

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL 475 OF 2016

Meharbano w/o Sayyed Hussein,
Age 45 years, occupation Household,
R/o Shewala Tq. Kalamnuri,
Dist. Hingoli. ..Appellant.

VERSUS

- 1) Salim Naik w/o Gafoor Naik,
Age 61 years, Occupation Agri.,
- 2) Nisar Naik s/o Gafoor Naik,
Age 54 years, occupation Service,
- 3) Tohid Naik s/o Gafoor Naik,
Age 49 years, occupation Agri.,

R. No.1 to 3 R/o Shewala,
Tq. Kalamnuri Dist. Hingoli.
- 4) Sajedabi w/o Sadullahkhan,
Age 39 years, occupation Housewife,
R/o Senodi Tq. Kalamnuri
Dist. Hingoli. ..Respondents

...
Mr. A. G. Dalal and A. F. Pathan, Advocates for
appellant.
Mr. S. K. Chavan, Advocate for respondents No1. to 4.
...

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of reserving the
Judgment : 07-01-2019.**

**Date of Pronouncing the
Judgment : 18-01-2019.**

ORAL JUDGMENT :

1. Present appeal has been filed by the original defendant No.2 challenging the Judgment and order passed by learned District Judge -2 Hingoli, in Misc. Civil Application No. 08 of 2011, dated 23-03-2016, whereby her application for condonation of delay under Section 5 of the Limitation Act came to be dismissed.

2. Present respondents No.1 to 3 had filed Regular Civil Suit No.42 of 2000 before Civil Judge, Junior Division, Kalamnuri District Hingoli for declaration of ownership and the consequential prayer of injunction. In the said suit the present defendant No.2 had filed the counter claim thereby she had prayed for the declaration of ownership over the suit land. The said suit was dismissed, so also the counter claim was also dismissed. Thereafter the defendant No.2 intended to challenge the said dismissal of her counter claim by preferring appeal, however since there was delay she filed the said application for condonation of delay of about three years and ten days in the said Misc. Civil Application No. 08 of 2011. After perusing the evidence and hearing both sides, the learned first appellate Court has rejected the said application. She intends to challenge the said decision by way of this second appeal.

3. Heard learned advocate Mr. A. G. Dalal for appellant and

learned advocate Mr. S. K. Chavan for respondents No.1 to 4. It has been submitted on behalf of the appellant that, there is a reference of Regular Civil Suit No.51 of 1999 in the suit. The said suit was disposed of by compromise decree between defendants No.1 and 2. The original plaintiffs had claimed that the said compromise decree as it was in collusion with each other should be set aside. By way of counter claim, in fact the defendant No.2 was praying for declaration of her ownership in view of the said compromise. The suit was also dismissed and the counter claim was also dismissed, however the defendant No.2 being a 'Pardanashin' lady and was an illiterate person could not come to know about the said decision. In fact she had received the possession of 1 H 20 R land by way of 'Hiba' on 23-11-1998 and this has resulted in the compromise. When the counter claim was dismissed and it was made known to her by the advocate, she had prayed for the condonation of delay. In fact her advocate had not even given idea that a counter claim has been made. Therefore, the learned trial Court ought to have taken a liberal view, it ought to have been considered that the appellant is a restrict lady that too 'Pardanashin', was dependent on her advocate, but when the advocate had not given her complete picture, she could not prefer the appeal. She got the wrong advise and even had filed another suit which was again dismissed. Therefore, for the wrong legal advice given by the

advocate, she should not suffer.

4. Per contra, it has been submitted by the respondents that, the learned first Appellate Court has taken all the facts into consideration. Intentionally it was not pleaded that, she had filed Regular Civil Suit No.42 of 2013 before Civil Judge, Junior Division, Kalamnuri against the present respondents and that suit has been dismissed on merits on 06-10-2015. Therefore, definitely that decree is binding. She has not preferred any appeal against the same. When she was fighting for her rights it cannot be said that, she is a restrict lady. She was party to Regular Civil Suit No.51 of 1999, Regular Civil Suit No.42 of 2000 and again Regular Civil Suit No.42 of 2013.

5. It is to be noted that, the delay that was caused in preferring appeal was three years and ten days. In Regular Civil Suit No.42 of 2000 which was filed by the present respondents No.1 to 3, defendant No.2 had filed counter claim. In fact prior to that it was the case that there was a compromise between original defendant No.1 and defendant No.2 in Regular Civil Suit No.51 of 1999. The declaration was sought by the plaintiffs that, since the said decree has been obtained in collusion, it should be set aside. However, depending on that decree itself a counter claim was made that she should be declared as owner. The present appellant has led evidence in Regular Civil Suit No.42 of

2000 but then since the certified copy of the decree of Regular Civil Suit No.51 of 1999 was not filed and it was pleaded that the total area of the suit land was 3 H 78 R, out of which she had received 1 H 20 R land in compromise decree Regular Civil Suit No.51 of 1999, and 2 H 48 R is stated to have been received by her by way of 'Will'. When documentary evidence was not produced, regarding compromise decree as well as 'Will' and the 'Will' was not proved, it was held that, he has failed to prove the ownership.

6. The appellate Court has considered the fact that, present appellant was party to Regular Civil Suit No.51 of 1999, Regular Civil Suit No.42 of 2000 and in the meantime she had also filed Regular Civil Suit No.42 of 2013 which came to be dismissed on merits on 06-10-2015. The certified copy of Regular Civil Suit No.42 of 2013 was produced before the learned appellate Court and it is also an admitted fact that she has not preferred any appeal challenging the decision in Regular Civil Suit No.42 of 2013 decided on 06-10-2015. It will not be out of place to mention here again that, that suit was decided before the application of condonation of delay was preferred, and even as on today it has not been brought on record by the present appellant that she had preferred any appeal challenging the decree in Regular Civil Suit No.42 of 2013 wherein she had also claimed

the title and then possession of 1 H 20 R land. Now it is contended by the learned advocate for the appellant that, though she is owner of the land received it in compromise yet she will not be able to get the possession because of the dismissal of the said suit and rejection of the application for condonation of delay. When in spite of having right to challenge the said decree dismissing her counter claim instead that if she had filed the suit i.e. Regular Civil Suit No.42 of 2013, and on merits it has been dismissed, then now the appellant cannot say that she was not negligent or in other words the delay was not intentional. The appellant was party to three suits and she has contested them. Under such circumstance she cannot say that, she is a illiterate and 'Pardanashin' lady and because of the wrong advise she had filed the said suit. It is also to be noted that, the said application for the condonation of delay Misc. Civil Application No. 08 of 2011 was filed on 13-06-2011. Instead of pursuing further the said application, she allowed it to linger till 23-03-2016 and in the meantime she filed the second suit and it has been dismissed on merits. The effect of dismissal of that suit, of which now finality has been arrived will have to be considered here. Under such circumstance no substantial question of law has been shown, and therefore, the appeal is dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE