

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**932 CIVIL APPLICATION NO.3858 OF 2019
IN SAST/5481/2019**

SHAIKH RAFIUDDIN ABDUL AZIZ
VERSUS
UDGIR MUNICIPAL COUNCIL THROUGH ITS
CHIEF OFFICER AND OTHERS

...
Advocate for Applicant : Mr. S.A.P.Quadri
Advocate for Respondent No.2 : Mr. V. C. Solshe
Advocate for Respondent No.3 : Mr. Pathan Sartajkhan H.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 28-01-2021

PER COURT :

1. Present application has been filed getting delay of 829 days condoned in filing second appeal.
2. The present applicant is the original plaintiff who had filed Regular Civil Suit No.124 of 2012 (Old No.179 of 2007) before Joint Civil Judge, Senior Division, Udgir for declaration and perpetual injunction against the present respondents/ defendants. It came to be dismissed on 26-09-2013. He, therefore, challenged the said Judgment and decree before District Judge-2, Udgir by filing Regular Civil Appeal No.54 of 2013. The said appeal came to be dismissed on 09-08-2016. Now he wants to challenge the said Judgment and decree before this Court in Second

Appeal under Section 100 of Code of Civil Procedure, however there is delay of 829 days. Hence, present application has been filed under Section 5 of the Limitation Act.

3. Heard learned Advocate Mr. S.A.P.Quadri for applicant, learned Advocate Mr. V. C. Solshe for respondent No.2 and learned Advocate Mr. S. H. Pathan for respondent No.3.

4. It has been submitted on behalf of the applicant that the applicant is a driver serving with Maharashtra Andhra Transport at Hyderabad. There was miscommunication between him and his Advocate who was representing him before the First Appellate Court and the Judgment and order was beyond the knowledge of the applicant. It is stated that the applicant was residing at Hyderabad for discharging his services as driver. His wife was suffering from various diseases and there was nobody to take care of his wife. He says that the delay is unintentional and if it is not condoned then he would suffer irreparable loss. The learned Advocate for the applicant also submitted that he is having a certificate from the Transport company showing that he was at Hyderabad during the said period.

5. Affidavit-in-reply has been filed on behalf of the respondent No.2. Learned Advocate Mr. V. C. Solshe representing respondent No.2, after taking me through the affidavit-in-reply submitted that

the delay has not been properly explained, it has been intentionally kept vague. It is stated that the applicant/ appellant had every knowledge about dismissal of his appeal. In the cause title, the applicant has given his address of Udgir and, therefore, he cannot now say that he was residing at Hyderabad. Medical documents of his wife have not been produced and vague contentions have been raised. Under such circumstances, the application cannot be said to be made with a bonafide intention. He prayed for rejection of the application.

6. At the outset, it is to be noted that the applicant has given his residential address of Udgir and not of Hyderabad. In his application he has not stated from which date he was residing at Hyderabad and till which date the alleged certificate issued by his employer is with the learned Advocate for the applicant and he has not taken pains to produce it before the Court at any earlier point of time, and only at the time of making submissions in support of his application he is stating it and tried to tender it across the bar. It cannot be taken on record now. The applicant has not stated where he used to reside at Hyderabad. If we find the Judgments of the lower Courts, especially the decree, it can be seen that sine 2007 he is representing the Courts that he is resident of Udgir. He has given his occupation as driver at that time also. Under such circumstance, question arises

as to what prompted him to shift to Hyderabad even for temporary period. As regards the illness of his wife also he has not produced a single document. In spite of absence of those documents which could have been available with the applicant, the applicant wants the Court to believe in whatever he is saying. For condonation of delay or the application under Section 5 of the Limitation Act, the applicant cannot take it lightly and would tried to give some vague reasons. The application should be bonafide. Further it can be seen that the applicant who is the original plaintiff intended to protect immovable property which he states to be in his possession, and therefore, he had prayed for declaration of ownership and perpetual injunction. Under such circumstance, he should be diligent enough.

7. Though above said shortcomings are coming in the way of the applicant, yet since the applicant intends to canvass regarding his rights in the property being driver we cannot contemplate that he may not be having that much legal knowledge, and therefore, a liberal approach is taken. The inconvenience that would be caused to the respondent No.2 can be compensated in terms of money and, therefore, the application deserves to be allowed by imposing costs. More amount of cost is required to be imposed in respect of cost of respondent No.2 as he has contested the suit as well as appeal and the present application by filing the written statement, and now the

affidavit-in-reply. However, as regards the respondent No.3 is concerned, now the oral submissions have been made on behalf of respondent No.3, he has not taken pains to file affidavit-in-reply as well as the fact is that he was ex-parte before the learned Trial Judge, and therefore, less amount of cost is imposed as against the respondent No.3. Hence, following order.

ORDER

- 1) Application stands allowed.
- 2) The delay of 829 days in filing second appeal is hereby condoned subject to deposit of cost of Rs.10,000/- (Ten thousand) to respondent No.2 and Rs.1000/- (one thousand) to respondent No.3.
- 3) Cost amount to be deposited within period of three (03) weeks from today in this Court.
- 4) After the amount is deposited, Registry to verify and register the second appeal.
- 5) The respective respondents/ non-applicants are allowed to withdraw the said cost amount.

**(SMT. VIBHA KANKANWADI)
JUDGE**

vjg/-.