

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

910 SECOND APPEAL NO.251 OF 2013

Vithal Rambhau Bokan,
Age 68 years, Occupation Tailoring,
R/o Mauje Anandgaon
At Present Parali (V)
Tq. Parali (V) Dist. Beed.

..Appellant

VERSUS

1. Rambhau Gangaram Bokan
Died Through L.Rs.
- 1/1. Gangabai Rambjau Bokan
Died through L.Rs.
- 1/A. Sushilabai Digamberrao Dahiwal,
Age 36 years, Occupation Household,
R/o Dowalyacha Vada Padmavati
Galli, Parali Tq. Parali Dist. Beed.
2. Narayan Namdeo Kharat,
Age 57 years, Occupation Agriculture,
R/o Mogara Tq. Majalgaon Dist.
Beed.
3. Venka s/o Rambhau Rawale
Died Through L.Rs.
- 3/A. Ranubai w/o Venka Rawale,
Age 81 years, Occupation Household
(Deleted as per Order dated
21-10-2013).
- 3/B. Rama Venka Rawale,
Age 72 years, occupation Agriculture,

- 3/C. Laxman Venka Rawale,
Age 68 years, occupation Agriculture,
- 3/D. Maruti Venka Rawlae,
Age 67 years, occupation Agriculture,

3-A to 3-D R/o Anandgaon
Tq. Majalgaon Dist. Beed.
- 3/E. Tanubai Bapu Hazare,
Age 62 years, Occupation Household,
R/o Padali Tq. Parali Dist. Beed.
- 3/F. Janbai Bhaurao Gavali,
Age 57 years, Occupation Household,
R/o Anandgaon Tq. Majalgaon
Dist. Beed.
- 3/G. Kuntabai Visbho Kote,
Age 52 years, Occupation Household,
R/o Chitegaon Tq. Dharur
Dist. Beed.
- 3/H. Kantabai w/o Bapurao Dirde,
(Abated)
- 4. Bapu Yeda Pote,
Age 55 years, Occupation Agriculture,
R/o Chatgaon Tq. Dharur
Dist. Beed.
Died Through L.Rs.
- 4/A. Dhrupatabai w/o Bapu Pote,
Age 70 years, Occupation Household,
- 4/B. Tukaram Bapu Pote,
Age 50 years, Occupation Agriculture,
- 4/C. Biru Babu Pote,
Age 45 years, Occupation Agriculture,

4/D. Sarjerao Bapu Pote,
Age 35 years, Occupation Agriculture,

4/E. Dnyanoba Babu Pote,
Age 30 years, occupation Agriculture,
R/o Chatrgaon Tq. Dharur.
At Present Anandgaon Tq. Majalgaon
Dist. Beed.

4/F. Surwantabai w/o Dnyanoba Waghe,
Age 25 years, Occupation Household,
R/o Anandgaon Tq. Majalgaon
Dist. Beed.

...Respondents.

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Mr. T. G. Gaikwad, Advocate for appellant.
Mr. B. S. Kudale, Advocate for respondents No.2,3B to 3D

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 26-03-2019.

ORAL ORDER :

1. Present second appeal has been filed by original plaintiff who had filed Regular Civil Suit No.51 of 1990 before Civil Judge, Junior Division, Majalgaon Dist. Beed for partition and separate possession. The said suit came to be dismissed on 21-12-1999. Thereafter, the present appellant had filed Civil Misc. Application No.01 of 2009 for condoning the delay caused in filing appeal to challenge the said Judgment and decree. The said application was heard by learned District Judge -1, Majalgaon. In the said application it was prayed that, delay of 08 years, 11 months and 30 days be condoned. The application was

rejected on 05-12-2012. The present applicant had come with a case before the learned District Judge that, he had migrated to Parli. He is illiterate person and doing tailoring work for livelihood. He was suffering from hypertension and other disease and was under treatment in the hospital of Dr. Dubhe from Parli till 19-12-2008. He had incurred expenses for the Court proceedings and also for his medical expenses, therefore, he could not make arrangements for the finance to contest the said Judgment and decree, and on this ground he prayed for condonation of delay. The said reason has been disbelieved by the learned first Appellate Court and it was held to be not sufficient and reasonable. The appellant has filed the present second appeal to challenge the said Judgment and order passed by the first Appellate Court.

2. Heard Mr. T. G. Gaikwad, learned advocate for appellant and Mr. B. S. Kudale, learned advocate for respondents No.2, 3B to 3D.

3. Learned advocate appearing for appellant Mr. T. G. Gaikwad submitted that the trial Court had held that, the appellant i.e. original plaintiff had 1/3rd share in the suit property. It was also held that the defendants have failed to prove that there was a partition in the past. The decree was refused only on the ground of non-joinder

of necessary parties. The trial Court ought not to have dismissed the suit only on that count. Therefore vital rights are in favour of the plaintiff. He could not challenge the said Judgment and decree within a period of limitation. He had given sufficient and reasonable ground though it may appear that the delay is inordinate and huge. The learned first Appellate Court did not consider those reasons and rejected the said application. Therefore, substantial question of law arises and furthermore the appellant had specifically pleaded that, he was not aware about the decision that was given in the appeal.

4. The learned advocate appearing for the respondent resisted by saying that the reasons given by the learned first Appellate Court are perfectly correct. Though medical certificate stating that, appellant was suffering from hypertension was produced on record, the learned first Appellate Court had rightly observed that, merely because he suffers from hypertension, it was unthinkable that, he was not able to perform his day to day work and approach the Court to assert his rights. He cannot take the defence that he is poor and uneducated. He was negligent and sleeping over his rights. Therefore, the view taken by the learned first Appellate Court is correct.

5. As regards whether the suit was rightly dismissed or wrongly dismissed is concerned, we cannot go into that aspect at this stage. If the plaintiff was dissatisfied with the Judgment and decree passed by the trial Court, he had the opportunity to knock the doors of the first Appellate Court. According to the appellant he could not approach the first Appellate Court due to his illiteracy, poor financial condition and ill-health i.e. on account of hypertension. What is important to be noted here is that, the delay he wanted to get condone was 08 years 11 months and 30 days. Definitely hypertension cannot incapacitated him from approaching the Courts and it cannot be imagine that hypertension would be continuously handicapping him from approaching the appellate Court. That can be taken as a reasonable ground if the duration of the delay was too short.

6. The learned advocate appearing for the appellant has placed reliance on the order passed by this Court in Civil Application No.2199 of 2009 in Second Appeal (Stamp) No.3106 of 2009, dated 22nd September 2009, wherein the delay of about 09 years was condoned by this Court. A regards condonation of delay is concerned it lies in the discretion of the Court. If the party who

seeks delay condonation is able to show reasonable and sufficient ground then the discretion can be used judiciously to condone the delay. In the facts of the above said case which has been relied by the learned advocate for the appellant, what prompted this Court to condone the delay appears to be that, there was a settlement of dispute as against other defendants who had initially opposed the suit but then appellant alone had remained as opposite party when the first appeal was heard and then he had come with a case that, he was not aware about the outcome of the appeal. As regards the said delay condonation application, notices were served to the above opposite side and nobody had challenged the reason that was mentioned by the applicant and under those circumstances when the reason itself was not challenged, this Court had condoned the delay.

7. Here in this case the application is challenged, and therefore, any benefit of the said decision cannot be given to the present appellant. Another fact that is also required to be considered is that, that was the delay caused in filing the second appeal which was entertained under Section 5 of the Limitation Act by this Court, whereas this is the second appeal which has to be considered within the parameters of Section 100 of the Code of Civil Procedure. The

appellant is duty bound to show that, there is substantial question of law involved in the case. It has not been shown by the appellant that the discretion that was with the first Appellate Court to condone the delay has not been used judiciously. As regards the financial condition and illiteracy ground are concerned, huge delay of 08 years 11 months and 30 days cannot be condoned. Appellant was doing his day to day affairs during all these years but he preferred to sleep over his rights or in other words he appears to be negligent and under such circumstance the Court of law cannot help a negligent party. Therefore, no substantial question of law has been made out to admit the second appeal, hence it is disposed of as **not admitted.**

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.