

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.1582 OF 2016

Subhadrabai Dagadu Jadhav,
Age 65 years, Occupation Household,
R/o Kale Plot, Omerga Tq. Omerga
Dist. Osmanabad.

...Applicant.

VERSUS

1. Radhikabai Ambaji Kamble,
Age 50 years, Occupation Household &
Business, R/o Kale Plot, Omerga
Tq. Omerga Dist. Osmanabad.
2. Anusayabai w/o Ratan Mane,
Age 50 years, Occupation Household,
R/o Balaji Nagar, Omerga
Tq. Omerga Dist. Osmanabad.

...Respondents.

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Mr S. S. Kulkarni, Advocate for applicant.
Mr. S. B. Gastgar, Advocate for respondent No.1.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 06-06-2019.

ORAL ORDER :

1. Present application has been filed to condone the delay of 362 days in filing second appeal.
2. The applicant is the original defendant No.2 who intends to challenge the Judgment and decree passed in Regular civil Appeal

No.20 of 2009 on 23-09-2014 by learned District Judge -1, Omerga thereby confirming the Judgment and decree passed by learned Joint Civil Judge, Junior Division, Omerga in Regular Civil Suit No.693 of 2005 dated 24-07-2009. Present respondent No.1 had filed the said suit for declaration and permanent injunction in respect of House property bearing Municipal Council No.260 admeasuring 33 x 33 feet, in Ward No.1, Omerga. According to the present applicant – appellant, the plaintiff has no concern with the suit property. It is stated that, the house was belonging to defendant No.2 but she had sold it to defendant No.1 by way of registered sale deed dated 30-05-2003 for consideration of Rs.1,00,000/-. With this fact the plaintiff had come with the suit, however the defendant No.2 had contended that, in fact the transaction was of sale with a condition to repurchase, and it is stated that she had not handed over the possession of the suit property. The suit had proceeded ex-parte against defendant No.1. Though defendant No.2 had contested the suit, both the Courts are against her. But taking into consideration the fact she is agitating that she is still in possession of the property, she intends to challenge the Judgment and decree passed by the First Appellate Court, however there is delay of 362 days.

3. As regards delay is concerned the applicant is coming with a case that, the advocate who was representing her before the First Appellate Court did not communicate about the Judgment and decree that was passed. However, in the last week of October 2014 she approached advocate to make inquiry, at that time she came to know about the decision. Immediately she had applied for the certified copies and contacted advocate at Aurangabad. It is stated that, since she is a old and helpless lady, had no knowledge about the limitation, the delay has occurred which is unintentional.

4. Respondent No.1 is objecting the application on the ground that, reasonable and sufficient ground has not been shown to condone the delay. Further even as regards the order that was passed by this Court on 25-04-2017 to deposit an amount of Rs.50,000/- in the Court by 05-05-2017, she has not deposited the said amount within the stipulated period. It came to be deposited only on 13-02-2019, therefore there are no bonafides with the applicant.

5. Heard both sides. Both the learned advocates have made submissions in support of their respective contentions.

6. No doubt the fact remains here is that the applicant though a specific order came to be passed by this Court on 25-04-2017 has not deposited the requisite amount. That delay of depositing the amount was condoned by this Court by order dated 13-02-2019 and accordingly the amount has been deposited. The first and the foremost fact on which the present applicant wants to get the delay condoned is that, her advocate who was representing her before the First Appellate Court did not communicate the Judgment and decree passed by the First Appellate Court to her. In fact except the bare words of the applicant, there is nothing which can support her contention. It is not her case that, she has taken any action against her advocate for not obeying his professional duties. However at the same time which we cannot forget is that the applicant is 65 years old lady coming from rural area. So also the respondent No.1 is also equally old and coming from the same area. Both are illiterate. The thing that is also required to be considered is that, the suit was for declaration and permanent injunction. The suit was decreed. Plaintiff was declared as owner and the defendants No.1 and 2 or anybody else through them were permanently restrained from causing obstruction to the possession of the plaintiff over the enjoyment of the house. A submission has been made on behalf of

the applicant that, in the execution petition the original plaintiff has prayed for possession, and therefore it supports the submission of the applicant that she possess the suit house. If this is a fact then the fact deserves to be gone into and for that purpose at least it can be said that the case is made out to condone the delay, however at the same time the rights of respondent No.1 are also required to be protected. When the order of deposit of amount of Rs.50,000/- was passed by this Court on 25-04-2017, an observation was recorded that, till then the possession of the applicant may not be taken over subject to applicant depositing amount of Rs.50,000/- in this Court by 05-05-2017, and further stipulation was made that, in case of failure to deposit the amount, the restrain put on taking over possession would cease to operate. In spite of this fact, till 13-02-2019, the applicant did not deposit the amount. No doubt in the meantime the possession has not been taken by respondent No.1 as it appears to be the situation as on today. Therefore apart from imposing cost, a conditional order for deposit of further amount deserves to be passed on the ground that the plaintiff is held to be the owner of the property by both the Courts. Even if for the sake of arguments it is taken that the possession still lies with the defendant No.2 then the right of the plaintiff deserves to be protected. So also

this would be to show further bonafides since the earlier order was not obeyed within time. With these observations, following order is passed.

ORDER

- 1) The application is hereby allowed.
- 2) The delay caused in filing second appeal is hereby condoned subject to deposit of cost of Rs.5,000/- (five thousand) within 15 (fifteen) days from the date of this order.
- 3) After the said amount is deposited, it be disbursed to respondent No.1.
- 4) Further the applicant should deposit amount of Rs.20,000/- (twenty thousand) within a period of three (03) months from the date of this order to show further bonafides.
- 5) After the amount of cost is deposited, Registry to verify and register the second appeal and place it for consideration before appropriate Bench.

Application is disposed of accordingly.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-