

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

Second Appeal No. 0250 of 2019

District : Aurangabad

Sanjay s/o. Bhasakarrao
Dharmadhikari,
Age : 42 years,
Occupation : Business, .. Appellant
R/o. A-4, Chaudhary Estate, (Original
Beed By pass, Satara Parisar, plaintiff)
Aurangabad.

versus

Suryachandra s/o. Lalmani Dubey,
Age : 53 years,
Occupation : Business, .. Respondent
R/o. Plot no.211-B, (Original
N-1, CIDCO, Aurangabad. defendant)

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*Mr. Rameshwar U. Gavhane, Advocate, for the
appellant.*

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 24TH APRIL 2019

ORDER :

01. Present appeal has been filed by original plaintiff challenging the order passed in M. A. R. J. I. No. 323 of 2018 by learned District Judge-13, Aurangabad on 04-04-2019; whereby his application under Section 5 of the Limitation Act for getting the

delay caused in filing First Appeal to challenge the judgment and decree passed in Special Civil Suit No. 95 of 2015 came to be rejected.

02. Present appellant had filed the said civil suit for cancellation of sale-deed dt. 22-08-2014 between him and defendant, declaration and injunction. Present respondent / original defendant had filed counter-claim for possession and mesne profits in the very same suit. Plaintiff had filed application for temporary injunction in the suit, restraining defendant from alienating property. That application was allowed, however, at the same time, plaintiff was directed to deposit damages @ Rs.17,740/- per month from 01-04-2015 till further orders. Plaintiff had failed to make the payments accordingly. Defendant had therefore moved an application under Order 39 rule 11 of Code of Civil Procedure for dismissal of the suit. That application was rejected. Defendant had challenged the said order before District Court in MCA No. 120 of 2016. Learned Appellate Court had allowed the appeal and directed plaintiff again to deposit the entire amount with arrears within two months from the date of the order. It was a conditional order. It was directed that in case of failure on the part of plaintiff to deposit the amount within stipulated period, the suit would stand dismissed under Order 39 Rule 11 of Code of Civil Procedure. In spite of the said concession, plaintiff failed to deposit the

amount within stipulated period, hence, the suit came to be dismissed by virtue of conditional order. Thereafter the counter-claim of the defendant proceeded and it came to be decreed. Plaintiff was directed to handover the possession of the suit property Row House No. A-4, Grampanchayat No. 7822 situated at Satara, Tal & Dist. Aurangabad to defendant within a period of three months. Direction was also given to pay mesne profits to him with direction to hold enquiry under Order 20 Rule 12 of Code of Civil Procedure.

03. Original plaintiff intended to challenge the said judgment and decree in Appeal before District Court; however, there was delay of 331 days in filing the appeal. He had therefore, filed application under Section 5 of Limitation Act for condoning the delay. It was contended by him that his Advocate had not communicated any dates till the date of evidence therefore he could not attend the Court. His Advocate had not even informed him that counter-claim has been filed. Valuable rights are involved and therefore, if the delay is not condoned then he could suffer hardship and injustice. The delay is unintentional.

04. The application for condonation of delay has been opposed by respondent by filing say at Ex.13. It was stated that the delay is intentional and deliberate. Applicant / plaintiff was present before

the Trial Court on the due dates. He had filed application for temporary injunction. He was aware about the order about payment to be made by him each month. No reasonable, much less sufficient ground has been shown to condone the delay.

05. After hearing both sides, learned First Appellate Court has rejected the application, hence, this Second Appeal.

06. Heard learned Advocate Mr. R. U. Gavhane for appellant / original plaintiff. It is not even necessary to issue notice to respondent. Learned Advocate appearing for appellant has submitted that the learned First Appellate Court has failed to consider that there was no fault on the part of appellant in not approaching the Court. His lawyer had not informed him dates and even the fact of filing of counter claim by defendant. Learned Appellate Court failed to take lenient view though, it is required to be taken as per catena of judgments of Apex Court as well as High Courts. Delay application could have been allowed by imposing certain cost, when vital rights of applicant were involved in the matter. Therefore, substantial question of law is arising in this case.

07. Important point to be noted is that certain submissions made in the application by the appellant were against the record. It was stated that his

advocate had not even informed him about the filing of counter-claim. However, judgment of the Trial Court shows that initially plaintiff had failed to file written statement to the Counter-claim, however, later on that order of proceeding the matter without written statement was got set aside subject to payment of cost of Rs.1,000/-. It was also a conditional order. It was stated that in case of failure to deposit the amount, the application would stand rejected. Plaintiff failed to deposit the cost amount within time limit. It appears that thereafter again on 13-10-2017, plaintiff had filed application at Ex.44 for permission to deposit amount of cost. That application was rejected by learned Trial Court. Plaintiff did not challenge the said order before higher forum. Now, he is blaming his advocate for not communicating dates. He forgot a fact that it is not only the duty of the advocate to communicate the progress in the matter to client, but there is equal duty on the part of client to remain in touch with Advocate. It is hard to believe that in spite of dismissal of suit, plaintiff was not alert. He has not come with a case that his Advocate had not informed him the order of payment of monthly damages and conditional order. When plaintiff wanted to protect his possession over the suit property, then he ought to have been alert. His suit came to be dismissed for non-payment of damages as directed and then his written statement was not taken on record for non-payment of cost. Every time he can not afford to

be negligent.

08. Appellant had led evidence before First Appellate Court. In his evidence, appellant has claimed ignorance about order of deposit of amount. He had come to know about issuance of warrant by executing Court in Diwali. Still he did not act swiftly. Learned First Appellate Court had called the record of the Trial Court and observed that Appellant was present before Trial Court on 19-06-2007, but did not take cross-examination of witness of defendant. That means he would have come to know about dismissal of his suit and counter-claim proceeded on that day. Thereafter his Avocate had withdrawn his vakalatnama. On the adjourned date i.e. 29-04-2017 he had filed application Ex.33 for taking further steps. It was granted. Thereafter twice he got adjournment by filing applications at Ex.34 and 37. The last one was granted subject to payment of cost. Then he had filed the application for setting aside the order of proceeding the matter without written statement at Ex.40, then at Ex.44 to allow him to deposit cost amount. Thus, it can be seen that he was remaining present before the Trial Court and therefore, had the knowledge about the stage of counter-claim against him. His application can not be said to be bonafide application.

09. Another fact to be noted is that there is absolutely no explanation about the delay of 331 days

in the application. Whatever the reason that has been tried to be given is the explanation for not contesting the counter-claim. Appellant has not explained, when he came to know about the decision in the suit, when he has collected the certified copies. He was bound to explain the delay caused in appeal, means the period between date of decision of Trial Court and filing date of appeal. In his cross, he has rather stated that he has no idea as to why delay has been caused. Thus, it can be seen that the First Appellate Court has considered the application from all angles. It can not be said that the decision on the application is based on assumptions, presumptions, surmises and conjectures. There was no question of taking any lenient view in favour of appellant, as it appeared that he was doing said acts, just to protract the matter. He was totally negligent and Courts will not help such litigants by exercising discretion in their favour. No substantial question of law as contemplated under Section 100 of Code of Civil Procedure is arising in this case.

10. In the light of above, the Second Appeal is disposed of as **"Not Admitted"**.

(Smt. Vibha Kankanwadi)
JUDGE

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