

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

**29 CIVIL APPLICATION NO.6450 OF 2018
IN SAST/35516/2017**

**NAJIRBEE JAVED SHAIKH ABDUL RAHEMAN
VERSUS
VIDYAKALA DNYANDEO KAKADE AND ANOTHER**

...
Advocate for Applicant : Mr. Kendre N.D.
Advocate for Respondent : Mr. Gunale V.D.
...

CORAM : MANGESH S. PATIL, J.

DATE : 26.11.2019

PER COURT :

Heard.

2. This is an application under Section 5 of the Limitation Act for condonation of delay of 236 days in preferring the Second Appeal by the original defendant no.2.

3. The learned advocate for the applicant referring to the contents of the application submits that it is due to lack of communication between the applicant who is illiterate lady and her lawyer that the delay has occasioned. She was not aware about the date of pronouncement of the Judgment. She got the knowledge when she received a notice in the execution proceeding. She then approached her advocate. The time was spent for collecting documents and arranging fees and all these reasons cumulatively caused the delay. It was not intentional and had occasioned

bona fide. Her right to an immovable property is at stake and unless she is allowed to prefer the Second Appeal it would result in gross miscarriage of justice. In support of his submission he places reliance on the decision in the case of **S. Ganesharaju (dead) through Lrs. and another Vs. Narsamma (dead) through Lrs. and Ors.; (2013) 11 Supreme Court Cases 341.**

4. The learned advocate for the respondent no.1 who is the original plaintiff strongly opposes the application by referring to her affidavit in reply. He submits that the application is as vague as it could be. Each day's delay has not been attempted to be explained. The respondent no.1 has been found entitled to declaration and possession of an immovable property and her right to get it executed is being hampered *mala fide* by causing the delay. He submits that the application does not give any particulars as to when actually the applicant approached her advocate after she was served with a notice of execution. She does not state specifically as to what steps were required to be taken by her which resulted in the delay. He therefore submits that the delay has not been properly explained and may not be condoned.

5. The learned advocate also places his reliance on the decision of the Supreme Court in the case of **P. K. Ramachandran Vs. State of Kerala and Anr.; 1998 AIR SCW 2177** and few judgments of the coordinate Benches of this Court in **Kamalbai Narasaiyya Shrimai and Anr. Vs. Ganpat Vithalrao Gavare; 2007(1) Bom.C.R. 51** and **Chandrakant s/o Shrimantrao Patil and Others Vs. Vikas s/o Balaji Parsewar; 2011(2) Mh.L.J. 94**, and

Vasant Vithal Gawand Vs. Shantaram Tukaram Gawand and Ors.; 2016(1) Mh.L.J. 89.

6. I have carefully gone through the application, the affidavit in reply and the papers. Needless to state that the guidelines while considering the applications for condonation of delay have been far too well settled. In the case of **Collector, Land Acquisition Officer Vs. Mst. Katiji; 1987 (2) S.C.C. 107**, the guidelines have been laid down as under :

- “(1) Litigant does not stand benefitted by lodging an appeal late;*
- (2) Refusal to condone may result in meritorious matters being thrown out at the very threshold and the cause of justice being defeated;*
- (3) In the matter of explanation of every day’s delay, pedantic approach should be avoided. Rational common sense pragmatic approach should be invariably adopted;*
- (4) Substantial justice is to be preferred against technical flaws;*
- (5) There is no presumption that delay is always deliberate;*
- (6) Injustice is to be removed.”*

7. Coupled with these guidelines as has been laid down in the case of S. Ganesharaju (supra), in the normal course the delays are to be condoned by taking a liberal approach unless there is something to demonstrate *mala fides* on the part of the applicant applying for condonation of delay.

8. Bearing in mind above principles if one examines the matter in hand, though it is expected that the delay of each day is to be explained, the courts are supposed to take a pragmatic view rather than a pedantic one. It is expected that the rights are allowed to be determined on merits rather

than by default. The parties are litigating over an immovable property. The applicant is a lady who is the defendant no.2 in the suit. She had preferred the First Appeal before the District Court and claims that she came to know about the decision only after she was served with the notice in the execution proceeding in September 2017. She has then stated to have approached the advocate and was required to spend some time for collecting the documents and for arranging the finances to enable her to prefer the Second Appeal.

9. Except the statement in the affidavit in reply, there is absolutely no material before me to demonstrate that the applicant had some ulterior motive in not preferring the Second Appeal in time. The delay of 236 days in my considered view has been attempted to be explained with plausible reasons.

10. The decisions cited on behalf of the respondent no.1 clearly demonstrate that in the facts and circumstances obtaining in each of the cases that the Courts had refused to condone the delay. In the matter of Kamalabai Narasaiyya Shrimal (supra) there was material to demonstrate that the petitioner there in had appeared before the executing Court and had sought time for vacating the premises and it is thereafter that she had applied for condoning the delay. In the case of Chandrakant Shrimantrao Patil (supra) there was material to show that the applicant there in was aware about the decision in the matter and was still indolent enough not to prefer the appeal in time. In the case of Vasant Vithal Gawand (supra) the person applying for condonation of delay was held to be conversant with the

legal niceties as immediately after purchasing the property he had filed an application for getting himself impleaded in the suit and the attempt was made to pass on the blame to his advocate as an excuse for condoning the delay. Apparently the facts in the matter in hand are not comparable with the facts in the above three matters before the coordinate Benches of this Court.

11. True it is that the Law of Limitation has to be applied with all its rigors. Even if the consequences are harsh it has to be applied in an appropriate case even to non suit a person. However, when in the matter in hand, there is sufficient reason demonstrated by the applicant the delay deserves to be condoned by awarding some cost to the respondent no.1.

12. The application is allowed and the delay is condoned subject to the applicant paying costs of Rs.1000/- to the respondent no.1 within one week. List the Second Appeal on 06.12.2019 if the costs are paid/deposited.

(MANGESH S. PATIL, J.)

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