

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

SECOND APPEAL NO.769 OF 2018

- 1 Shankar Harsingh Rathod,
Age 48 yrs., Occ. Agri.,
- 2 Ladu Harsingh Rathod,
Age 45 yrs., Occ. Agri.,
- 3 Gorakh Harsingh Rathod,
Age 56 yrs., Occ. Agri.,
- 4 Kisan Harsingh Rathod,
Age 51 yrs., Occ. Agri.,
- 5 Harsingh Somla Rathod,
Age 80 yrs., Occ. Agri.,

All R/o Londhe Tanda, Krishnapuri,
Tq. Chalisgaon, Dist. Jalgaon.

... Appellants.

...**Versus**...

- 1 Vijaysingh Devsingh Patil,
Age 69 yrs., Occ. Agri.,
- 2 Harsingh Devsingh Patil,
Age 55 yrs., Occ. Agri.,
- 3 Sursingh Devsingh Patil,
Age 46 yrs., Occ. Agri.,
- 4 Sunandabai Jagan Patil,
Age 50 yrs., Occ. Household,

All R/o Varkhede, Tq. Chalisgaon,
Dist. Jalgaon.

... **Respondents.**

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Mr. M.M. Bhokarikar, Advocate for the appellants
Mr. A.J. Patil, Advocate holding for Mr. B.S. Deshmukh, Advocate for the
respondent Nos.1 to 4

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 01st MARCH, 2019

PRONOUNCED ON : 22nd APRIL, 2019

J U D G M E N T :

1 Present appeal has been filed by the original defendants. Present respondents were the original plaintiffs, who had filed R.C.S. No.51/2011 before Civil Judge Junior Division, Chalisgaon, Dist. Jalgaon for permanent injunction. They had contended that their father Devsingh Govind Patil had purchased 01 H 66 R land out of Gat No.151 by registered sale deed dated 15.04.1987 from one Uttam Sukhdeo Gaware. After death of their father the names of the plaintiffs have been mutated vide Mutation Entry No.314 to the Record of Rights. The mother of the plaintiffs by name Durgabai also

expired. Plaintiffs are possessing the suit property as owner thereof. Defendants have no right, title or interest over the suit property, however, they were obstructing the plaintiffs' possession over the suit land and therefore, they had sent notice to the defendant Nos.1 and 2 on 17.06.2010. Defendants gave false reply on 24.06.2010 and obstructed the possession of the plaintiffs over the suit land therefore, they filed suit.

2 Defendants were duly served with the summons. They appeared in pursuance thereto. However, they failed to file their written statement and therefore, matter proceeded without written statement against them. Thereafter, the plaintiffs led evidence and after considering the evidence of the plaintiffs the learned Trial Court has decreed the suit. Defendants intended to file appeal and therefore, approached District Court, Jalgaon, however, there was delay of about 15 months, therefore, they filed Civil Miscellaneous Application No.108/2016 under Section 5 of the Limitation Act for condoning the delay. In the said application the applicants i.e. present appellants had contended that the appellants are the agriculturists and they also do agriculture labour work. They had gone for sugarcane cutting work in Gujrat. Applicant No.5 is old and ill person and therefore, he could not remain present in the Court and therefore, they could not file written statement within limitation. It is stated that they possess the suit land,

however, taking into consideration the decree that has been passed plaintiffs obstructed their possession in June, 2016 and then they came to know about the decree that was passed. It is stated that they are illiterate and have no knowledge about law. They could not get the seriousness of the matter and therefore, there is delay of about 15 months. They, therefore, prayed for condonation of said delay.

3 The application was objected by the respondents i.e. original plaintiffs. It was contended that applicant No.4 Kisan is a member of Grampanchayat at Londhe Tanda, Krishnapuri. He was present in the monthly meetings of Grampanchayat. Letter to that effect has been issued by Gramsevak on 25.01.2017 and therefore, it is false to contend that the applicants went for sugarcane cutting work.

4 After hearing both sides the learned First Appellate Court has held that the grounds of delay are vague. The applicants are negligence. It is also stated that the delay of 15 months is not at all explained and therefore, the application was rejected. Hence, against the said order the appellants have come in this Second Appeal.

5 Heard learned Advocate Mr. M.M. Bhokarikar for appellants and

learned Advocate Mr. A.J. Patil holding for Mr. B.S. Deshmukh, learned Advocate for respondent Nos.1 to 4. It has been submitted on behalf of the appellants that the learned First Appellate Court failed to consider that there was an explanation given by the appellants for the delay. No doubt, the appellants were absent and did not file their written statement in time, but still the learned Trial Court did not consider many facts. There was suppression of material facts by the plaintiffs and then they have obtained the injunction order. It is stated that there was cloud over the rights of the plaintiffs and only injunction was filed on the basis of alleged sale deed. Therefore, the question of maintainability of the suit ought to have been considered. It is stated that one Shankar Harsingh Rathod had filed R.C.S. No.126/2016 on 25.07.2016 and one Ladu Harsingh Rathod had filed R.C.S. No.127/2016 on 22.07.2016 before the same Court i.e. Civil Judge Junior Division, Chalisgaon. Those suits were filed against the original plaintiffs for clarification to the Court that would result in practical setting aside the Judgment and Decree. It is stated that there would be conflicting decisions in the matter. Proper opportunity was not given by the First Appellate Court to explain the delay and therefore, substantial question of law is arising in this case.

submitted that perusal of the delay condonation application filed by the present appellants before First Appellate Court would show that there was absolutely no reason given for delay of 15 months. Whatever reason has been given in respect of appellant Nos.1 to 4 going on out of station for sugarcane cutting work was the explanation for not filing the written statement. What was required to be explained by the defendants was, as to why there was delay for challenging the decree that was passed by the learned Trial Court on 17.04.2015. Merely by stating that the appellants are illiterate and had no knowledge of law, it cannot be stated that any reasonable ground has been shown. The learned First Appellate Court had therefore, rightly rejected the application. No substantial question arises in this matter.

7 At the outset, it is required to be seen, as to whether any substantial question of law has been made out or any such act is needed which would amount to interference in the order passed by the learned First Appellate Court taking into consideration the record of the case. Here, perusal of the delay condonation application would show that the reason of absence of applicant Nos.1 to 4 for sugarcane cutting work and going to Gujrat for that work was the explanation for not filing the written statement within time. In para No.3 of the said application, it appears that reason has

been tried to be given for condonation of 15 months delay. It is stated that the applicants are illiterate and they do not have knowledge of law and therefore, they could not get the seriousness in the matter. Perusal of the order passed by the learned First Appellate Court would show that opportunity was not given to lead evidence in support of the contention to the applicants as well as to the respondents. The respondent has filed one letter along with the say which is stated to be issued by Gramsevak. The said letter has been believed without any proof by the First Appellate Court. Unless both the parties would have been given an opportunity to lead evidence, there would not have been an explanation. Even after giving an opportunity if the party does not take it either by way of filing pursis to that effect or by orally communicating the said fact to the Court, then the question is different. Yet in that situation, a letter which has been filed on record by a party cannot be considered without its proof or without asking the author of the letter to undergo the ordeal of cross-examination otherwise it was open for the parties to bring any kind of certificate or letter to support their respective contentions. Therefore, the learned First Appellate Court erred in the procedure to deal with the delay condonation application. An opportunity ought to have been given to lead the evidence to both the parties and then, if evidence would have been led, it would have been proper for the

First Appellate Court to consider the said evidence and if that opportunity would not have been taken, then to proceed with the submissions and the contentions. Under such circumstance, the matter deserves remand for fresh consideration of the application under Section 5 of the Limitation Act, to give an opportunity to both the parties to lead evidence in support of their respective contentions. The substantial question of law therefore would be – Whether the learned First Appellate Court has adopted proper procedure while rejecting the application for condonation of delay ? And the answer would be, in the negative. Hence, following order.

ORDER

1 The Second Appeal is partly allowed.

2 The order passed by learned District Judge-6, Jalgaon dated 09.06.2017 in Civil Miscellaneous Application No.108 of 2016 is hereby set aside.

3 The said application is hereby restored to the same Court.

4 The learned First Appellate Court is directed to give an opportunity to both the parties to lead evidence, if any, and after considering the evidence that may be led, to decide the application on merits.

5 Both the parties to appear before the First Appellate Court on
06.06.2019.

6 No order as to costs.

(Smt. Vibha Kankanwadi, J.)

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