

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.477 OF 2018

1. Veerbhadra s/o Mahadyappa Swami,
Age 64 years, Occupation Agriculture,
2. Chandrakala w/o Veerbhadra Swami,
Age 59 years, Occupation Household,

Both R/o Chapoli Tq. Chakur
Dist. Latur.

...Appellants.

VERSUS

1. Manmath s/o Mahadyappa Swami,
Age 59 years, Occupation Agriculture,
2. Jagannath s/o mahadyappa Swami,
Age 54 years, Occupation Agriculture,
3. Premrahsya s/o Mahadyappa Swami,
Age 50 years, Occupation Agriculture,
4. Sow. Pushpabai w/o Vaijnath Swami,
Age 44 years, Occupation Household,

All R/o Chapoli Tq. Chakur
Dist. Latur.

...Respondents.

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Mr. A. N. Sabnis, Advocate for appellants.
Advocate for respondents No1. to 3 - Absent.
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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 27-03-2019.

ORDER :

1. Present appeal has been filed by original defendants. Present respondents are the original plaintiffs who had filed Regular Civil Suit No.83 of 2013 before Civil Judge, Junior Division, Ahmedpur for

declaration of share and injunction.

2. Plaintiffs had come a case that, defendant No.1 is the mother of plaintiffs as well as defendant No.2. Defendant no.3 is the wife of defendant No.2. Agricultural land bearing Survey No.48/2 new Gut No.131 admeasuring 3 Acres 32 Gunthas was purchased by Mahadayya who was the husband of defendant No.1 and father of plaintiffs and defendant No.2. It was thereafter decided that till the lifetime of defendant No.1 the said land should be given to her for maintenance, and thereafter, 28 R land out of suit property was given by defendant No.1 with consent of plaintiffs No.1 to 3 and defendant No.2 on 08-03-1992 to Vaijnath, who was another son of defendant No.1. Defendant No.1 is presently residing with defendant No.2 and by taking disadvantage of the said fact defendant No.2 is planning to get the said property either by way of gift, Will or sell, and therefore, suit was filed. It is also stated that, sale deed has been executed in favour of defendant No.3 in respect of land 66 R out of suit property which is not binding on the plaintiffs.

3. Defendants No.1 to 3 appeared in the matter, however in spite of giving chances, they did not filed their written statement within time. Thereafter defendant No.3 was allowed to contest the matter for filing written statement on deposit of cost of Rs.500/- but that

cost amount was also not paid by defendant No.3. She did not remain present in the matter thereafter.

4. Plaintiffs led oral as well as documentary evidence and taking into consideration the evidence on record, the learned trial Court has decreed the suit. It was declared that, plaintiffs have 1/5th share, so also defendant No.2 is having 1/5th share in the suit property. It was also declared that, the sale deed executed in favour of defendant No.3 is not binding on the share of the plaintiffs. Permanent injunction was granted to defendant No.1 from alienating the land.

5. Defendants No.2 and 3 wanted to challenge the said Judgment and decree before the Appellate Court, and therefore, they filed Misc. Application No.15 of 2017 for getting delay of 598 days condoned in filing the appeal before the learned District Court, Ahmedpur. The said application was heard by learned District Court -1, Ahmedpur and it was dismissed on 06-02-2018. Hence, present second appeal.

6. Heard learned Advocate Mr. A. N. Sabnis, appearing for appellants and learned Advocate Mr. V. D. Gunale, appearing for respondents No.1 to 3 was absent.

7. It has been vehemently submitted on behalf of the appellant

that, learned First Appellate Court failed to consider that the delay was not intentional. An ex-parte decree was passed against the appellants and it ought to have been in the interest of justice to condone the said delay. It is also submitted that, the suit land was self acquired property of deceased Laxmibai, and therefore, she had every right to alienate the same. This fact was not considered by the learned Trial Court. Therefore, substantial question of law is arising in this matter that, Whether the First Appellate Court has exercised the discretion in condoning the delay in filing the appeal properly or not ?.

8. The first and the foremost fact that is required to be considered is that, the perusal of the application which was filed for getting the delay condoned would show that, there is absolutely no reason mentioned for condoning the huge delay of 598 days. It was tried to be contended that, the applicants – present appellants could not deposit the cost of Rs.500/- as per the order of the Trial Court due to the illness of defendant No.3, and under that circumstance the ex-parte decree was passed. Even if for the sake of arguments we expect that, she was ill and could not deposit the cost amount yet that can be said to be a ground for not filing written statement within limitation. We are concerned with the fact that, the learned trial Court had decreed the suit on 13-10-2015 and application before First Appellate Court for condonation of delay was filed on 03-

07-2017. Under that circumstance the appellants were required to explain the delay of 598 days caused in not filing the appeal within limitation. The application for condonation of delay is totally silent on the reasons. A cryptic application was presented and merely on the ground that it would be in the interest of justice the delay cannot be condoned. The appellants appear to be negligent for the simple reason that even before the Trial Court they did not act swiftly by filing written statement in time. Even after giving an opportunity to file the written statement by imposing cost, that opportunity was not availed, and thereafter, after the decree was passed, there is unexplained delay of 598 days. Therefore, the reasons given by the learned First Appellate Court for rejecting the application for condonation of delay dated 06-02-2018 cannot be doubted on any count. No substantial question of law is arising in this matter requiring admission of the second appeal. Hence, the second appeal is disposed of as not admitted.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.