestral properties. By notional partition, the present appellant, who was defendant No. 1 got one-half share alongwith his deceased father, and the share of deceased father was further bifurcated into one-third each, thereby the present appellant got two-third share and two sisters got one-sixth share each. After the judgment, granting preliminary decree dated 15.12.2004, the two sisters (plaintiffs) moved an application for enhancement of their shares, in view of amendment in the Hindu Succession Act in 2005. The said application was allowed and the share of the two sisters (the plaintiffs) was enhanced to one-third each. Consequently, the amount of mesne profits was also increased.

3. Aggrieved by this modification of preliminary decree, the defendant (present appellant) as per the legal advice received filed review petition dated 14.12.2012. The said Review Application No. 1 of 2012 by order dated 6th November,

2014 was dismissed as not maintainable. Within two months thereafter the first appeal was filed alongwith Misc. Civil Application No. 2 of 2015 on 9th January, 2015, for condonation of delay of 4 years and 30 days. The material part thereof was in view of pendency of review petition before the trial court, the applicant claimed that he was old and illiterate and he did not receive proper information from his advocate, and therefore, there was delay in filing the present application.

4. By judgment dated 22.2.2018, the learned District Judge – 1, Islampur rejected the delay condonation application, holding that the delay has not been satisfactorily explained and the application itself was not maintainable.

5. The learned District Judge – 1, Islampur held that when the application was filed, the appeal was not maintainable, and therefore, the delay condonation application was not maintainable. He further held that the ground of illiteracy and old age were not sufficient to condone the delay, considering the huge delay.

6. After hearing the parties, following substantial questions of law are framed:

- (i) Whether the learned first appellate court has ignored the settled principles of law and the fact of pendency of review petition as the cause for the delay?
- (ii) What order?

My findings on these questions are as under:

- (i) In the affirmative;
- (ii) The appeal is allowed as per final order.

7. By consent of learned advocates for the parties, appeal is taken up for final hearing. From the facts on record, it is abundantly clear that the preliminary decree passed initially was in favour of the present appellant, getting two-third share, which was subsequently modified and his share was decreased to one-third. He was thereby aggrieved. It is obvious that he must have acted as per the legal advice given by the advocate, who instead of filing the appeal, preferred the review petition. The law on this point was not clear. The said modification of shares in a partition decree was first time introduced. The learned

advocate for the Appellant committed a mistake, which can be assumed to be bona fide in preferring the review petition instead of preferring the appeal against the said order.

8. Since the review petition is held not maintainable, there was no dispute that the Appellant had a right to file first appeal. As held in **State of Jharkhand Vs. Ashok Kumar Chokhani, AIR 2009 SC 1927**, in the application for condonation of delay, the first appellate court could not have gone into merits of the appeal and the delay condonation application could not have been rejected on the assumption that first appeal itself was not maintainable. At this stage, the Appellant had no opportunity to argue about the maintainability of the first appeal.

9. It is well settled law that if the party is litigating its cause before the wrong forum under a bona fide belief as per the legal advice given by his advocate, the delay occurred in the said proceeding has to be taken into consideration for condonation of delay in preferring the appeal. This is well settled principle as

recognised in Section 14 of the Limitation Act. This position was ignored by the trial judge and if the major part of the delay was on account of pendency of the review petition, and the said period if deducted, there was no delay in preferring the first appeal. In the circumstances, this was a fit case for condonation of the delay. If the learned first appellate court had doubt about maintainability of the appeal, the same could have been decided at the time of hearing of the first appeal. In the result, substantial question No. (i) is answered in the affirmative. In view of these facts appeal deserves to be allowed. Hence, the following order.

ORDER

- (i) The second appeal is allowed.
- (ii) The impugned order is set aside, condoning the delay, subject to payment of costs of Rs. 3,000/- by the Appellant to the respondent (as was awarded by the first appellate court), and the matter is remanded to the first appellate court. The Appellant is permitted to deposit cost in the first appellate court.

- (iii) Parties are directed to appear before the first appellate court on 17.10.2018. Both parties shall cooperate the first appellate court for early disposal of the appeal. The first appellate court shall dispose of the appeal as early as possible and in any case within three months from the date of uploading of this order.
- (iv) Second appeal is disposed of in the above terms.
- (v) Pending civil application filed in the second appeal does not survive and is accordingly disposed of.

Sd/-
[A. M. DHAVAL, J.]

Vinayak Halemth