

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

**CIVIL APPLICATION NO.1626 OF 2018
IN
SECOND APPEAL (ST.) NO.34247 OF 2018
WITH
SECOND APPEAL (ST.) NO.34247 OF 2018**

Bhiva Kondiba Magdum .. Applicant/Appellant
Vs.
Shiva Kondiba Magdum & Ors. .. Respondents

ALONG WITH

**CIVIL APPLICATION NO.1624 OF 2018
IN
SECOND APPEAL (ST.) NO.34223 OF 2018
WITH
SECOND APPEAL (ST.) NO.34223 OF 2018**

Bhiva Kondiba Magdum .. Applicant/Appellant
Vs.
Shiva Kondiba Magdum & Ors. .. Respondents

ALONG WITH

**CIVIL APPLICATION NO.1627 OF 2018
IN
SECOND APPEAL (ST.) NO.34239 OF 2018
WITH
SECOND APPEAL (ST.) NO.34239 OF 2018**

Vijaya Bhivaji Magdum .. Applicant/Appellant
Vs.
Shiva Kondiba Magdum & Ors. .. Respondents

Mr.Drupad Sopan Patil for the applicants in all the appeals.
Mr.Chetan Patil for the respondents in all appeals.

**CORAM : R.D.DHANUKA, J.
DATE : 3rd September 2019**

P.C.:

. By consent of parties, these three civil applications were heard together and are being disposed of by a common order.

2. By these three civil applications, the applicants seek condonation of delay of 1 year and 331 days in filing second appeal. The applicants in these three civil applications were the appellant in the appeals filed by them impugning the decree passed by the learned trial Judge. It is the case of the applicants that the applicants Bhiva Kondiba Magdum is 75 years whereas the applicant Vijaya Bhivaji Magdum is 63 years and both are suffering from disorder for last several years. It is the case of the applicants that from 2005, the applicant is undergoing treatment for mood disorders and depression and has been taking medicines as prescribed by Dr.G.R. Harshe to improve the mental condition. In the month of February 2018, daughter of applicant had visited house of the applicant. While cleaning the house, she found some case papers. In spite of inquiry, neither the applicant nor her husband could recollect all details of the litigation. Thereafter, the daughter of the applicant contacted Advocate Vijaysinh Patil and shown to him the papers. The said advocate took search of papers in the Court of Civil Judge, Junior Division, Kale. Upon the said search, it was realised that the appeals filed by the applicant and her husband has been dismissed by the learned Judge of District Court. The applicant thereafter applied for

certified copy in the month of March 2018 and thereafter filed these second appeals. There is thus delay of 1 years 331 days.

3. Mr.Drupad Partil, learned counsel for the applicants in all these three civil applications, invited my attention to some of the averments made in the civil applications, affidavit-in-reply and the roznama. He submits that both the applicants were suffering from several diseases and as a result thereof were not able to file the second appeals within the time prescribed.

4. Learned counsel invited my attention to some of the medical certificates annexed to the civil applications and would submit that the medical certificates would clearly indicate that in view of various diseases suffered by the applicants, the applicants could not remain present before the appellate Court. Learned counsel for the applicants invited my attention to some of the observations made in the judgment delivered by the first appellate Court and would submit that the findings rendered by the first appellate Court are totally perverse. He submits that the first appellate Court however, took very casual approach in the judgment passed by him. He submits that the applicants have good chances of succeeding in second appeals and thus these civil applications for condonation of delay in filing these appeals be allowed.

5. Mr.Chetan Patil, learned counsel for the respondent, on the other hand, submits that the applicants have not come to this Court with clean hands. He submits that both the applicants were pursuing the suit even during the period of so called sickness of the applicants and had filed affidavit of evidence and had subjected themselves for cross-examination. It is submitted by the learned counsel that they have also appeared before the executing Court and were fully aware about the decree passed by the first appellate Court. Learned counsel submits that inspite of the statement made before the trial Court that they would not sell part of the property, the applicants issued a public notice on 14th May 2019 for sale of the entire property. He invited my attention to the public notice issued by the applicants and would submit that the applicants have participated in various proceedings and issued a public notice which would clearly indicate that medical records produced by the applicants in support of their applications for condonation of delay are not convincing.

6. Learned counsel also placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy & Ors., 2013 (12) SCC 649*** and in the case of ***Basawaraj & Anr. Vs. Special Land Acquisition Officer, (2013) 14 SCC 81*** and would submit that none of the guidelines framed by the Hon'ble Supreme Court in those judgments are satisfied by the applicants for condonation of gross delay in filing

these three civil applications.

7. Mr.Drupad Patil, learned counsel for the applicants in rejoinder submits that the applicants have good chances of succeeding in these second appeals and thus this Court shall take a liberal view in the matter and condone the delay.

8. A perusal of the record indicates that delay is of 1 year 331 days in filing the second appeals. Though the applicants have annexed several medical records in the civil applications for condonation of delay, other records forming part of the record to which my attention is invited by Mr.Chetan Patil, learned counsel for the respondent would clearly indicate that the appellants had been participating in various proceedings and have filed affidavit of evidence and had subjected themselves for cross-examination during the period of their alleged sickness.

9. A perusal of the roznama of the proceedings before the first appellate Court would also clearly indicate that when the respondent had commenced the arguments, the applicants and their advocates were present before the first appellate Court. The applicants as well as their learned advocate, however, remained absent on the subsequent dates when the matter was heard. A perusal of the record further indicates that even before the executing Court, one of the applicants was present much

prior to the date of the alleged knowledge of February 2018 set out in the civil applications. In my view, if the applicants were suffering from depression, the applicants would not have filed affidavit of evidence in the matter and would not have subjected to the cross-examination before the trial Court. In my view, the applicants have not come to this Court with clear hands.

10. The Hon'ble Supreme Court in the case of ***Esha Bhattarcharjee (supra)*** after adverting to several other judgments of the Supreme Court had culled out the principles applicable to the Courts while considering an application for condonation of delay. In my view, none of the guidelines framed by the Hon'ble Supreme Court which permits the condonation of delay are satisfied in this case filed by the applicants. No case is thus made out for condonation of delay in these civil applications. Civil applications are accordingly dismissed. In view of dismissal of the civil applications, the aforesaid second appeals are also dismissed. No order as to costs.

R.D.DHANUKA, J.