

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.99 OF 2017

1. Laxman Bajiba Holgir (Deceased).
2. Jijaba Maruti Holgir,
Age 32 years, occupation Agriculture,
R/o Lingdeo Tq. Akole,
Dist. Ahmednagar. ...Appellants.

VERSUS

1. Kacharabai Lingu Sadgir (Deceased)
Through Legal Representatives
- 1-A. Dattu Lingu Sadgir,
Age 70 years, Occupation Agri.,
(Dead)
- 1-B. Punja Lingu Sadgir,
Age 65 years, occupation Agri.,
- 1-C. Sudam Lingu Sadgir,
Age 60 years, Occupation Agri.,

Respdts.No.1-A to 1-C R/o.
Lingdeo Tq. Akole Dist.Ahmednagar.
- 1-D. Lilabai Kundlik benke,
Age 55 years, occupation Agri.,
R/o Samsherpur Tq. Akole
Dist. Ahmednagar.
- 1-E. Lahanbai Dashrath Bhusnar,
Age 50 years, Occupation Agri.,
R/o Mohegaon Tq. Nandgaon
Dist. Nashik.
2. Maruti Laxman Holgir,
Age 65 years, Occupation Agri.,
R/o Lingdeo Tq. Akole
Dist. Ahmednagar.

3. Land Development Co-operative Bank, Ahmednagar, A/p and Tq. Sangamner Dist. Ahmednagar. ...Respondents.

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Mr. S. T. Shelke, Advocate for appellants.

Mr. A. N. Nagargoje, Advocate for respondents No.1A to 1D.

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CORAM : SMT.VIBHA KANKANWADI, J.
Date of Reserving The order : 04-06-2019.

Date of Pronouncing The Order : 28-06-2019.

ORDER :

1. Present second appeal has been filed by the original applicant challenging the Judgment and order passed by learned District Judge -2, Sangamner in delay Misc. Application No.04 of 2006 rejecting his application for condoning the delay and seeking restoration of first appeal filed by him dated 22-12-2016.

2. Original appellant No.1 was the defendant No.1 in Regular Civil Suit No.179 of 1982 filed before learned Civil Judge, Junior Division Akole District Ahmednagar. That suit was filed by original respondent No.1 herein for specific performance of the contract. The said suit was decreed on 18-10-1993. The present appellant No.1 had preferred Regular Civil Suit No.425 of 1993 before District Court, Ahmednagar, however it appears that initially the said appeal was transferred to Shrirampur Court after it was established and

thereafter it was transferred to Sangamner Court after it was established. According to the appellants he could not come to know about the transfer of their appeals to both the Courts, and therefore, he was unable to remain present for the hearing. Said appeal was renumbered as Regular Civil Appeal No.356 of 2000 before Sangamner Court after its transfer. It came to be dismissed in default on 16-02-2005. Thereafter, he had applied for certified copies on 27-10-2005 and received the same on 02-12-2005. After the copies were received, applicant No.1 was unable to attend the Court because of serious illness as he has suffered with an accident and had received injuries to his hip joint. Under those circumstances he could not file the restoration application in spite of getting the certified copies. There was delay of 353 days in filing the said application for restoration of the appeal and by way of Misc. Application No.04 of 2006, he prayed for getting the said delay condoned.

3. The said application was objected by the respondents by filing say at Exhibit 14. In the meantime, the original plaintiff – the respondent in the application expired and her legal heirs were brought on record. They had adopted the said say filed by the predecessor. They denied all the contentions in the application. It is stated that, even after the dismissal of the appeal, the appellant was appearing in another matters such as Regular Civil Suit No.38 of

1993 which was then before Akole Court and in Regular Criminal Case No.132 of 2000. It is denied that, he was seriously ill and was unable to move.

4. Taking into consideration the rival contentions, the application was heard by learned District Judge -2, Sangamner and the said application came to be rejected on 22-12-2016 as aforesaid, hence this second appeal.

5. Heard Mr. S. T. Shelke, Advocate for appellant and Mr. A. N. Nagargoje, Advocate for respondents No.1-A to 1-D.

6. Perused the record and proceedings. At the outset it can be said that, in order to take cognizance of the second appeal, it is required to be considered as to whether substantial question of law as contemplated under Section 100 of Code of Civil Procedure is arising in the matter or not. It was submitted on behalf of the appellant that the learned first Appellate Court erred in not taking liberal approach while dealing with delay condonation application. The transfer of cases from one Court at one place to another Court at another place was not known to the applicant – appellant and the further fact that was not considered that he was aged 83 at that time. Taking into consideration his age and the fact that, many legal aspects were involved in the appeal, the first appellate Court ought to have taken liberal approach.

7. Per contra, the learned advocate appearing for the respondents supported the reasons given by learned first Appellate Court and it was submitted that, when the appellant himself was defending execution proceedings and other proceedings before a competent Court then it cannot be said that he was incapacitated from moving from the bed or he was unable to move. Though he contended that, he sustained injury in accident and received injury to his hip joint yet medical evidence produced by him was something different. It showed that, he was suffering from fever therefore there is variance between pleading and proof. Therefore, the learned first appellate Court rightly disbelieved the medical certificate those were produced on record.

8. It is to be noted that, along with the record and proceedings of Misc. Application No.04 of 2006, record and proceedings of Regular Civil Appeal No.356 of 2000 before Adhoc District Judge, Sangamner Dist. Ahmednagar was also called. Perusal of roznama of the said appeal would show that, each time the matter was transferred to different Court, notice was issued to the appellant as well as respondent. When the matter was proceeded to Sangamner Court, he was served with notice Exhibit 24 and this fact has been specifically mentioned in order of dismissal dated 16-02-2005. The said service has been taken as proper service by the Court and when

in spite of the due service he failed to appear, the order of dismissal in default was passed. Therefore, there is no substance in the say of the appellant - appellant that, he was unaware about the fact of transfer of his appeal to those Courts.

9. The appellant has further contended that, he came to know about dismissal of his appeal on 25-10-2005 and then gave application for certified copies. In fact he had received the certified copies on 02-12-2005 but still he filed the application for delay condonation on 06-08-2008. In order to explain this delay of around 350 days, he submits that, he was seriously ill during that period as he had suffered injury to his hip joint due to accident. Perusal of the record would show that, two medical certificates were produced by the appellant-appellant issued by Dr. Manoj More for the period between 20-02-2005 to 18-02-2005 and 28-01-2006 to 31-01-2006. As regards the first certificate is concerned, it is of no use for the simple reason that according to him he came to know about the dismissal of the appeal on 25-10-2005 only. He was mainly suppose to explain the delay from 25-10-2005 to 06-08-2008. Therefore, the another certificate may help him but taking into consideration the duration of the same it could not be said that, it is sufficient and reasonable ground. There is absolutely no evidence produced by the appellant-applicant to show that, he had suffered injury to his hip joint in an accident. Merely because he was aged 83, we cannot

give him liberty and deal with his application with sympathy only. Further it is also required to be noted is, present appellant No.2 who was also then added in said application in view of order below Exhibit 25 dated 31-01-2007, would make it clear that, in Exhibit 25 present appellant No.2 had come with a case that even before Regular Civil Suit No.179 of 1982 was decided, appellant No.1 had transferred the said suit property in the name of his son Maruti Laxman who is the father of present appellant No.2. Thereafter said Maruti had transferred the said suit property in the name of present appellant No.2 when he was minor at that time. But then he says that, he came to know about the proceedings in Akole Court and since there is his interest in the suit property he prayed that his name be added as appellant, accordingly his name has been added. However, the certified copies which have been produced on record would show that, Regular Darkhast No.38 of 1993 was filed by present original respondent No.1 for execution of decree in Regular Civil Suit No.179 of 1982. A notice was issued to present appellant No.2 in that proceeding and he was called upon to remain present before the Court on 15-12-2005. Said notice was served on present appellant No.1 on 04-01-2006. Thereafter it appears that, again vide Exhibit 20 notice was issued to both the present appellants, in that matter to remain present on 20-07-2006 and the date was then extended to 21-09-2006. The said notice was served on both the

appellants on 12-08-2006. In pursuant to that, appellant No.2 appeared in the matter on 21-09-2006. Further in the same matter at Exhibit 08 the present respondent No.1 had produced certified copies of the order dated 25-08-2005 passed in Regular Civil Appeal No.356 of 2000. That means, when present appellant No.2 appeared in Regular Darkhast No.38 of 1993 said certified copy about dismissal of their appeal on 16-02-2005 was already on record yet neither he himself of his own capacity being an interested party nor the original applicant No.1 filed application for restoration of the said appeal. Even if we reckon the period from the date of the knowledge of present appellant No.2 about dismissal of the appeal from the date he appeared in Regular Darkhast on 21-09-2006 yet there is absolutely no reason mentioned about the same in application dated 06-08-2008. Therefore, merely it appears that, taking advantage of the age of original appellant No.1, the present appellant-applicant intended to get the delay condoned but then present appellant No2. who says that, he had become owner of the suit property much prior to the decision in Regular Civil Suit No.179 of 1982 could have definitely filed appeal or got the appeal filed by respondent No.1 restored.

10. Taking into consideration the facts from all the angles it can be seen that no reasonable and sufficient ground has been shown to explain the delay of 350 days by the appellants, and therefore, first

Appellate Court has rightly dismissed the said application. No substantial question of law is arising in this case as contemplated under Section 100 of Code of Civil Procedure. Hence, the appeal is disposed of as not admitted.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.

DATE : 28-06-2019

1. Learned Advocate appearing for the appellant is praying for stay to the order of this Court for eight weeks as he intends to approach Hon'ble Apex Court.
2. Under such circumstance, the execution of this order and the execution in consequent thereto is stayed for eight weeks from today.

(SMT. VIBHA KANKANWADI)
JUDGE