

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO. 23 OF 2019
WITH
CIVIL APPLICATION NO. 1129 OF 2019**

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| 1. Shahaduji s/o. Panduji Khandare | .. | Appellants |
| Age. 68 years, Occ. Agri., | | [original |
| | | defendant |
| 2. Kantabai w/o. Shahaduji Khandare | | Nos.5 & 6] |
| Age. 60 years, Occ. Agri., | | |

Both R/o. Parda, Tq. & Dist. Hingoli.

Versus

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|------------------------------------|----|-------------|
| 1. Sau. Ratan w/o. Ganeshrao Maske | .. | Respondents |
| Age.48 years, Occ. Agri., | | [R-1 — Ori. |
| R/o. Parda, Tq. & Dist. Hingoli, | | plaintiff & |
| At present R/o. Wadchuna, | | R-2to5 Ori. |
| Tq. Aundha, Dist. Hingoli. | | Defendant |
| | | Nos.1 to 4] |
| 2. Ganeshrao s/o. Nagorao Maske | | |
| Age. 55 years, Occ. Agri., | | |
| R/o. Parda, Tq./ & Dist. Hingoli. | | |
| 3. Pramod s/o. Ganeshrao Maske | | |
| Age. 30 years, Occ. Agri., | | |
| R/o. Parda, Tq. & Dist. Hingoli. | | |
| 4. Atmaram s/o. Nagorao Maske | | |
| Age. 63 years, Occ. Agri., | | |
| R/o. Parda, Tq. & Dist. Hingoli. | | |
| 5. Nanarao s/o. Nagorao Maske | | |
| Age. 50 years, Occ. Agri., | | |
| R/o. Parda, Tq. & Dist. Hingoli. | | |

Mr.Sandeep D. Munde, Advocate for the appellants.
Mr.Sharad S. Shinde h/f. Mr. V.H. Pathade, Advocate for
respondent Nos.2 to 5.

CORAM : S.M.GAVHANE,J.
RESERVED ON : 16.01.2020
PRONOUNCED ON : 30.01.2020

J U D G M E N T :-

. The appellant – original defendant Nos.5 and 6 have filed this Second Appeal against rejection of Civil Misc. Application No.17 of 2018 by District Judge-1, Hingoli on 29.11.2018, filed by them and respondent Nos. 2 to 5 for condoning delay caused in filing appeal, aggrieved by the decree in Regular Civil Suit No.164 of 2014, filed by respondent No.1 against them and respondent Nos. 2 to 5.

2. Facts leading to this appeal, in short, are that above said suit was filed by respondent No.1 against the appellants and respondent Nos.2 to 5 for declaration that she is owner of land Gat No.456 admeasuring 82 Are situated at Parda and possession of said land from the

appellants, which suit was decreed by the Civil Judge, Senior Division, Hingoli on 20.08.2016. Aggrieved by the said decree, the appellants and respondent Nos.2 to 5 had filed appeal along with Civil Misc. Application No.17 of 2018 for condoning delay of 17 months and 20 days caused in filing the said appeal and it was rejected by the impugned order. Therefore, this Second Appeal.

3. This appeal was admitted by this Court by order dated 14.10.2019 for following substantial question of law and hearing of the appeal was expedited.

“Whether the impugned order is contrary to settled principles of law laid down in the matter of condonation of delay and sustainable in law?”

. By the aforesaid order only, it was directed that there shall be ad-interim relief in terms of prayer clause (B) of Civil Application No.1129 of 2019, pending disposal of the appeal.

4. Mr.Munde, learned counsel appearing for the

appellants has taken me through the contents of Civil Misc.Application No.17 of 2018 (Exh."B") and the impugned order passed by the Appellate Court. He submitted that original applicant Nos.1 to 3 i.e. respondent Nos. 2 to 4 being the only *Kartas* of the family, were out of station for labour work. Applicant No.5/appellant No.1 was suffering from Paralysis and was taking treatment at Aurangabad and applicant No.6/appellant No.2 being his wife was accompanying him. Therefore, no written statement order was passed against them and suit was decreed ex-parte. It is submitted that, therefore, original applicants could not contact their advocate and thus delay caused was not intentional. It is also submitted that the applicants had filed medical treatment papers of applicant No.5 and thus learned counsel for the appellants submitted that the First Appellate Court should have adopted liberal approach to condone delay, as sufficient cause was shown by the appellants and respondent Nos.2 to 5, to condone the delay. Therefore, the impugned order rejecting their application to condone

delay is erroneous and against settled principles of law.

5. Though respondent No.1 – original plaintiff is served, she failed to appear.

6. Learned Counsel appearing for respondent Nos.2 to 5 supported arguments of learned counsel appearing for the appellants.

7. I have carefully considered the submissions of learned counsel appearing for the appellants and perused the record.

8. On perusal of Exh."B" – copy of Exh.1 in Civil Misc. Application No.17 of 2018, it appears that appellants and respondent Nos.2 to 5 had sought to condone the delay on the grounds stated earlier referred by learned Counsel appearing for the applicants during the course of his arguments. It appears that delay of 17 months and 20 days was caused in filing the appeal. It

is submitted that the original applicants got knowledge of ex-parte decree when they were served with the notice of execution petition filed by the original plaintiff. On perusal of the impugned order, it appears that appellants and respondent Nos.2 to 5 had also placed on record documents for the period from 2015-2018 in respect of treatment of appellant No.1. It appears that respondent No.1 opposed to grant application contending that the application to condone delay is filed to delay the execution proceedings. On perusal of judgment of the Trial Court (Exh."C"), it is seen that the suit proceeded without written statement of original defendant Nos.1,2,5,6 and it proceeded ex-parte against defendant No.4. It appears that the suit was decreed on 20.08.2016. When as per contention of the appellants and respondent Nos. 2 to 5 in the application that appellant No.1 was admitted in the hospital and appellant No.2 – his wife was with him and when the documents regarding treatment of appellant No.1 were for the period from 2015 to 2018, as noted in paragraph No.6 of the impugned order

by the Appellate Court, I find that the appellants and respondent Nos.2 to 5 had shown sufficient cause for not filing the appeal in time. It appears that the Appellate Court failed to consider settled principles of law regarding condoning delay as laid down by the Apex court in the case of Collector, Land Acquisition, Anantnag and others Vs. Mst Katiji and Others 1987 (2) SCC 107 and Esha Bhattacharjee vs Managing Committee Of Raghunathpur Nafar 2013 AIR SCW 6158. The principles in this respect laid down in the case of Esha Bhattacharjee (Supra) are as under :-

- i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
- ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact- situation.
- iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.
- iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.
- v) Lack of bonafides imputable to a party seeking condonation of delay is a significant and relevant fact.

vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

9. For the above reasons, I hold that there was sufficient cause to condone delay caused in filing appeal. Therefore, the impugned order is not sustainable.

The substantial question of law is thus answered accordingly in favour of the appellants. Therefore, the appeal is allowed. The impugned order is set aside. The Civil Misc. Application No.17 of 2018 is allowed. The appeal filed by appellants and respondent Nos.2 to 5 before the First Appellate Court be registered and be placed before the First Appellate Court for further necessary orders.

10. In view of disposal of the Second Appeal, Civil Application No.1129 of 2019 is disposed of.

11. Till the appeal is placed before the First Appellate Court for necessary orders, the ad-interim relief granted by this Court in terms of prayer clause (B) of Civil Application No.1129 of 2019 to continue.

[S.M.GAVHANE,J.]