

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

**CIVIL APPLICATION NO.67 OF 2018
IN
SECOND APPEAL (ST) NO.18960 OF 2017**

**WITH
CIVIL APPLICATION NO.68 OF 2018
IN
SECOND APPEAL (ST) NO.18960 OF 2017**

Mr. Prabhakar Ganpat Sonawane & Anr.	Applicants
V/s.	
Ashok Mahadu Khairnar	Respondent

Mr. Gaurang Jhaveri, i/by Mr. M.N. Sandhyanshiv, Advocate for the Applicants.

Mr. Tushar Sonawane, Advocate for the Respondent.

CORAM : M.S. SONAK, J.

DATE : 22nd FEBRUARY, 2018

P.C.

1. Heard the learned counsel for the parties.
2. Normally, this Court, is liberal in matters of condonation of delay and therefore, was inclined to condone the delay of 172 days in institution of the appeal. However, the learned counsel for the respondent pointed out that in case, the reason set out in the civil application for condonation of delay is accepted, then, it is possible, that the applicant on the basis of the same reasons, urges that the appeal itself be allowed. This is because the appeal is against the impugned judgment and order dated 24.09.2016 by which the first

Appellate Court, has declined to condone the delay of almost 6 years in institution of the appeal against the judgment and order dated 26.06.2016.

3. Accordingly, the civil application as well as the second appeal were taken up for consideration together with a view to examine whether any substantial question of law is at all involved in the second appeal. If such question of law was found to be involved, then, a liberal approach have to be taken in the matter of condonation of delay of 172 days in institution of the second appeal.

4. The appellant is the original plaintiff in RCS No.14/2002. The respondent-defendant filed a counter-claim in the said suit which came to be numbered as RCS No.28/2005. The two suits were disposed of by the learned Trial Judge by the judgment and decree dated 26.06.2009, the operative portion of which reads as under:-

ORDER

- 1) *The suit of plaintiff bearing RCS.No.14/2002 dismissed with costs.*
- 2) *The suit of the defendant bearing RCS.No.28/2005 is decreed with costs on the following terms and conditions.*
 - i) *Suit is decreed on a condition that plaintiff will execute the sale-deed of the suit property after obtaining necessary permission from the Collector by the defendant.*
 - ii) *If Collector refused for permission, plaintiff pay Rs.35000/- (thirty five thousand) to the defendant within 1 month of the order of Collector.*
 - iii) *If Collector passed the order in favour of the defendant, the defendant is hereby directed to pay Rs.40000/- (Rs. Forty thousand only) to the plaintiff within 02 months from the date*

of the order of Collector.

iv) After payment of the amount of Rs.40000/- (Rs. Forty thousand only) to the plaintiff by the defendant, plaintiff is hereby directed to execute the sale deed of the suit property in favour of the defendant.

v) If plaintiff fails to execute the said sale deed in favour of the defendant, defendant is at liberty to get the execution of the sale deed through due procedure of law and if defendant failed to comply the order he will not entitled for relief of execution of sale deed then he is entitled for refund the earnest money of Rs.35000/- (Thirty five thousand only).

3) Decree be drawn up accordingly.

5. From the aforesaid, it is clear that the suit of the appellants-plaintiffs was dismissed with costs and the counter-claim of the respondent-defendant was decreed subject to certain terms and conditions. One of the condition was that the respondent-defendant must pay balance consideration of Rs.40,000/- to the appellants-plaintiffs within two months from the date the Collector grants permission in favour of the respondent-defendant with respect to the suit property. The decree in the counter-claim was essentially a decree of specific performance subject to compliance of certain conditions by the respondent-defendant.

6. Record indicates that, the appellants-plaintiffs infact, instituted Execution Proceeding No.34/2012 in the year 2012 for recovery of the amount of Rs.40,000/-. At that stage, no appeal was instituted against the judgment and decree dated 26.06.2009. The appeal alongwith

application for condonation of delay came to be instituted only on 16.06.2015 i.e. after almost 6 years from the date of the judgment and decree. There is inordinate delay of almost 6 years in institution of the first appeal.

7. The reason set out in the civil application seeking condonation of delay is that, the Applicant No.1 was suffering from paralysis, hypertension and diabetics. He stated that the Applicant No.1 was admitted in the hospital as an indoor patient on 14.06.2009 i.e. even prior to the issuance of the judgment and decree dated 26.06.2009. Basically, it is stated that the Applicant No.1 was unable to institute the appeal on account of his old age and health condition. The learned counsel for the applicants also points out that since the parties were from Zoran, Nashik, they had no ready access to advocates and this circumstance also contributed to the delay.

8. The record also indicates that the Applicant No.1 had appointed his son as a power of attorney holder. In fact, the power of attorney was styled as the second appellant in the first appeal and the civil application seeking condonation of delay. This indicates that the Applicant No.1, had the assistance of his son to pursue the matter. That apart there since the appellants were well enough to institute and execution petition in the year 2012, some better explanation was necessary to explain the delay of almost 6 years, out of which, the delay

of 3 years is after the institution of the execution petition. The fact that the execution petition was instituted to recover the amount of Rs.40,000/- also indicates that the appellants, could not really be serious about challenging the decree by which his suit came to be dismissed and the counter-claim of the respondent came to be decreed. Appeal Court, after consideration of all the facts and circumstances as also by exhaustive reference to case law has exercised discretion in a fair and proper manner. No substantial question of law therefore, arises in this appeal. If the appellants could contact an advocate in the year 2011 for institution of the execution application, then the plea that, they had no ready access to advocate being from Zoran, Nashik, cannot be accepted.

9. In these circumstances, even if the delay of 172 days in institution of the appeal were to be condoned, the appeal itself, would have to be dismissed since it involves no substantial question of law.

10. Taking into consideration the aforesaid, the civil application and consequently the second appeal are hereby dismissed.

11. There shall be no order as to costs.

(M.S. SONAK, J.)