

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

**SECOND APPEAL NO.168 OF 2016
WITH
CIVIL APPLICATION NO.2431 OF 2016**

Chandrasen Vishwanath Dhavale

...Versus...

Suryabhan Lahanuji Veer and others

...

Mr. Dalal, Advocate h/f Mr. V.D. Salunke, Advocate for the appellant

Mr. H.V. Tungar, Advocate for the respondent Nos.1, 2A to 2C

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 07th FEBRUARY, 2019

ORDER :

1 Present appeal has been filed by the original defendant. Present respondent No.1 and predecessor of respondent No.2 had filed Regular Civil Suit No.24/2006 for specific performance of contract against present appellant before Civil Judge Senior Division, Beed. The said suit came to be decreed ex parte against the present appellant on 04.07.2007. Present appellant, thereafter filed Miscellaneous Civil Application No.137/2014 for condonation of delay in filing First Appeal. The said application came to be dismissed on 05.01.2016. Hence, present Second

Appeal is filed.

2 The original suit i.e. R.C.S. No.24/2006 was filed in respect of land admeasuring 1 Hectare 22 Ares in Sy.No.40 situated at Manjarsumba, Tq. & Dist. Beed. As aforesaid, the said suit was for specific performance of the contract. The suit summons was duly served on the defendant. However, when he failed to appear, the matter proceeded ex parte. After taking into consideration the evidence on record, the learned Trial Court directed the defendant to execute sale deed in favour of the plaintiffs by accepting the remaining amount of consideration of Rs.33,000/-, within two months from the date of the decree. The appellant submits that his forefather was having 1 Acre 31 Gunthas land in Sy.No.40/1 in village Manjarsumba. His father had sold 9 Gunthas land and the remaining area i.e. 1 Acre 22 Gunthas was in the name of his father, in the revenue record. After death of father, the said land was mutated in the name of the three brothers viz. Chandrasen, Sundar and Bhaskar. It was stated in the plaint in R.C.S. No.24/2006 that the defendant, his father and brother had agreed to sell the suit land for a consideration of Rs.75,000/-. Agreement to sell was executed on 21.04.2003. Earnest amount of Rs.42,000/- was paid and the remaining amount was agreed to be paid at the time of execution of the sale deed. It is stated that though the matter has proceeded ex parte against him, he had filed the application for condonation of delay by giving

reasonable and sufficient grounds. In fact, he intended to say that he was not properly served with the suit summons. He was doing labour work on daily wages at Sugar Factory and he used to be out of station most of the time. It was contended that summons was at Exh.7, but then the said Exh.7 is missing from the file of the Trial Court. The Appellate Court did not give opportunity to him to contest the matter. Intentionally the respondent did not file execution petition till 2010. Appellant came to know about the proceedings, only when he was served with the notice about the Darkhast proceedings. He has every doubt regarding the documents styled as 'agreement to sell' and it is, therefore, stated that his vital rights in the immovable property were involved. The learned First Appellate Court ought to have condoned the delay. The discretion with the First Appellate Court has not been properly used and therefore substantial questions of law are arising in this case.

3 Heard learned Advocate Mr. Dalal holding for Advocate Mr. V.D. Salunke for appellant and learned Advocate Mr. H.V. Tungar for respondent Nos.1, 2A to 2C.

4 The learned Advocate appearing for the appellant has taken me to the documents, those have been filed on record. He has specifically submitted that it was pointed out to the First Appellate Court that Exh.7, which was the only document showing alleged due service of summons,

was missing from the record of the Trial Court and therefore, he could not raise due objections in the matter. It was also not considered that not only the defendant but his brothers were having share in the property and therefore the said decree was not executable at all. It was brought to the notice of the First Appellate Court that the applicant had sold his 24 Ares land by way of registered sale deed to one Bharat Solunkhe on 15.02.2012 and said Bharat has been put in possession of the said property. Under such circumstance, the applicant/appellant was not at all the owner, against whom the decree could have been executed. He has also pointed out the mutation entries and 8-A extract in respect of said 24 Ares land out of Sy.No.40/1 standing in the name of Amol Bharat Salunkhe. The learned First Appellate Court did not consider that proper extension given in respect of delay of seven years and therefore, when the discretion has not been exercised judiciously, substantial question of law arises.

5 Per contra, the learned Advocate appearing for the respondents submitted that in fact, the present appellant had filed objection to the execution of the decree by filing application at Exh.16/D in Regular Darkhast No.3/2010 on 07.02.2011. His objection was rejected on 23.01.2012. In spite of that, he did not file any appeal. On the contrary, he went on to dispose of the land by executing sale deeds. Under such circumstance, he cannot be said to be a bona fide objector. The reason

given by him cannot be said to be reasonable. Reliance has been placed on the decision in Basawaraj and another vs. Special Land Acquisition Officer, (2013) 14 Supreme Court Cases 81, wherein it has been held that

“Discretion to condone delay has to be exercised judiciously based on facts and circumstances of each case. Sufficient cause cannot be liberally interpreted if negligence, inaction or lack of bona fides is attributed to the party. Even though limitation may harshly affects rights of a party but it has to be applied with all its rigour when prescribed by statute. Courts have no choice but to give effect to the same. Result flowing from statutory provision is never an evil. Inconvenience is not a good ground for interpreting a statute. Courts do not have power to extend period of limitation based on equal grounds. If courts start substituting period of limitation then it would amount to legislation, which is impermissible. If party has acted with negligence, lack of bona fides or inaction then there cannot be any justified ground for condoning the delay.”

6 The first and the foremost fact, that is required to be considered in this case is that the suit was filed on 19.01.2006. Specific observations have been made in the said Judgment that defendant was duly served and he had not appeared and therefore a specific order was passed below Exh.1 on 25.01.2006. Thereafter, the suit came to be decided on 04.07.2007. That means, for about more than one and half years, the suit was pending before the Court. Even though it was not tried to be brought on record that the suit summons Exh.7 was missing from the file of the Trial Court. There could have been a secondary evidence, if at all the appellant

intended to challenge the service of summons. The first appeal was tried to be filed after a period of 6 years 7 months and 10 days, which is definitely an inordinate delay. The conduct of the present appellant is also required to be considered. The Regular Darkhast was filed in 2010. He was served with the notice of the same. But then he has intentionally not given the date, of which he received the notice in his Miscellaneous Civil Application No.137/2014. It was stated in the application that instead of filing the appeal against the said decree, he was advised to file objection petition in execution proceedings on 07.02.2011. He has not given the name of the Advocate, who had given him alleged wrong advise. Merely because the said objection was filed by him through appellant, it cannot be stated that the said Advocate had given him that wrong advise. Therefore, it was incumbent upon him to give the name of the Advocate, who had given him the alleged wrong advise. Further, after the said objection was taken by him vide application Exh.16, it was heard on merits and rejected on 23.01.2012. At least after that rejection of Exh.16 he could have definitely filed appeal, but then he does not give any reason as to why till 2014 he had not tried to file any appeal. One more conduct on his part is required to be considered. He had taken objection by filing application Exh.16 on 07.02.2011. Yet he has executed sale deed in favour of Bharat Prabhakar Solunkhe on 15.02.2012. That means, during the pendency of said Regular

Darkhast, not only the appellant but his brothers have also sold portions of land to different persons, on the same day. This action on the part of the appellant is not at all bona fide.

7 Learned First Appellate Court not only considered all these above facts but also the oral evidence led by the appellant in Miscellaneous Civil Application No.137/2014 before him. In his cross examination the appellant has not denied receipt of summons, but then claimed that it was received to him late. That means, he had not fixed the defence as to whether he should say that he had not received at all the summons or it was received late. But then, further, he was told that he was not aware about what should be done in respect of ex parte decree. That means, he was aware about the decision in the matter against him. Thus, it can be seen from the entire conduct of the appellant that he was not only negligent, was inactive but his actions were not bona fide and therefore, definitely the observations and ratio laid down in Basawaraj and another (supra) is applicable here. There is no substantial question of law arising in this matter. Hence, the Second Appeal is disposed of as not admitted. Since Second Appeal is not admitted, Civil Application is also disposed of.

(Smt. Vibha Kankanwadi, J.)