

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Civil Application No. 02288 of 2019
(In Second Appeal Stamp No. 02988/2019)

District : Aurangabad

Bhagwansing Kacharu Pune. .. Applicant.

versus

Ashok Damodar Puneekar. .. Respondent.

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Mr. Girish S. Rane, Advocate, for the applicant.

Mr. Pramod F. Patni, Advocate, for the respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 26TH MARCH 2019

ORAL ORDER :

01. Present application has been filed for getting delay of 316 days condoned in filing the second appeal.

02. The applicant is the original defendant. The present respondent had filed Regular Civil Suit No. 51 of 2006 for possession and mesne profits. The said suit was dismissed by learned Civil Judge (Junior Division), Kannad, District Aurangabad, on

18-06-2012. He preferred first appeal before District Court, Aurangabad, bearing Regular Civil Appeal No. 451 of 2012. The said appeal has been allowed and the suit came to be decreed on 15-12-2017. Now, the defendant intends to file the second appeal challenging the said judgment and decree passed by the first appellate Court.

03. It has been contended that the applicant had engaged Advocate Shri K.U. Nikam to defend himself before the trial Court. The same Advocate appeared in appeal for him. However, unfortunately the said Advocate expired in May 2017. The applicant was not aware about the decision of the first appellate Court. He came to know about the impugned judgment and decree when he was served with notice of execution proceedings on 01-12-2018. He had thereafter visited office of the Advocate for preparing second appeal and thereafter he was required to go to District Court, again to the trial Court and once again to the District Court for obtaining certified copies of the judgment and decree. The delay is unintentional. Since the Advocate whom he had engaged had expired and then he could not come to know about the decision by the first appellate Court, it took time to obtain certified copies. That was the outcome for the said delay and, therefore, he prays for condoning the same as substantial questions of law are arising in the

second appeal.

04. The application is contested by filing affidavit in reply by the respondent. It is denied that any substantial question of law is involved in the appeal. The delay is inordinate and huge. It is denied that for the first time the applicant came to know about the decision when he came to know about execution proceedings. It is specifically stated that on the date of hearing of the appeal, the applicant was present in the court. It was admitted that he had engaged Advocate Mr. K.U. Nikam to represent him in appeal. It is denied that he was not aware about death of his Advocate. Further fact is also denied that he was required to go to District Court, again to trial Court and again to the appellate Court for obtaining certified copies. It is stated that the applicant is desirous of enjoying the property which is in his possession and, therefore, he is interested in delay.

05. Heard both sides. They have submitted submissions in support of their respective contentions.

06. The first and the foremost fact that is admitted by the respondent also, that the present applicant was represented by Advocate Mr. K.U. Nikam in appeal. The certified copy of the *Roznama* in

appeal has been made available. It appears that on 23-01-2013, Advocate Mr. K.U. Nikam filed his appearance vide filing *Pursis* Exhibit 06 to represent the respondent i.e. present applicant. It also appears from the certified copy of the *Roznama*, that the arguments were heard on 28-11-2017. It was tried to be submitted that the arguments on behalf of the respondent were advanced by son of Advocate Mr. K.U. Nikam, who himself is an Advocate. It also appears that prior to 28-11-2017, said Advocate had obtained adjournment on behalf of the respondent on 20-11-2017. That means, it cannot be said that nobody was representing the applicant. The only fact that requires consideration is, as to whether said son of deceased Advocate Mr. K.U. Nikam had also signed *Vakalatnama* for the present applicant when Advocate Mr. K.U. Nikam had filed his *Vakalatnama* before the trial Court. This is with the background, that in appeal, he has only filed *Pursis* stating that he had represented the respondent in the trial Court and, therefore, he has the authority to represent him in appeal also. The question is, after death of Advocate Mr. K.U. Nikam, whether it was proper or expected from his son, who is also an Advocate, to file a separate *Vakalatnama*. All these facts were necessary just to see whether appellant was aware about hearing of the appeal and thereafter its decision. A specific statement on affidavit made by the present respondent has been pointed out, that on

the date of hearing of the appeal, present applicant himself was present in the court. However, it is to be noted that in *Roznama*, presence of the applicant - respondent therein has not been mentioned. Therefore, except the said statement on oath, there is no corroboration to that fact.

07. Further, as regards time taken in obtaining certified copies is concerned, a statement is made that he was firstly required to approach District Court and thereafter to the trial Court. Even if for the sake of arguments it is accepted, it could have been obtained much earlier than as predicted in the application, taking liberal approach, it can be said that reasons have been shown to condone the delay. However, at the same time, inconvenience that would be caused to the respondent deserves to be compensated in terms of money.

08. Hence, the following order :-

(a) The civil application is allowed.

(b) The delay caused in filing second appeal is hereby condoned, subject to deposit of costs of Rs. 10,000/- [Rupees ten thousand] within 15 (fifteen) days from the date of this order, in this Court. After the amount is deposited, it be given to the respondent.

(c) After the amount is deposited, Registry to verify and register the second appeal and place it for consideration before this Court on 18th April 2019.

(Smt. Vibha Kankanwadi)
JUDGE

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