

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 122 OF 2019
WITH
CIVIL APPLICATION NO. 1618 OF 2017**

Kadir Mahammad Modak and Ors. ... Appellants
Vs.
Khalil Ahammadali Modak and Ors. ... Respondents
.....
Mr. Shashank Chandrakant Mangle for the Appellants.
Mr. Rajesh S. Patil for the Respondent No.1.

.....
CORAM : M. S. KARNIK, J.
DATE : 14th OCTOBER, 2019.

ORAL JUDGMENT:

1. Heard learned counsel for the appellants and learned counsel for the respondent No.1-original plaintiff No.2.
2. By consent of the parties heard the Appeal finally.
3. The appellants are the original defendant Nos.1, 2 and 9. The plaintiffs filed a suit for partition and separate possession. The Trial Court decreed the suit and declared that the plaintiffs and defendant Nos.3 to 8 have share of 29/60 in the suit property. It was the case of the defendant Nos.1, 2 and 9 before the Trial Court that they have 2/3rd share in the suit property. The judgment and decree of the Trial Court is dated 23.06.2015.

4. As there was delay of 545 days on the part of the appellants in preferring an Appeal before the First Appellate Court, the Civil Miscellaneous Application was filed for condonation of delay. The reason given in the Civil Miscellaneous Application is that appellant Nos.1 and 3 are aged persons and that it is the appellant No.2 who has to look after their well being. The appellant No.2 is the daughter of appellant No.1. The other reason mentioned was that the son of the appellant No.2 is in S.S.C. and therefore she was required to attend to her son and also help him in his studies. The First Appellate Court did not find any sufficient cause or justification to condone the delay. The Civil Miscellaneous Application is rejected against which order this Appeal.

5. Heard learned counsel. Admit on the following substantial question of law.

“Whether the First Appellate Court was justified in rejecting the application filed for condonation of delay in filing the Appeal and whether the same is not based upon the facts before it and thus perverse ?”

6. Learned counsel for the appellants pointed out that the judgment and decree of the Trial Court is dated 23.06.2015.

The appellants got knowledge of the judgment and decree sometime in November 2015 whereafter the application was made on 18.12.2015 for certified copy. The certified copy was made available to the appellants on 21.12.2015. The Civil Miscellaneous Application for condonation of delay in filing the Appeal is filed on 07.01.2017 almost after one year from the date when the certified copy is obtained by the appellants.

7. Learned counsel for the appellants would contend that the delay of 545 days is not so gross in the facts of the present case. He would submit that it was appellant No.2 who was looking after the proceedings in view of the old age of appellant Nos.1 and 3. The appellant No.2 is the daughter of appellant No.1. Appellant Nos.1 and 3 are suffering from various old age related ailments. Moreover she has a school going child and therefore she was required to attend her son. According to learned counsel for the appellants the delay is not deliberate.

8. Learned counsel for respondent No.1 on the other hand submitted that the appellants-original defendant Nos.1, 2

and 9 have not indicated any sufficient cause in the application for condonation which prevented them from filing the Appeal within limitation. He would submit that the appellants have been negligent at every stage. He would further submit that though the certified copy of the judgment and decree dated 23.06.2015 was made available to the appellants on 21.12.2015, even then the application for condonation of delay is filed on 07.01.2017 almost after one year. This according to him would show that there has been a gross negligence on their part and that reasons given in support of the explanation for condonation of delay are not bonafide. He would further submit that the reasons in the application are utterly false. According to him though in the application it is stated that the appellant No.2 had to look after her son's education since he was studying in the 10th Standard, in support of the application, the mark sheet for H.S.C. was produced. For all these reasons learned counsel would submit that the First Appellate Court was justified in rejecting the application for condonation of delay. In support of his submission learned counsel for the respondent would rely upon the decision of the Hon'ble Supreme Court in the case of **Basawaraj & Anr.**

Versus Special Land Acquisition Officer reported in **2014 AIR (SC)**

746. He would lay emphasis on Para 15 of the decision which reads thus :-

“15. The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the “sufficient cause” which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bonafide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature.”

9. Learned counsel also relied upon the decision of this Court in the case of **Varhyan Narendra Singh Chhatwal and Ors. Versus Kala Narendra Singh Chhatwal and Ors.** reported in **2014(2) Mh.L.J. 61** in support of his submission that the

discretionary powers to condone the delay should not be so exercised as to help a party which is negligent and does not present a bonafide case.

10. I have considered the submissions advanced by learned counsel for the parties. The suit is filed by the present respondents-original plaintiffs for partition and separate possession. The Trial Court decreed the suit and declared that the plaintiffs and the defendant Nos. 3 to 8 have 29/60 share in the suit property. The certified copy of the judgment and decree dated 23.06.2015 was made available to the present appellants on 21.12.2015. The application for condonation of delay was filed on 07.01.2017 almost after one year. The question for consideration is whether this delay of 545 days is so gross and whether the explanation offered by the appellants does not constitute sufficient case for condoning the delay.

11. There is no dispute that the appellant Nos.1 and 3 are aged persons. It is the contention of learned counsel for the respondent that the presence of the appellant Nos.1 and 3 was not required as the appellant No.2 is power of attorney holder of the

appellant Nos.1 and 3. No doubt there is delay of 545 days in preferring the Appeal. Even after the certified copy was obtained on 21.12.2015 the application for condonation of delay is filed after one year.

12. The reason mentioned in the application is that appellant Nos.1 and 3 are aged persons suffering from various ailments and it is the appellant No.2 who is looking after them. There is nothing placed on record to indicate that the appellant No.2 is not taking care of appellant Nos.1 and 3 and that appellant Nos.1 and 3 are not suffering from old age related ailments. Moreover the appellant No.2 has stated that she had to take care of her son's education as he is in 10th standard. It may be that the certificate produced on record is for H.S.C. examination. The Appellate Court has placed much emphasis on this certificate which is of H.S.C. in the light of the claim made by the appellant No.2 that her son is studying in 10th Standard while rejecting the application for condonation of delay. Merely because there is a discrepancy as to whether the appellant No.2's son is in 10th or 12th Standard is no ground to infer that a false case is made

out. It is no ones case that the son is not taking education. Undoubtedly the Apex Court has laid down the principle that the the applicant has to explain the Court as to what was the “sufficient cause” which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bonafide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay.

13. In the facts of the present case the explanation offered by the appellants deserves acceptance as “sufficient cause” for not filing the Appeal within limitation. In my opinion the right to prefer an Appeal in the facts of the present case should not have been foreclosed on the ground that there has been delay of 545 days in preferring the Application. Some inconvenience would be caused to the original plaintiffs as a result of the delay. But this inconvenience is not such that the same can not be compensated without even imposing cost. In the facts of the present case, the Appeal deserves to be allowed subject to cost of Rs.25,000/- payable to the plaintiffs and defendant Nos.3 to 8 equally. The

cost to be deposited before the First Appellate Court within a period of four weeks from today. The plaintiffs and the defendant Nos.3 to 8 are permitted to withdraw the cost.

14. The impugned order passed by the First Appellate Court is set aside. The delay in filing the Appeal is condoned. The First Appellate Court to hear the Appeal on merits.

15. In view of the disposal of the Second Appeal, nothing survives for consideration in the Civil Application. The Civil Application is disposed of accordingly.

(M. S. KARNIK, J.)