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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.3298 OF 2017
in
SECOND APPEAL ST.NO.6374/2017

1) Chokhoba Vithoba Pandit
and Ors. = APPLICANTS

VERSUS

1) The State of Maharashtra
and Ors. = RESPONDENT/S

Mr.SG Bhalerao, Advocate for Applicant/s;

Mr.BV Virdhe, AGP for Resp.Nos.1 & 2.

Mr.HV Tungar, Advocate for Resp.Nos. 3 to 7;

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 6th August, 2021.

PER COURT :-

1. Present application has been filed for condoning delay of 88 days in filing the Second Appeal.

2. The applicants are the original defendant Nos.3 to 5. Present Respondent Nos.3 to 7 are original plaintiffs, who had filed Regular Civil Suit No.18/2012 for declaration, perpetual injunction, mandatory injunction as well as recovery of compensation worth Rs.50,000/-. That

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suit came to be dismissed by learned 2nd Jt.Civil Judge, Senior Division, Beed on 4.12.2014. The original plaintiffs filed Regular Civil Appeal No.1/2015 before the District Court, Beed. The appeal was heard by learned District Judge-4, Beed and it came to be allowed on 2.9.2016, by reversing the decree passed by the learned Trial Judge. The suit was partly decreed. It was declared that the order passed by the Tahsildar was without jurisdiction and then the defendants were directed, by way of mandatory injunction, to restore the possession of the land, occupied by new road created by Tahsildar, Beed and then the defendants were restrained. The present applicants-appellants intend to challenge this decree, however, there is delay of 88 days.

3. Learned Advocate for the applicants submitted that the respondents' appeal was heard by the learned First Appellate Court without properly serving the applicants-appellants. They came to know about allowing the appeal when they received notice of execution proceedings, i.e. R.D.No. 12/2017 on 6.2.2017. It was stated that it was an

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ex parte decree that has been passed against them. Some time was consumed by them for collecting the certified copies and making arrangement for the expenses to file the appeal before this Court. It was also submitted that due to illiteracy and old-age, the applicants could not come to this Court within period of limitation. He, therefore, prayed for condoning the delay.

4. Learned Advocate for Respondent Nos.3 to 7 in this application strongly opposed the application and filed an affidavit in reply of one of the Respondents. He has also filed certain documents on record. He submitted that the copy of the Bailiff report would show that notices were served personally on the applicants on 6.1.2015. Their signatures were obtained by him in token of serving the summons. Thereafter, a pursis was filed by learned Advocate Mr. LR Jagtap on behalf of the present applicants on 5.2.2015, stating his appearance and then say was filed to the temporary injunction application, that was filed by the appellants in the said appeal, i.e. by the present respondents. That say was signed by the present

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applicants and, therefore, by suppression, the applicants are contending that they are not served properly in the appeal, it is wrong. They have not come with clean hands and want to get sympathy in their favour by suppressing the facts on record before the Appellate Court. He, therefore, prayed for rejection of the application.

5. Important point to be noted is that the delay is of 88 days. But the reasons those have been given are three-folds; firstly that they were not properly served in the appeal and they came to know about the decision in the appeal only when they were served in the execution proceedings. Secondly, they took time in collecting the certified copies and thirdly, due to illiteracy and old-age, they want the delay to be condoned. If we see the application it can be seen that only applicant No. 2 is aged 63 and other two applicants are 38 and 35 years respectively. Therefore, the ground of old age can be attributed only to applicant No.2 and not to other two applicants. Further, it appears that applicant Nos.1 and 3 are literate persons, as they are signing in English.

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Only applicant No.2 appears to be illiterate and this can be seen from the say that was filed by them before the first Appellate Court, taking objection to the interim injunction application. Further, the copies of the Bailiff report clearly says that they were either personally served or adult member of the family had received the notice of the appeal. Further, their Advocate appeared on their behalf and filed appearance pursis, stating that his Vakalatnama should be continued in the appeal. Thereafter, a written say was filed which was signed by the present applicants on 5.2.2015 in the appeal, raising objection to the interim injunction application. When these facts are coming on record, definitely, there appears to be suppression of the fact and wrong ground has been raised that no proper notice was given to the applicants and they could know about the decision of the appeal only in the execution proceedings. Another fact, that is required to be noted, is that the appeal was before the District Court for about one year and seven months. Perusal of the appeal would show that submissions were made on behalf of the appellants; but learned Advocate for the

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respondents did not appear. Now, it was for the applicants to explain as to why their Advocate had not appeared before the concerned Court, when the matter was taken up for final hearing. There is no reason mentioned about the same in this application.

6. Even though there is suppression of material fact by the applicants and it appears that they are not coming with clean hands; yet the dispute, that was before the Courts below, was in respect of access to the fields, i.e. road, a sympathetic view is taken and, therefore, the delay deserves to be condoned, however, heavy costs are imposed on the applicants for suppressing the facts. Hence, the following order, -

ORDER

i. The application stands allowed. The delay caused in filing the Second Appeal is hereby condoned subject to deposit of costs of Rs.50,000/- (Rupees fifty thousand), within a period of one month from today.

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ii. After the costs are deposited,
Registry to verify and register the
Second Appeal.

iii. The amount so deposited towards
the costs be distributed to Respondent
Nos.3 to 7 equally.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV