

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 365 OF 2016

**ALONGWITH
CIVIL APPLICATION NO. 626 OF 2015
AND
CIVIL APPLICATION NO. 760 OF 2016
IN
SECOND APPEAL NO. 365 OF 2016**

Shri. Ramesh Marbia Kharat

....Appellant

(Original Defendant)

V/s.

Bakulabai Namdev Kamble

...Respondent

(Original Plaintiff)

* * * *

Mr. Drupad Sopan Patil, Advocate for the appellant.

Mr. B.K. Raje, Advocate for the respondent.

CORAM : SANDEEP K. SHINDE, J.

Monday, 18th March, 2019.

P.C. :

1. Heard learned Counsel for the parties.
2. This appeal is preferred by the defendant. I will refer the parties as plaintiff and defendant.

3. The plaintiff's suit for preventive injunction and for declaration of title on the basis of the sale-deed dated 24th June 1998, has been decreed by the learned trial Court, Phaltan.

4. Though the suit summons was duly served, defendant did not appear and participate in the suit proceedings. Resultantly, he was marked ex-parte and the suit decreed on 15th January, 2010.

4. The appellant-defendant, did not prefer Appeal within limitation and therefore an Application No. 181 of 2011 was filed, seeking condonation of delay of a year and six months. The learned Ad-Hoc District Judge, Satara declined to condone the delay vide order dated 5th October, 2012. Against this order, Writ Petition was preferred, but, was withdrawn with liberty to file the Second Appeal. Accordingly, Second Appeal was filed in February, 2015 alongwith an application for condonation of delay and which has been condoned and the Second Appeal was registered.

5. The learned Counsel, would submit that, defendant was marked ex-parte within thirty days from service of suit summons and thereby did not afford opportunity to file the written statement. Thus, fair opportunity was given to contest the suit. He would next submit that, though the defendant was served on 31st August, 2009 he had relied on the assurance of the plaitniffs that suit would not proceed and believing the same, he did not participate in the suit proceedings. The learned Counsel would further submit that, for want of knowledge and due to financial constraints, defendant could not file Regular Civil Appeal which caused delay of a year and six months and it was not deliberate. The learned Counsel would further submit that, the suit land being a Mahar-Vatan land, for want of requisite permission, the sale-deed executed by him was void being against the public policy. It is further contended that, there are other co-sharers who were not party to the sale-deed allegedly executed by the defendants in favour of the plaintiffs on 25th June, 1998. It is further contended that,

sufficient cause was shown for condoning the delay, however, the same was not considered. He would therefore submit that, the impugned order be set aside and the Appeal be remanded to the learned District Judge for deciding it on its own merits.

6. On the other hand, the learned Counsel for the respondent, has filed affidavit-in-reply and also placed on record, the reply filed by him before the learned District Judge.

7. Admittedly, the sale-deed was executed, registered on 25th June, 1998 and the suit was filed in the year 2009 i.e. nearly after ten years. The defendant is ex-service man, and the subject sale-deed was executed for consideration and registered with the Sub-Registrar. It appears, the applicant's wife was present while executing the sale-deed and she is one of the witnesses. It is plaintiff's case that, the defendant was likely to alienate the suit land taking advantage of the fact that the land, was not mutated in the name of the respondent. Apprehending alienation, a public notice was issued in the

local newspaper on 13th February, 2008. It also appears that, the defendant was obstructing possession of the plaintiff in the suit land and thus the complaint was filed with the police in 2008. In the said suit, temporary injunction was granted by the learned Judge against the respondents whereby he was injuncted from creating third party interest in the suit land. Thus, taking into consideration, the facts aforesaid, it cannot be said that the appellant was unaware of the proceedings and/or he executed the sale-deed on mis-representation of the plaintiffs.

8. It is not in dispute that, though the suit summons was duly served, the appellant chose, not to participate in the suit proceedings. A fact cannot be ignored that, the sale-deed executed by the appellant was registered before the Sub-Registrar and his wife was one of the witnesses to the said transaction. Though, it is contended that the sale-deed is void for want of requisite permission, it may be stated that the suit has been filed nearly after, ten years after execution of the sale-deed.

Thus, conduct of the appellant cannot be overlooked, in as much as, in the year 2008 taking advantage of the fact that the suit land has not been mutated in the name of the plaintiff in the revenue records, defendant attempted to alienate the property. It is for this reason, the respondent had issued a public notice in the local newspaper. That even otherwise, the cause shown for condoning the delay is not sufficient. It is settled law that, the rules of limitation are not meant to destroy the rights of the parties but they are meant to see that parties do not resort to dilatory tactics. It is not the length of delay which is to be considered. Length of delay is not the matter but acceptability of explanation is the only criterion.

9. The Appellate Court has rightly observed that, no steps were taken by the appellant after service of the summons to contest the suit. The explanation offered by the appellant for condoning the delay in instituting the Regular Civil Appeal was not sufficient.

10. Thus, taking into consideration the facts of the

case, I do not see any reason to interfere with the order passed by the lower Appellate Court. In the result, the Appeal is dismissed.

11. In view of dismissal of the Appeal, Civil Application No. 760 of 2016 and Civil Application No. 626 of 2015 do not survive. The same are disposed of.

(SANDEEP K. SHINDE, J)