

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

**CIVIL APPLICATION NO.1849 OF 2013
IN
FIRST APPEAL (ST.) NO.13460 OF 2013**

Ganpat Dadu Savant

... Applicant

V/s.

Balkrishna @ Balkrishnan Kesu Bhondve
(deceased) Through his L/Rs and Ors.

... Respondents

Mr.S.G.Kudle for the applicant

Mr.S.M.Gorwadkar, Senior Counsel for the respondent nos.1 to 5

Smt.R.Uma Maheshwari for the respondent no.6

**CORAM: K.K. TATED &
B. P. COLABAWALLA, JJ.**

DATED : MARCH 20, 2018

P.C. :

1 Heard.

2 This Application is preferred by original defendant no.1 for condonation of 787 days delay in filing First Appeal challenging the decree in respect of non consideration of issue about the Supplementary Will dated 29.09.1995 by judgment and decree dated

30.11.2010 in Regular Civil Suit No. 2282 of 2010.

3 It is the contention of advocate for Applicant that in Regular Civil Suit No. 2282 of 2010 Applicant filed his written statement cum counter claim dated 2.12.1989. Though the Suit was decided by Trial Court, there is no finding on his counter claim. Hence, after taking advice from the legal advisor, they filed First Appeal. He submits that there is a delay on their part to file First Appeal. Hence, delay may be condoned in the interest of Justice. In support of this contention, he relies on the paragraph 1 of the Civil Application which reads thus:

“1. The Applicant herein is the original Appellant in First Appeal No. 954 of 2011 and the said appeal is admitted by this Hon'ble Court and the impugned Judgment and Decree passed in Regular Civil Suit No.2282 of 2000 with Regular Civil Suit No.338 of 1996 by the Learned 4th Joint Civil Judge, Senior Division, Pune dated 30th November, 2010 has been challenged but however while filing the said appeal the issue in respect of not having considered the Applicant's counter claim has not been independently challenged by way of filing independent appeal but however subsequently, after having interaction with the well wishers and other legal luminaries Applicant has been advised to file independent appeal and hence now issue has cropped up in respect of the ownership rights of the suit property and admittedly Applicant's name is recorded in the 7/12 extract in the owners column but however for not having dealt with the issue in respect of Supplementary Will dated 29.9.1995 many hurdles are likely to crop up in the near future and hence, in order to resolve the said unwarranted things the Applicant thought it fit and proper to file the present Appeal and the delay caused in filing the present Appeal is not deliberate and willful and when the Applicant went to the suit premises the revenue authorities concerned advised him to get the declaration to the effect that Supplementary Will dated 29.9.1995 is valid will and the same is binding upon all the

concerned and hence anyhow the grounds have been taken out in the earlier First Appeal No.954 of 2011 but however merely on account of not having raised the objections about non consideration of the supplementary Will by way of not filing independent appeal, it should not result into miscarriage of justice and hence, the delay caused in filing the present appeal be condoned in the interest of justice.”

4 On the basis of this submission, the learned counsel for the Applicant submits that this Hon'ble Court be pleased to condone the delay and matter be heard on its own merits.

5 On the other hand, the learned Senior Counsel for the Respondent nos.1 to 5 vehemently opposed the present Civil Application. He submits that First Appeal filed by the Applicant itself is misconceived. He submits that bare reading of the written statement dated 2.12.1998 filed by the Applicant defendant no.1 in Regular Civil Suit No. 2282 (Old Regular Civil Suit No. 1742 of 1996) shows that Applicant failed to file any counter claim. Not only that, after filing written statement, Applicant after more than 11 years preferred Application in trial court dated 10.11.2009 being Exhibit-105 for permitting Applicant no.1 original defendant no.1 to pay requisite court fees on declaration sought in the counter claim vide Exhibit-42. Prayer clause of that Application reads thus:

“The application may kindly be allowed and the Defendant No.1 may be allowed to pay appropriate and requisite Court Fee Stamp on the declaration sought in the Counter Claim Wide Exh.42.”

6 The learned Senior Counsel for the Respondent nos.1 to 5 submits that said Application was opposed by them before Joint Civil Judge, Senior Division Pune. He submits that Trial Court passed order below Exhibit-105 in Regular Civil Suit No. 2282 of 2000 and rejected Applicant's original defendant no.1's Application for payment of court fees on alleged counter claim. He submits that Trial Court by order dated 6.11.2010 specifically held that bare reading of written statement shows that Applicant has not filed any counter claim. He relies on paragraph 4 of the said order which reads thus:

“4. On perusal of the above cited citation, it appears that in the matter before the Hon'ble High Court the defendant had specifically mentioned in his written statement about the counter claim and also shown his willingness to pay the court fee and later on applied for payment of the court fee, which was rejected by the lower court and under such circumstances Hon'ble Bombay High Court had held that when the defendant has already included the counter claim in his written statement, the lower court would have permitted defendant to pay court fee stamp on the said counter claim. In the written statement Exh.42 there is absolutely no mention of filing of any counter claim by the defendant no.1. Only one prayer has been made along with the prayer of dismissal of the suit about the declaration of ownership of defendant no.1. Such prayer cannot be treated as counter claim on behalf of defendant no.1. Under such circumstances the permission cannot be granted to defendant no.1 to treat the written statement. Exh. 42 as counter claim and to pay the court fee on it. Hence, application is rejected.”

7 The learned Senior Counsel submits that without any counter claim, there is no question of filing First Appeal in this court. Hence, Civil Application preferred by Applicant is required to be dismissed on this ground only. Even there is no justification for delay.

8 The learned counsel for the Respondent no.6 submits that she is adopting the arguments made by the learned Senior Counsel for the Respondent nos.1 to 5. She submits that there is no substance in the present Civil Application and same be dismissed.

9 It is to be noted that in the present proceedings, bare perusal of written statement filed by the Applicant dated 2.12.1998, Application dated 10.11.2009 Exhibit-105 and order dated 6.1.2010 below Exhibit-105 shows that there was no counter claim on behalf of Applicant Defendant no.1 before Trial Court. Therefore, there is no substance in entertaining the present Civil Application for condonation of delay. Apart from that, Applicant has not made out any case to condone the inordinate delay of 787 days in filing the First Appeal. Hence, following order is passed:

- a) Civil Application is rejected.
- b) In view of rejection of Civil Application for condonation of delay, registration of First Appeal (ST) No.13460 of 2013 stand cancelled.
- c) No order as to costs.

(B. P. COLABAWALLA, J.)

(K.K. TATED, J.)