

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

921 CIVIL APPLICATION NO.8447 OF 2019
IN SAST/21283/2019 WITH CA/8448/2019 IN SAST/21283/2019

SAHEBRAO GOVIND GUND AND OTHERS
VERSUS
KISAN GOVIND GUND AND ANOTHER

Mr.N.V. Gaware, Advocate for the applicants.

Mr.S.N. Garud h/f. Mr. N.C. Garud, Advocate for
respondent No.1.

CORAM : S.M.GAVHANE,J.

DATED : 29.01.2020

P.C. :-

. The applicants/original defendant Nos.1 to 4 have filed this application to condone delay of 275 days caused in filing Second Appeal aggrieved by the judgment and decree dated 22.06.2018 passed by the Adhoc District Judge-6, Ahmednagar in Regular Civil Appeal No.110 of 2010.

2. Mr.Gaware, learned counsel appearing for the applicants submitted that respondent No.1/original plaintiff had filed Regular Civil Suit No.456 of 2003 in

the Court of Civil Judge, Senior Division, Ahmednagar against the applicants and respondent Nos.2/original defendant No.5 for partition and separate possessions of her share in the suit properties. Said suit was partly decreed on 18.03.2010. Aggrieved by the said decree, the applicants filed Regular Civil Appeal No.110 of 2010 and the same was dismissed by the Adhoc District Judge-6, Ahmednagar by the judgment and decree impugned in the Second Appeal and to condone the delay caused in filing the said appeal, the applicants have filed this application.

3. Mr. Gaware, learned Counsel for the applicants referring the grounds of delay mentioned in paragraph 5 of the application submitted that the delay caused is not intentional, but it is circumstantial one for the reasons beyond the control of the applicants. The applicants and the contesting respondents are near relatives. Therefore, after passing of order by the Appellate Court, it is on account of intervention by the near relatives, the

dispute was tried to be settled amicably out of Court in order to put an end to the controversy. It is submitted that initially both the parties had responded favourably after various rounds of settlement. Ultimately, in the first week of January, 2019, settlement talks were frustrated and it is on account of said settlement talks, no steps could be taken by the applicants to file the instant proceeding, as any attempt on the part of the applicants to file proceedings would have thwarted the settlement talks. It is further submitted that the applicants are agriculturists. They are depending only on agriculture to earn their livelihood. They are poor agriculturists and are financially handicapped. It is further submitted that in 2018, there was very scanty rain-fall throughout the State of Maharashtra including Ahmednagar district. The applicants, therefore, could not arrange for funds for preferring the Second Appeal. There was shortage of fodder and scarcity of water. The applicants during said period had to look after and maintain their live stock by admitting them to cattle

pond and were busy with the said activity. It is submitted that contesting respondents had kept the applicants busy with the compromise talks and had taken out proceedings for execution of which the applicants recently got knowledge and therefore approached the advocate and have taken steps to file the Second Appeal. It is submitted that valuable rights of the applicants are involved in the suit properties and if the delay is not condoned, they would suffer irreparable loss. It is also submitted that liberal approach may be adopted. Thus, learned counsel has prayed to condone the delay by allowing the application.

4. Learned counsel appearing for the applicants has in support of his submissions relied upon decisions in the case of Collector, Land Acquisition, Anantnag Vs. Katiji, 1987 AIR(SC) 1353, N. Balakrishnan Vs. M. Krishnamurthy, 1998 AIR (SC) 3222 and order of this Court in Civil Application No.11769 of 2018 (Subhash Pandharinath Sathe & Ors. vs. Dwarkabai Mohan Borude

(died) through LRs & Ors. Dated 26.04.2019 (Coram : Smt. Vibha Kankanwadi,J.). In the case of Collector, Land Acquisition, Anantnag (Supra), it was held that liberal approach is required to be taken while dealing with the delay condonation application. It was observed in paragraph-3 as under :-

"3. The legislature has conferred the power to condone delay by enacting Section 51 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on merits. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

"Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

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

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

. In the case of N. Balakrishnan (Supra), delay of 883 days was condoned on the ground that the advocate failed to inform the appellant about the decision.

5. Learned counsel Mr. S.N. Garud h/f. Mr. N.C. Garud, counsel for respondent No.1/plaintiff referring to reply affidavit filed on behalf of respondent No.1 submitted that this respondent has denied almost all the grounds of delay as contended by the applicants. There is inordinate delay of 275 days. So also, he submitted that no talks of compromise were going on between the parties at any point of time. Therefore the ground that

settlement talks were going on is not sufficient ground to condone the delay. To support the said submission, he has placed reliance on the decision of this Court in the case of Victor Albuquerque Vs. Saraswat Co-operative Bank Ltd. & Ors., 1998(2) Mh.L.J.437, wherein there was delay of 182 days in filing appeal. Said delay was sought to be condoned on the ground that the appellant/applicant thought that filing of appeal would retard settlement talks initiated between the parties. It was observed that from the record it was obvious that settlement talks were initiated only after expiry of limitation period for filing the appeal. Therefore, it was held that bald statement on the part of the applicant that he thought it fit not to file appeal on account of comprehensive suit already filed by him cannot be said to be a sufficient cause for not preferring appeal within prescribed period. The application for condonation of delay was, therefore, dismissed.

6. Learned counsel appearing for respondent No.1

further submitted that the delay cannot be condoned only because it is unintentional and mere poverty cannot be ground for condonation of delay. To support said submission, he has relied upon decision of this Court in the case of Kamalbai w/o. Narasaiyya Shrimal & Anr. Vs. Ganpat s/o. Vithalrao Gavare, 2007(1) Mh.L.J.807. So also, learned counsel for respondent No.1 submitted that discretion to condone delay has to be exercised judiciously based on facts and circumstances of each case. To support said submission, learned counsel has relied upon decision in the case of Basawaraj And Anr. Vs. Special Land Acquisition Officer (2013) 14 SCC 81. Thus, according to learned counsel for respondent No.1, there is no sufficient cause to condone the delay caused in filing the appeal and he thus prayed to reject the application. In the alternative, it is submitted that in case delay is to be condoned, heavy costs be imposed on applicants.

7. I have carefully considered the submissions made

by learned counsel for the applicants and the respondent No.1. There is no dispute that the applicants and respondent No.1 are real brothers and respondent No.2 is their sister and thus they are close relatives. Respondent No.1 had filed suit for partition and separate possession of his share in the suit properties particularly in the 17 agricultural lands. It was case of respondent No.1/plaintiff that the suit properties are owned by his forefathers. His father died, but there was no partition and hence suit for partition was filed. The applicants and respondent No.2 have resisted the suit on the grounds that during the lifetime of their father – Govind, partition of the suit properties was effected and there was memorandum of partition and stamp of said memorandum of partition was brought by the respondent No.1/plaintiff. Said partition was effected in 1975. Accordingly, mutation entry No.1127 was effected and it was sanctioned on 29.10.1975. According to learned counsel for the applicants, the stamp paper for memorandum of partition was purchased by respondent No.1-

plaintiff for applicant No.1 and therefore there cannot be re-partition. Learned counsel further submits that since the said partition, all brothers are separately enjoying lands allotted to their shares as per partition and they are having separate mess and residence. So also, it was case of the applicants that suit is bad for non-inclusion of other properties and non-joinder of necessary parties. There is no dispute that there is a delay of 275 days in filing the Second Appeal.

8. It is the contention of the applicants in the application, which is verified by applicant No.4, that after the decision in the appeal, on intervention by near relatives, as the parties to the suit are near relatives, talks of settlement were going on and initially both the parties had responded favourably after various rounds of settlement, but in the first week of January, 2019, settlement talks were frustrated. Even after that the applicants could not take steps to file appeal because filing of proceedings by the applicants would have

thwarted settlement talks. Therefore and as the applicants are poor agriculturists, the delay has been caused.

9. No doubt, respondent No.1 has denied aforementioned grounds of delay in his affidavit. But considering the close relationship between the applicants and respondents, it is probable that on intervention of close relatives, the applicants and even the respondents must have thought to settle the dispute and therefore the delay must have occasioned in filing the appeal. When the applicants after decreeing the suit had filed appeal before the First Appellate Court in time, there was no reason for them to make delay purposely to file Second Appeal aggrieved by decision in the appeal. Therefore, the cause shown by the applicants that as the talks of settlement were going on between them and the respondents and the talks were frustrated in the first of week of January, 2019 and therefore the delay has been caused, is acceptable.

10. The learned Counsel for respondent No.1, as referred earlier, has relied upon decision in the case of Victor (Supra) to support his submission that the ground of settlement talks is not sufficient ground to condone delay. But the facts of the said decision are different from the facts of the present case. As per the facts of the decision in the case of Victor (Supra), talks of settlement between the parties were initiated after expiry of limitation period for filing appeal and therefore it was held that bald statement on the part of the applicant that he thought it fit not file appeal on account of comprehensive suit already filed by him cannot be said to be sufficient cause for not preferring appeal within prescribed period. In the present case, the applicants have in very clear terms stated that after passing the order by the Appellate Court, on account of intervention by near relatives, the dispute was tried to be settled out of Court in order to put an end to controversy and thus time was consumed. Therefore, the

aforementioned decision relied by learned counsel appearing for respondent No.1 is not applicable to the present case to state that the time spent in compromise talks between the parties is not sufficient ground to condone the delay.

11. Another ground of delay according to applicants is that they are poor agriculturists and they are financially handicapped. There was drought situation in 2018 in Ahmednagar district and therefore they were busy in maintaining their live stock by admitting them in cattle pond and after rainy season they could file instant proceeding. According to learned counsel for respondent No.1, poverty is not ground to condone delay and to support his submission, he has relied upon decision in the case of Kamalbai Shrimal (Supra), wherein it was held that mere poverty cannot be ground for condonation of delay. In the present case according to the applicants, the compromise talks between the parties were going on, but the talks were frustrated and hence

the delay has been caused. Moreover, it is also case of the applicants that in addition to said ground, as they are poor agriculturists and were busy in maintaining their live stocks due to drought in 2018, they could not arrange to file present proceedings and thus delay has been caused. So, here it is not the case that the applicants are claiming to condone the delay only on the ground of poverty. Therefore, the decision in the case of Kamalbai Shrimal (Supra) relied upon by learned counsel for the respondent No.1 cannot be suitably made applicable to this case to state that delay cannot be condoned.

12. It appears that as per case of the applicants, there was partition in 1975 during lifetime of their father. Thereafter, in 1980 memorandum of said partition was prepared on the stamp purchased for applicant No.1 by respondent No.1/original plaintiff and since then all five brothers are separate in mess, residence and cultivation of properties allotted to their respective

shares and therefore there cannot be re-partition of the properties. So also it is also their defence that the suit is bad for non-joinder of necessary parties and non-inclusion of the properties. Considering all these aspects, I am of the view that valuable rights of the applicants are involved in the subject matter of the present appeal. There is nothing on record to show that the applicants will be benefited by filing appeal late. In the circumstances present in the case, no prejudice would be caused to respondent No.1, if delay is condoned. On the contrary, on condoning delay, the matter will be decided on merits, after hearing both the parties. Therefore, to do substantial justice, by applying decision in the case of Collector, Land Acquisition (Supra) relied upon by learned counsel for the applicants, I am of the view that the applicants have shown sufficient cause to condone the delay caused in filing the Second appeal. Therefore, the same needs to be condoned on some costs payable to respondent No.1 having regard to the submissions made on his behalf, by

allowing the application. Therefore, following order is passed :-

- i. The application is allowed.
- ii. The delay is condoned subject to costs of Rs.1500/- (One Thousand Five Hundred) payable to respondent No.1/original plaintiff.
- iii. The appeal be registered. After registration of appeal learned Counsel Mr. S.N. Garud h/f. Mr. N.C. Garud, Advocate waives notice before admission for respondent No.1/original plaintiff.
- iv. Place the appeal for admission and further consideration on 11.03.2020.
- v. Interim relief, if any, operating to continue till next date.

[S.M.GAVHANE,J.]