

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL (ST) NO. 36022 OF 2018

Namdeo Sadashiv Walunj

.....Appellant

V/s.

Sau. Chhaya Dilip Maule and Ors.

....Respondents

* * * *

Mr. Sachin D. Kadam, Advocate for the appellant.

Ms. Smita Gaidhani, Advocate for respondents no.2 and 3.

CORAM : SANDEEP K. SHINDE, J.

Monday, 25th February, 2019.

P.C. :

1. Heard learned Counsel for the parties.
2. I will refer the parties as per their status in the
plaint.
3. This Appeal is preferred by the defendant no.1
against, whom the decree of possession has been passed on
29th March, 2017 in Regular Civil Suit No. 132 of 2014
("suit" for short). The defendant was thus directed to

handover vacant possession of the suit land to plaintiff no.3 within one month.

4. Against the decree of possession, defendant no.1 had preferred Regular Civil Appeal on 13th April, 2018 alongwith Civil Misc. Application No. 41 of 2018 seeking condonation of 320 days caused in preferring the Regular Civil Appeal. The learned Judge dismissed the said application and declined to condone the delay vide order dated 29th November, 2018. It is against this order, the defendant no.1 has preferred this Appeal.

5. It is not in dispute, the suit summons was served to defendant no.1 on 15th July, 2015 and thereafter he filed three successive applications seeking time to file the written statement. The last application dated 21st January, 2017 was rejected by the Court. Be that as it may, the suit was decreed ex-parte against the defendant.

6. I have perused the Appeal memo, as well as, an application for condonation of delay filed by the appellant before the learned District Court. In the appeal memo, it is stated that, due to chronic illness and advance age, the

appellant could not instruct his advocate. It is further submitted that, only after receiving the notice in execution proceedings, he came to know about the decree passed against him in the suit. It is further averred that, he applied for certified copy on 21st March, 2018 and received the same on 10th April, 2018 and immediately thereafter had filed Regular Civil Appeal on 13th April, 2018 with an application for condonation of delay.

7. The only reason advanced for condoning the delay, is that, he applied for certified copy on 21st March, 2018 after receipt of notice in execution proceedings, and thus suggesting, till 21st March, 2018 the appellant was not aware of the decree passed against him. However, the facts on record are otherwise. The learned District Court, while dismissing the application, found that, the appellant had applied for certified copy of the judgment and decree passed by the trial court on 21st June, 2017 and copies were delivered to the appellant on 7th July, 2007. It may be stated that, this fact was not disclosed and therefore it is a clear case of suppression of the material facts. In view of

this, the averments in the Appeal memo, as well as, in the application of condonation of delay, that he had applied for the certified copy on 21st March, 2018 without disclosing earlier application made for, is not only suppression but was also false to the knowledge of the appellant.

8. It may also be stated that, the aforesaid facts are not disclosed in the Appeal Memo filed before this Court.

9. In the case of **Collector, Land Acquisition, Anandnag V/s. MST Katijib**, the Supreme Court has held thus :

“ When substantial justice and technical conditions are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right injustice being done because of non-deliberate delay.

. In the case in hand, there is deliberate delay as could be seen from the averments and by suppressing the material facts that appellant had applied for certified copy at the first instance in June, 2017 and received it in July, 2017.”

10. Thus, in my view, the finding recorded by the learned District Judge while declining to condone the delay, cannot be interfered with. The Appeal is therefore dismissed.

11. In view of dismissal of the Appeal, Civil Application No. 60 of 2019 does not survive. The same is accordingly disposed of.

(SANDEEP K. SHINDE, J)