

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

921 WRIT PETITION NO.4785 OF 2016

CHHAGAN BAJA GOSAVI DIED THROUGH LRS SHILABAI BHARAT
GOSAVI
VERSUS
PRAKASH GHAGAN RATHOD AND OTHERS

...
Advocate for Petitioner : Mr. S. B. Yawalkar
Advocate for Respondent No.1 : Mr. G.A. Nagori

CORAM : M. S. KARNIK, J.

DATE : 7th AUGUST 2019

PER COURT

Heard.

2. The petitioner/original plaintiff has challenged the order below Exhibit-1 in Misc. Civil Application No. 45 of 2016 whereby the First Appellate Court has condoned the delay of 10 years 2 months and 22 days in filing Regular Civil Appeal. The petitioner is the original plaintiff. The petitioner/plaintiff had filed a suit for partition which came to be decreed. Respondents/original defendant Nos. 5 and 6 filed appeal before the First Appellate Court.

3. From the record it is seen that respondents/defendant Nos.5 and 6 were impleaded for the first time in the year, 2003 by the plaintiff. It appears that in the said suit summons were issued. Respondents/original defendant Nos. 5 and 6 did not appear and therefore, suit proceeded ex-parte against them. It appears that Gut No. 46 of which the respondent/defendant No.5 claims to be the owner was added subsequently as subject matter of the suit property in the year 2004 by an amendment. It is the case of respondents /defendant Nos.5 and 6 that they did not have any objection to other suit properties being partitioned. But so far as Gut No. 46 is concerned, respondent/defendant No.5 claimed to be the owner. The said property was included as suit property only in the year 2004, without issuing any notice to respondent /defendant Nos.5 and 6 in that regard.

4. Learned counsel for the petitioner would submit that an application was made for impleading respondents/ defendant No.5 and 6 as party-defendants. The respondents/defendant

Nos. 5 and 6 did not appear and therefore an order came to be passed by the trial Court for proceeding with the suit ex-parte. He submits that it would not open for the respondents /defendant Nos. 5 and 6 to contend that they did not have any notice about the subsequent amendment of the year, 2004.

5. Learned counsel for the petitioner therefore would submit that the Appellate Court committed an error in condoning the delay of 10 years 2 months and 22 days in filing Regular Civil Appeal. According to him, as the suit proceeded ex-parte against respondents/defendant Nos. 5 and 6, the Appellate Court was not right in proceeding on the footing that respondents/defendant No.5 and 6 got knowledge of the decree only after the notice in Darkhast proceedings came to be issued. He further points out that even the decree is executed.

6. Learned counsel for respondents/defendant No.5 and 6 supported the impugned order.

7. I have gone through the order passed by the First Appellate Court condoning the delay. No doubt, the delay condoned is of 10 years 2 months and 22 days in filing the Regular Civil Appeal. The Appellate Court has given elaborate reasons and observed that respondents/defendant Nos.5 and 6 got knowledge of the decree only after service of notice in the Darkhast proceeding. It is also material to note that respondents/defendant Nos.5 and 6 were impleaded as party in the suit in the year, 2003. Though the summons were issued, the respondents/defendant Nos. 5 and 6 did not appear as they did not have any objection to the partition of suit property which was then the subject matter of the suit. Therefore, they did not appear pursuant to issuance of the summons. From the record, it is seen that the property Gut No. 46 with which respondents/defendant No.5 and 6 are concerned, was included as suit property by way of an amendment only in year, 2004. This was done without notice to them and behind their back.

8. In this view of the matter, I do not find any fault in the

reasoning of the First Appellate Court while condoning the delay of 10 years 2 months and 22 days in filing the Regular Civil Appeal.

9. In my opinion, however, while condoning the delay, the First Appellate Court should have imposed some reasonable costs. Without interfering with the order of the First Appellate Court, respondents No.1 and 2 are directed to pay costs of Rs.2,500/- to the petitioner/plaintiff. With these observations, the petition is dismissed.

(M. S. KARNIK, J.)

vsm/