

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

9 CIVIL APPLICATION NO.2024 OF 2019
IN SAST/3270/2018

SUBHAN SHESHRAO DUDHATE

VERSUS

BANDU ANKUSHRAO DUDHATE AND OTHERS

...

Mr. V.D. Gunale, Advocate for the applicant

Mr. D.A. Madake, Advocate for respondent Nos.1 to 3

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 17th AUGUST, 2021.

ORDER :

1 Present application has been filed for getting delay of 816 days condoned in filing Second Appeal. Present appellant is the original plaintiff, who had filed Regular Civil Suit No.192/2008 before Civil Judge Junior Division, Palam, Dist. Parbhani for declaration and injunction. The said suit came to be partly decreed on 12.04.2012. The plaintiff has been declared to be the owner and possessor of the suit property, however, the relief of injunction has been rejected by holding that plaintiff has failed to prove that the defendants are obstructing his peaceful possession over the suit land.

Original plaintiff thereafter filed Regular Civil Appeal No.16/2012 before learned District Judge-1, Gangakhed, Dist. Parbhani. His appeal came to be dismissed on 07.08.2015. Original plaintiff intends to file Second Appeal, however, there is delay of 816 days and hence, he has filed present application under Section 5 of the Limitation Act.

2 Heard learned Advocate Mr. V.D. Gunale for the applicant and learned Advocate Mr. D.A. Madake for respondent Nos.1 to 3.

3 The applicant has contended that he is an old and illiterate man and because of his old age he could not approach the Advocate. There was also communication gap between him and his Advocate, who was representing him before the First Appellate Court. Though, according to his Advocate, he had communicated the decision of the District Court dated 07.08.2015 to him, however, according to the applicant, he had not received that communication. He was also suffering from illness due to several diseases of old age. He had then approached the Advocate in the month of September, 2017 to make inquiry regarding the appeal and came to know that his appeal is already decided on 07.08.2015. He had then applied for the certified copies and even after getting certified copies, some time was consumed by him in consultation with the Advocate and taking legal advice. The delay is unintentional and he has therefore, prayed for condonation of

the same.

4 At the outset, it is to be noted that when the suit was filed, plaintiff was already 68 years old. Thereafter, when he filed the appeal within the limitation prescribed before the District Court, he was 70 years old and now when he is getting his age as 75, he wants to brand him as old aged person. He has not produced any documents on record to show by which illness he was suffering and what was the duration. Another fact to be noted is that when he himself has come with the case that his Advocate had told him that he had communicated the decision to him, but still he is coming with the case that he has not received that communication. His residential address given before the Lower Courts is also the same as it is given in the present application. The communication would have been given by the learned Advocate, who was representing him before the First Appellate Court, on the same address. Under such circumstance, presumption under Section 27 of the General Clauses Act is required to be invoked. Further, his inaction for about two years in absolutely not communicating with his Advocate that too without cogent reason is unacceptable. He has given his occupation as 'Agriculture' and there is no documentary evidence to show that he has been advised bed rest by any Doctor. Therefore, even the case of considering the reasons given by him on sympathetic ground are also not

made out.

5 Another fact to be noted is that both the Courts below have partly accepted the claim of the plaintiff-appellant. He has been held to be the owner of land Sy.No.36/1 admeasuring 00 H 59 R and Sy.No.11/2 admeasuring 01 H 41 R situated at village Umarthadi. It appears that his prayer for grant of injunction has been refused on the ground that he could not prove the cause of action, that is, the defendants are obstructing his possession over the suit properties. The learned Trial Judge had specifically framed point in respect of possession of the suit property and it has been held to be in his possession, however, though the appeal has been dismissed the decree of the Trial Court has been modified by the First Appellate Court and it has been stated that plaintiff is the owner of 59 R land on the western side of Sy.No.36/1 and 00 H 04 R land on the southern side of Sy.No.11/2 of village Umarthadi. The oral partition was contended by the plaintiff during the life time of his father, however, according to him, there was no partition in respect of other properties. The defendants contended that there was partition in respect of entire properties in the year 2005. A consent deed was executed by the plaintiff, at that time. The effect of mutation entry as well as proof of consent deed has been considered by the First Appellate Court and on the basis of that proved partition of the year 2005, it is held that he was

the owner of portion of the land and not the entire suit land. All these are the questions of facts, which have been answered by the First Appellate Court. Substantial questions of law appears to be not arising.

6 Since the applicant has failed to prove sufficient, much less reasonable ground to condone the delay, the application stands rejected.

(Smt. Vibha Kankanwadi, J.)

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