

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

**SECOND APPEAL (ST.) NO. 12411 OF 2018
WITH
CIVIL APPLICATION NO. 766 OF 2018**

Baba Khan Aamir Khan	...	Appellant
V/s.		
Sarabee Aamir Khan		
(Since deceased) Through LR.s. & Ors.	...	Respondents

- Mr.Ashok B. Tajane for the Appellant.
- Mr.J.A. Rahman for Respondent No.2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 3rd JULY, 2018.

P.C. :

1] Heard learned counsel for the parties.

2] This Second Appeal takes an exception to the judgment and order dated 15/02/2018 passed by the Adhoc District Judge-1, Pune in Civil Misc. Application No.736 of 2013, which was an application for condonation of delay in preferring the appeal against the judgment and decree dated 30th August, 2005 passed by the Civil Judge, Senior Division, Pune in Regular Civil Suit No.340 of 2000.

3] The said suit was filed by Respondent Nos.1 and 2 for injunction, partition and separate possession of their share. The suit summons was duly served on the Appellant. The Appellant has engaged the Advocate and appeared through his wife i.e. Power of Attorney Holder. However, thereafter he failed to remain present. As a result, the suit came to be decreed on 30th August, 2005. Against the said judgment and decree the Appellant preferred an application before the Appellate Court for condonation of delay of about 11 years in preferring the said appeal.

4] The reason given in the application before the Appellate Court was that he has engaged the Advocate and also he has appointed his wife as Power of Attorney Holder. However, according to him, his wife lost track of the suit due to household duties and therefore, the matter came to be decided exparte.

5] However, it is admitted by the Appellant in his cross-examination that though he was residing at Dubai from 1981 to 2012, he used to visit Pune once in a year for a period of a week or fortnight. As rightly held by the Appellate Court, no explanation is offered by the Appellant as to why he has not made any enquiry about the progress of the suit with his wife or even with his Advocate. There is nothing on

record or in the application to show that the Appellant was prevented from any sufficient cause from either attending the said Court or making such enquiry. In the considered opinion on this Court, the litigant has to be diligent in prosecuting the litigation. He cannot just engage the Advocate and say that as his Advocate was looking after the case, he did not bother to look into it for years together.

6] According to learned counsel for the Appellant, the Hon'ble Apex Court in the case of *N. Balakrishnan V/s. M. Krishnamurthy, (1998) 7 SCC 123*, has held that the length of the delay is not the deciding factor but the sole criteria is the "sufficient cause". Moreover, it was held that while considering the sufficient cause, the approach of the Court has to be liberal, as the object of fixing time limit is not to destroy the rights but law relating to limitation is founded on public policy of fixing a life span for the legal remedy for the general welfare. According to learned counsel for the Appellant, when the function of the Court is to adjudicate dispute between the parties and to advance substantial justice, then even if there is such a long delay, the Appellate Court should have condoned the same.

7] However, in my considered opinion, though it is true that the approach of the Court should be liberal in considering the application for condonation of delay and length of the delay alone may

not be a deciding factor, it is also one of the factors, which the Court has to consider; especially when no sufficient cause is made out, even from the averments made in the application. It is not merely a question of absence of any *mala fides* but then the diligence is also an important factor, which is conspicuously absent in the present case. At no time the Appellant has bothered to know the progress of the suit from his wife who, was the Power of Attorney Holder and also with the Advocate; though he was coming to India every year and that too for a week or a fortnight. Thus, the total lack of diligence or negligence writ large on the face of record cannot make out sufficient cause for condonation of delay.

8] Moreover, while deciding such application, the Court has to consider the rights of the other side also. If for all along these 11 years the Appellant has kept mum and therefore the rights of the Respondents are crystallized, the Appellate Court has rightly held that this is not a fit case, where the discretion can be exercised to condone the delay.

9] It is also pertinent to note that the medical certificate produced is also of the year 2013, which will not relate back to the date of judgment of the suit. The view taken by the Appellate Court being therefore just and reasonable, it does not call for interference in

any way.

10] As a result, the Second Appeal holds no merit, hence stands dismissed.

11] In view of the dismissal of the Second Appeal, nothing survives in the Civil Application and hence, it also stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]