

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CIVIL APPLICATION (CAO) NO.79 OF 2018
IN
MISC. CIVIL APPLICATION STAMP NO.607 OF 2018
IN
SECOND APPEAL NO.391 OF 2003

(Ramesh Manikrao Gawande thr. LR's Smt. Kalpana Ramesh Gawande and others
Vs. Smt. Shobha Prabhakar Kolkhede)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Shri V.B. Bhise, Advocate for Appellants.
Shri J.J. Chandurkar, Advocate for Respondent.

CORAM: ROHIT B. DEO, J.
DATE: 4th DECEMBER, 2018.

Heard.

2] This application is moved by the original defendant seeking condonation of delay of 446 days in filing application for restoration of second appeal.

3] This court was not inclined to condone the delay since the justification pleaded *inter alia* in paragraph 2 of the application is not satisfactory, to say the least.

4] However, the *prima facie* merits of the second appeal have been examined only to consider the justifiability or otherwise of condoning the delay. Having heard the learned counsel appearing on behalf of the appellant – defendant and the learned counsel appearing for the respondent – plaintiff this court is satisfied that the second appeal lacks substance.

5] It is not in dispute that the appellants herein are the tenant qua the suit property and have suffered decree of possession in suit instituted by the respondent – plaintiff.

6] The judgment and decree of the Trial Court dated 03.04.1998 is confirmed in Regular Civil Appeal 132/1998 which is dismissed by the Joint District Judge, Amravati on 21.04.2004.

7] Shri Bhise, the learned counsel for the tenant would urge that the quit notice dated 06.12.1995 issued by the landlord and where under the tenancy is determined pursuant to permission granted by the Competent Authority under the C.P. & Berar Letting of Houses and Rent Control Order, 1949, is deemed to have been waived by the landlord. The ground of waiver is based on the fact that the landlord instituted Regular Civil Suit 15/2001 seeking recovery of rent for the period 1997 till December, 2001. The submission is that by instituting the suit the quit notice is waived.

8] It must be noted that when the landlord instituted the suit for recovery of rent, the quit notice issued dated 06.12.1995 had served the purpose in as much as the landlord filed suit for eviction and secured decree of eviction. The fact that after securing decree of possession from the trial court the landlord, under wrong advice or otherwise, chooses to institute suit for recovery of “rent” and the further fact that the tenant deposited the rent in the court which is withdrawn by the landlord is not determinative of waiver. Indeed, since the suit for eviction

is decreed even prior to the landlord instituting suit for recovery of rent it debatable whether the doctrine of principle of waiver *per se* can be invoked. Even if it is assumed *arguendo*, that notwithstanding that the quit notice culminated in decree of eviction, the tenant could have been invoked the principle of waiver qua to quit the notice, there is no evidence on record to conclusively show that the landlord intended to waive his rights under the quit notice.

9] Since this court has not found *prima facie* merit in the grounds raised in the second appeal, the application for condonation of delay in preferring the miscellaneous civil application for restoration of appeal is rejected.

JUDGE