

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

Civil Application No. 11769 of 2018
(In Second Appeal Stamp No. 28721/2018)

District : Ahmednagar

1. Subhash Pandharinath Sathe,
Age : 54 years,
Occupation : Agriculture.
2. (Transposed as respondent no.02
as per order dated 21-01-2019
in C.A. Stamp no.2561/2019)
3. (Transposed as respondent no.03
as per order dated 21-01-2019
in C.A. Stamp no.2561/2019)
4. Sunita Bhausaheb Karale,
Age : 53 years,
Occupation : Household,
R/o. Khandala (Khadki),
Taluka & Dist. Ahmednagar.
5. Surekha Mahadeo Gaikwad,
Age : 53 years,
Occupation : Household,
R/o. Agadgaon,
Taluka & Dist. Ahmednagar.
6. (Transposed as respondent no.04
as per order dated 21-01-2019
in C.A. Stamp no.2561/2019)

.. Applicants.

versus

1. Dwarkabai Mohan Borude,
Died through L.Rs. :

1-A) Mohan Rambhau Borude,
Age : 82 years,
Occupation : Agriculture.

1-B) Dinkar Mohan Borude,
Age : 56 years,
Occupation : Agriculture.

Both R/o. Sarola Baddi,
Taluka & Dist. Ahmednagar.

2. Vilas Pandharinath Sathe,
Age : 44 years,
Occupation : Agriculture.

3. Prakash Pandharinath Sathe,
Age : 44 years,
Occupation : Agriculture.

Respondents no.02 and 03
R/o. Narayandoh,
Taluka & Dist. Ahmednagar.

.. Respondents

4. Smt. Indubai Pandharinath Sathe,
Age : 79 years,
Occupation : Household.

Respondents no.02 to 04
R/o. Narayandoh,
Taluka & Dist. Ahmednagar.

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*Mr. S.P. Salgar, Advocate, holding for
Mr. N.V. Gaware, Advocate, for the applicants.*

*Mr. U.V. Wagh, Advocate, for respondents
no.1A & 1B.*

Respondents no.02 to 04 served (Absent).

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the order : 27th March 2019.**

**Date of pronouncing
the order : 26th April 2019**

ORDER :

01. Present application has been filed for condonation of delay of 394 days caused in filing second appeal.

02. Appellants - applicants are the original defendants, whereas respondent no.01 is the original plaintiff who had filed Regular Civil Suit No. 419 of 2005 before 4th Joint Civil Judge (Senior Division), Ahmednagar, for partition and separate possession. The said suit came to be decreed on 12-01-2010. The present appellants had filed Regular Civil Appeal No.44 of 2010 before learned Principal District Judge, Ahmednagar. The appeal came to be dismissed on 30-03-2017. Therefore, they intend to file second appeal. However, there is delay of 394 days. It has been contended in the application, that after the learned first appellate Court pronounced the judgment, they applied for certified copies. They contacted the Advocate and sought legal advice. They are poor rustic villagers and have no knowledge about the court proceedings. Further, they were making efforts to settle the dispute amicably through close relatives and elderly persons. In the first week of September 2018, settlement talks could not materialize and, therefore, they have filed the appeal with delay condonation application. It is stated that the delay is unintentional and vital

rights are involved.

03. Affidavit in reply has been filed by the original plaintiff who has denied that there was any settlement talk. It is stated that no details have been given as to when the certified copies were applied. As regards settlement talks, it is false, incorrect and misleading statement. It is stated that intentionally the appellants allowed the period of caveat to expire and then the second appeal has been filed and thereafter this Court has granted stay, not to hand over possession. Under such circumstance, when the *mala fides* are clear, there is no question of condonation of delay.

04. Heard learned Advocate Mr. S.P. Salgar holding for learned Advocate Mr. N.V. Gaware for the applicants. Heard learned Advocate Mr. U.V. Wagh appearing for respondents no.1A and 1B. Respondents no.02 to 04 were served but failed to appear.

05. Learned Advocate appearing for the applicants submitted that there were genuine efforts to settle the matter and, therefore, there is delay which is unintentional and in view of the decision of the Hon'ble Apex Court in *Collector, Land Acquisition, Anantnag & another Vs. Mst. Katiji and others* (AIR 1987 SC 1353), liberal approach is required to be taken while dealing with the delay condonation application. He further relied

on the decision of the Hon'ble Apex Court in *N. Balakrishnan Vs. M. Krishnamurthy* (AIR 1998 SC 3222), wherein the delay of 883 days was condoned on the ground that the Advocate failed to inform the appellant about the decision. Further reliance has been placed on the decision of this Court in *Dhanraj Digambar Chaudhari Vs. Jai Tulja Bhawani Shikshan Prasarak Mandal & others* (Writ Petition No. 3989 of 2011, decided on 25-11-2011), wherein the delay caused in filing appeal before the School Tribunal was condoned by this Court on medical ground of the applicant. Further reliance has been placed on the decision of this Court in *Shivaji s/o. Jagannath Jadhav & others Vs. Sudhakar s/o. Kishan Jadhav & others* (Second Appeal No.416 of 2017, decided on 27-09-2017), wherein the second appeal was allowed and the order passed by the learned first appellate Court, rejecting the delay condonation application was set aside on the ground that there was no proper service of summons in the suit on the appellant and, therefore, vital rights were involved.

06. Per contra, learned Advocate appearing for respondents no.1A and 1B submitted that a false statement has been made that there were settlement talks going on in the intervening period. It is just to suit the convenience of the applicants. No such talks were going on. When the respondent is fighting for his rights since 2005 and then thereafter filed execution petition i.e. Regular Darkhast No.127 of 2011 to get the possession as per the partition

granted, why there can be compromise. Only to earn sympathy from the Court, such statement is made. So also, the applicants allowed the period of caveat to expire and then obtained interim order from this Court. Therefore, the application is not bona fide. He relied on the decision of this Court in *Ahmednagar Zilla Vidya Prasarak Samaj, Registered Public Trust through Trustees Vs. Rameshwar Shriram Dhoot & another* (Civil Application No. 08898 of 2018, decided on 15-02-2019) wherein similar statement was made for getting the delay condoned, that the settlement talks were going on and they could not materialize. This Court negatived that fact and rejected the application.

07. The fact to be noted is that the suit that was filed by the respondent - plaintiff was for partition and separate possession. It was declared that the plaintiff has 1/4th share in the suit properties. Thereafter, the defendants i.e. present appellants had approached the first appellate Court and their appeal has been dismissed on merits. The delay of 394 days has been tried to be explained by saying that after the judgment, the appellants had approached the concerned Advocate, sought legal advice and then started collecting necessary documents. The judgment was pronounced by the learned Principal District Judge on 30-03-2017. From the certified copy of the judgment, it can be seen that the certified copy was applied on 31-03-2017, that

means, on the next day of the pronouncement itself. The copies were ready on 23-05-2017 and it appears that they were collected on 08-06-2017. That means, there is no delay as such, committed by the applicants in approaching and collecting the necessary documents.

08. The second ground on which applicants want to harp upon is, poor rustic villagers. That is equally applicable to the plaintiff also because he is their relative coming from the same village. Therefore, no extra advantage can be given to the applicants on that count. The third ground is that they were making efforts to settle the dispute amicably through mediation of elderly persons and close relatives. No doubt, a simple question that arises is that the respondent no.01, who now expired, was aged 77 when the application was filed. Then how there can be settlement through further elderly persons, is a question. But even if we give concession to that, yet except statement, there is nothing. Under such circumstance, it is required to be seen as to whether there was any substance in the said statement or as stated by respondent no.01, the said statement is made just to gather sympathy and the applicants have not come with *bona fides*.

09. At the outset, it can be seen that the citations or the decisions relied by the applicants,

except the decision in *N. Balakrishnan's case (supra)*, cannot be made applicable to the facts before this Court as the delay that was condoned in those matters was for different reasons. It appears that after the decision by the first appellate Court in this case, respondent no.01 had filed caveat. It has its own limitation or period prescribed. If that period has expired, then respondent was not estopped from filing subsequent caveat. Therefore, filing of the second appeal with delay condonation application, after the period of caveat has expired, does not *ipso facto* spell out *mala fides* on the part of the applicants. Further, whether to grant any interim relief or not, is definitely within the discretion of this Court for which applicants cannot be blamed. Therefore, now what remains is that whether there was compromise talks going on. The statement made on oath by the applicants is denied on oath by respondent no.01. Therefore, when it is word against word, there is no hurdle in accepting the statement by the applicants, that they were trying to settle the dispute amicably since both the Courts went against them. In Civil Application No. 08898 of 2018, decided by this Court, though the reason was the same, that settlement talks were going on, but the facts were different. The applicants therein had taken part in execution proceedings and then still did not approach this Court within reasonable time. The delay therein was 667 days. Therefore, respondent no.01 cannot take

advantage of that decision.

10. The observations from the decision in *N. Balakrishnan's case* (*supra*) are important. In para 13 of the judgment, the Hon'ble Apex Court has observed thus :-

" It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the Court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant the Court shall compensate the opposite party for his loss. "

11. Therefore, when the respondents herein has not shown mala fides on the part of the applicants, the delay deserves to be condoned. However, at the

same time, the inconvenience that would be caused to the respondent no.01, now his heirs, are required to be compensated in terms of money.

12. Hence, the following order :-

(a) The application is hereby allowed.

(b) The delay caused in filing second appeal is hereby condoned, subject to deposit of costs of Rs. 10,000/- [Rupees ten thousand] in this Court, within a month from the date of this order. After the amount is deposited, it be disbursed to the legal representatives of respondent no.01 equally.

(c) After deposit of the amount, Registry to verify and register the second appeal and place it for consideration on 10th June 2019.

(Smt. Vibha Kankanwadi)
JUDGE

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