

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.9753 OF 2016
IN
SAST/12207/2016

Saw. Lata w/o Pravin Chandan,
Age 60 years, Occupation Business,
R/o Plot No.19, Sahakar Nagar,
Aurangabad Tq. Dist. Aurangabad. ...Applicant.

VERSUS

Kashinath s/o Ramji Shinde (Died)
Through Legal Heirs.
And Others. ...Respondents.

....
Mr. R. K. Jadhavar, Advocate for applicant.
Mr. R. F. Totla, Advocate for Respondents No.1-A to 1-C.
Ms. Anjali Dube, Advocate for Respondent No.4.
Mr. R. J. Sayed, Advocate for Respondents No.9 & 10.
Mr. M. K. Kakade, Advocate for Respondent No.3.

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CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving the Order :
02-04-2019.**

**Date of Pronouncing the Order :
25-04-2019.**

ORDER :

1. Present application has been filed for getting delay of 1106 days condoned in filing second appeal.
2. Applicant is a original defendant No.8. Original respondent No.1 was the plaintiff who had filed RCS No.777 of 2002 (Old Special

Civil Suit No.277 of 1998, Old Regular Civil Suit No.435 of 1987) before Civil Judge, Senior Division, Aurangabad for possession, declaration and mesne profits. Further present respondent no.3 had also filed RCS No.413 of 1987 for perpetual injunction. Both the suits were decided in common and a common Judgment has been given on 27-10-2009. Both the suits came to be dismissed.

3. Original plaintiff – present respondent No.1 filed RCA No.169 of 2011 challenging the Judgment and decree passed in RCS No.777 of 2002 before learned Adhoc District Judge -1, Aurangabad. The said appeal came to be allowed on 02-01-2013. Defendants No.1, 2 and 5 to 10 were directed to hand over the possession of the suit property to the plaintiff. Now the defendant No.8 intends to challenge the said Judgment and decree, however there is delay of 1106 days. The applicant has contended that she has purchased the suit property by registered sale deed from respondent No.7 on 12-03-1993 for consideration of Rs.1,24,000,-/-. She is a old lady of 60 years suffering from blood pressure and diabetes. It is also stated that, she is a patient of brain stem since 2011. She is taking treatment from Dr. Makrand Kanjalkar from Manik Hospital Research Centre, Jawahar Colony, Aurangabad. The MRI report says that, she is a patient of Meniere disease. She is continuously taking treatment from the said hospital. Because of the said disease she tend to forget the things, and therefore, she could not meet

advocate and contest the matter. The delay is unintentional. Since her vital property rights are involved, she has prayed for condonation of delay.

4. Affidavit in reply has been filed by respondent No.1. She has stated that, no sufficient much less reasonable ground has been shown for condonation of delay. It is stated that, the applicant had not appeared before the learned trial Court and the matter had proceed ex-parte against her. She was never diligent about her rights. He has also stated that, applicant appeared in Darkhast proceeding i.e. Regular Darkhast No.08 of 2013 on 12-02-2014, therefore she had the knowledge about the decision in the appeal. She appeared in the matter by filing Vakalatnaka on 30-02-2014. It is stated tht, the MRI Scan report shows that she is suffering from Vertigo, which means feelings of giddiness caused by looking down from great height. It is stated that, Meniere disease means disorder of the inner ear that causes episodes in which you feel as if you are spinning (Vertigo) and you have fluctuating hearing loss with progressive ringing in the ear. It is stated that, there is falsehood in the statement of the applicant that she could not move.

5. Respondent No.3 by filing affidavit in reply reiterated what the applicant intends to say and stated that the applicant, old lady is suffering from many diseases and was admitted for couple of

months in various hospitals. It is stated that, she is suffering from brain tumour. It is also stated that, initially in the sale deed original plaintiff mentioned the sheet number and plot number but thereafter a correction deed has been executed and the correction deed has been produced on 09-09-2001. Under such circumstance she has prayed for condonation of delay in favour of the applicant.

6. Heard both the sides. Both the learned advocates have made submissions in support of their respective contentions. It will not be out of place to mention here that, when a statement was made in the application that since 2011 the applicant is suffering from the disease, a chance was given to the applicant to produce old documents but no such old documents have been produced on record. Learned advocate appearing for the applicant relied on, *N. Balakrishnan Versus M. Krishnamurthy*, reported in *AIR 1998 Supreme Court 3222*, wherein delay of 883 days was condoned on the ground where information was not given by the advocate to the appellant and the said reason was found satisfactory.

7. Per contra, learned advocate appearing for the respondent No.1 relied on the decision in, *Office of The Chief Post Master General and Ors. Versus Living Media India Ltd. and Anr.*, reported in *AIR 2012 SC 1506*, wherein it has been observed that, if due diligence is not shown and proper steps are not taken then the Court

may not help negligent litigant.

8. At the outset it can be said that the delay of 1106 days is huge and inordinate. Now it is required to be seen as to whether the present applicant has given any reasonable and sufficient ground to condone the same. We cannot at the same time forget a fact that, she was absent throughout the trial before the Trial Court and the matter has proceeded ex-parte against her. Though this a fact definitely she can challenge the Judgment and decree but then when there is delay in filing second appeal we are required to consider whether there is sufficient and reasonable ground. The main ground which has been harped upon by the applicant is that she is suffering from brain disease. The report dated 25-01-2013 says that, "*The findings are within normal limits. No diagnostic abnormality is detected in the Brain Parenchyma.*" However, it appears that medicines were given and she continued to take the said medicines. Thereafter, there is report of C T Brain – Plain dated 22-02-2016 which says that, "*Contiguous axial sections were taken. Brain parenchyma reveals normal values. No evidence of infarct, SOL, IC bleed. Ventricles, cisterns, cortical sulci. No mass effect or mid line shift noted. Cerebellum and brain stem appear normal. Bony calvarium appear normal.*" The impression given by the consultant radiologist is that it is normal study. Thereafter there are reports of blood.

9. The applicant has not filed a single document issued by Dr. Makrand Kanjalkar showing that, she is suffering from Meniere disease. Whatever documents have been produced on record i.e. the reports of C T Scan and MRI. On the face of it they say that the findings are within normal limits. It will not be out of place to refer a prescription given by Dr. Makrand Kanjalkar on 25-01-2013 wherein certain tablets were prescribed and one tablet i.e. tablet Stugeron was prescribed and it is stated that, to be taken only after giddiness. Even if for the sake of arguments it is accepted that, she is suffering from Meniere disease, it can be said to be disorder of the ear like Vertigo. There are no documents produced on record showing that she was admitted to hospital for months together though respondent No.3 to this application is stating the said fact. In fact respondent No.3 has gone to the extent by saying that the applicant is suffering from brain tumour when in fact it is not the case of the applicant also. Another fact that is required to be noted is that, applicant had appeared before the executing Court on 30-02-2014 through advocate, therefore if she can take part in the legal process through advocate then there was no hurdle for her to file second appeal. When it comes to delay of 1106 days though now the law is settled that each and every day's delay need not be meticulously explained yet there has to be substantial compliance of the explanation to be given in respect of the entire duration. At the

cost of repetition it can be said that, there is no document produced on record by the applicant showing that she was hospitalized. That means if she was taking treatment on OPD basis then it cannot be taken as a reasonable and sufficient ground to condone the delay of 1106 days. Under such circumstance, the application deserves to be rejected. Hence, it is rejected. No order as to costs.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.