

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

***SECOND APPEAL NO.621 OF 2018
WITH
CIVIL APPLICATION NO.521 OF 2018***

Shri Ghamelu Prabhu Waghmode ... Appellant

Vs

Shri Dhanaji Dagdu Waghmode & Ors. ... Respondents

...

Mr. Ajay A. Joshi for the Appellant.

Mr. Sarang Aradhye for the Respondent No.1.

CORAM : SANDEEP K. SHINDE J.

DATE : APRIL 26, 2019

P.C. :

Heard.

2 With consent of the learned counsel for the parties, the Second Appeal is taken up for final hearing at the Admission stage.

3 The Second Appeal arises from the decision of the first Appellate Court, refusing to interfere with the decree of prohibitory injunction drawn by the Joint Civil Judge, Junior Division, Pandharpur whereby the appellant (defendant no.1)

and other other defendants were restrained from obstructing possession of the respondents herein-original plaintiff in the suit land.

4 It is not in dispute that the appellant/defendant no.1 was duly served with suit summons and had appeared in the suit proceedings, but he neither filed written statement nor cross-examined the plaintiff. Thus, the decree of the Trial Court though was not strictly ex-parte decree, but since suit proceeded uncontested, case of the plaintiff was accepted and the decree was drawn. The Regular Civil Appeal preferred by defendant no.1 was beyond the period of limitation and the request for condonation was declined in the Civil Miscellaneous Application No.93 of 2016.

5 Application for delay condonation was supported by the affidavit, wherein it is stated that, the applicant, Senior Citizen was suffering from typhoid, fever and malaria and, therefore, could not instruct his advocate to file appeal against the ex-parte decree which caused delay of five

months. The learned District Judge vide order dated 22nd August, 2017 proceeded to hear the application though the contesting respondent nos.2, 3 and 4 did not respond to the notice served on them.

6 The learned Trial Judge for the reasons stated in the paragraphs ten and eleven declined to condone the delay vide order dated 19th September, 2017. It is against this order, defendant no.1 has preferred this appeal.

7 The learned counsel for the appellant has produced on record medical certificate issued by Patil Surgical and Maternity Hospital, Pandharpur. Dr. Sanjay P. Patil attached to the said hospital has certified that the appellant was unwell and was under his treatment since February, 2016. It is certified that he was advised bed-rest for a month. The said medical certificate is taken on record and marked 'X' for Identification.

8 The learned counsel for the appellant has relied upon the judgment of this Court in the case of **Holya Lasha**

Mahale and another v. Raghunath Holya Mahale 2006(5)

Mh.L.J.80. Wherein in paragraphs 5 and 6, thus,

"5. The delay condonation application is a miscellaneous judicial proceeding and it is to be decided on the basis of the evidence led by the parties before the Court. The regular procedure is to record the evidence of the parties by way of examination-in-chief and cross-examination. However, such procedure can be dispensed with by the Court if the Court desires to exercise powers under Order-XIX rule-1 of the Code of Civil Procedure, 1908. In that eventuality the Court has to pass an order to that effect. Order-XIX, rule-1 of the CPC is to the following effect:

"1. Power to order any point to be proved by affidavit.- Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable.

Provided that where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit."

6 . Thus, the Court can read the evidence led by way of the affidavit after having recorded the sufficient reasons for accepting such affidavits and, if no such order is passed by the Court, the Court is under obligation to follow the regular procedure of recording the evidence by way of examination-in-chief and cross-examination. In the present matter, it is further noticed that none of the parties have filed pursis informing the Court that the evidence is closed by either side. Thus, it is transpired that

the matter is disposed of simply on the basis of the pleadings of the parties without recording of evidence in the court and/or obtaining evidence as per Order-XIX rule-1 of the Code of Civil Procedure, 1908. In the absence of pursis of the parties that they do not intend to lead evidence and/or they have closed evidence, it was inappropriate on the part of the First Appellate Court to dispose of the matter on the basis of the pleadings of the parties simplicitor. Therefore, on this aspect of the matter, the order passed by the First Appellate Court suffers from a procedural drawback and requires to be set aside. It is accordingly set aside. However, since the matter was disposed of without following the procedure as discussed above, it has become necessary to remand the matter to the First Appellate Court to decide the delay condonation application after recording evidence of the parties in the Court and/or by way of affidavit after passing an order under Order-XIX rule-1 of the Code of Civil Procedure, 1908. In the result, I pass the following order.

: O R D E R :

- (1) Writ Petition is allowed.
- (2) Judgment and Order dated July 16, 2005, passed by the IIIrd Ad-hoc Additional District Judge, Malegoan in Civil Miscellaneous Application No. 22 of 2004 is hereby quashed and set aside.
- (3) Civil Miscellaneous Application No. 22 of 2004 is remitted to the First Appellate Court for final disposal in accordance with the law after recording of the evidence as discussed in the body of this judgment.
- (4) Rule is made absolute accordingly.
- (5) During the pendency of this petition, there was an order of status-quo. Said order shall continue for a period of three months from today. The First appellate Court shall dispose of the said matter

within the aforesaid period of three months. Both parties to co-operate with the Court below for early disposal of the matter.”

9 The learned counsel has also relied upon the judgment in the case of **Chandrakant Somnath Melge v. Balasaheb Somnath Melge 2017(3) Mh.L.J.668**. In this judgment reliance was placed on the judgment in the case of **Holya Lasha Mahale (Supra)**.

10 In the aforesaid two judgments, it is held that whenever application for condonation of delay is made and there are contested facts, the Court must allow the applicant to lead oral evidence on the ground of condonation applied for more so, when there is an ex-parte decree and there is delay in filing appeal.

11 In the case in hand, the decree against the appellant was not strictly ex-parte, in-as-much as suit summons was duly served upon the appellant. As yet application for condonation of delay though served upon the contesting respondents (plaintiffs), they did not participate in the proceedings and, therefore, in view of these facts, it is

submitted by the learned counsel for the appellant that since cause shown by the appellant/applicant has not been disputed and/or controverted, the learned Judge ought not to have disbelieved cause shown; or if the learned Judge was of the opinion that the cause shown was not genuine or reasonable, he could have asked the applicant to lead evidence in terms of law laid down in the aforesaid two cases. It is further submitted that the delay is of five months and the appellant being Senior Citizen, the Court ought to have condoned the delay in the interest of justice by adopting liberal approach.

12 The learned counsel for the respondents has vehemently opposed this application and contended that the appellant at the first instance even did not bother to submit the medical certificate before the learned District Judge and in view of this fact, no interference is called for in the impugned order.

13 In this case, delay occurred in filing Regular Civil

Appeal was of five months. Appellant had filed application, which was supported by affidavit. Admittedly, contesting respondents chose to remain absent though they were duly served. In view of this fact, it is to be held that contention of the appellant that he was suffering from typhoid, fever and malaria which prevented him from filing appeal within time, has gone unchallenged. There was nothing before the learned District Judge to disbelieve the statement made by the appellant on oath that he was suffering from typhoid, fever and malaria which prevented him from filing appeal within permissible period. If at all the learned Judge was of the view that the cause shown was not genuine or reasonable or sufficient, he ought to have permitted the appellant to lead the evidence as held in **Holya Lasha Mahale (Supra)**.

14 Thus, taking into consideration facts of the case, in my view, sufficient cause is made out for condoning the delay and, therefore, the decision of the learned Judge dated 19th September, 2017 declining to condone the delay is

hereby quashed and set aside.

15 In view of the facts aforesaid, Civil Miscellaneous Application No.93 of 2016 is allowed. Resultantly, decision of the learned District Judge-3, Pandharpur dated 19th September, 2017 passed in Civil Miscellaneous Application NO.93 of 2016 is set aside.

16 Appeal is allowed in the aforesaid terms.

(SANDEEP K. SHINDE, J.)