

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

CIVIL APPLICATION NO.2679 OF 2020  
IN  
SECOND APPEAL NO.414 OF 2011

PANDURANG BHIMRAO PADAR  
VERSUS  
SUSHILA PRABHAKAR LIPNE AND OTHERS

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Mrs. S.A. Dhumal (Tambat), Advocate for the applicant  
Mr. Milind Patil, Advocate for respondent Nos.1 to 3

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CORAM : SMT. VIBHA KANKANWADI, J.  
DATE : 05<sup>th</sup> APRIL, 2021.

**ORDER :**

1 Present application has been filed by the appellant-applicant for restoration of the appeal against respondent Nos.7 and 8 by condoning delay of 2309 days for respondent No.7 and 779 days in respect of respondent No.8 in filing the application for setting aside the earlier orders passed by this Court.

2 Heard learned Advocate Mrs. S.A. Dhumal (Tambat) appearing for the applicant-appellant and learned Advocate Mr. Milind Patil for

respondent Nos.1 to 3.

3           It has been submitted by the learned Advocate for the applicant that he has filed the Second Appeal and it is awaiting admission. The appeal came to be dismissed as against respondent Nos.7 and 8. When the matter was listed before this Court on 30.09.2013, at that time, the notices issued to respondent Nos.7 and 8 had returned unserved and this Court had directed the appellant to take steps. Thereafter, once again the matter was before this Court for issuing fresh notice to respondent No.8 on 13.11.2017. Accordingly, notice was issued and it was made returnable on 08.12.2017. It was further observed that if the respondent No.8 is not served till 08.12.2017, then the appeal would abate against him. Both the respondents could not be served, and therefore, the appeal stood dismissed against them. It is stated that the respondent Nos.7 and 8 are residing at a different place than the place of residence of the appellant. Necessary details in respect of respondent No.8 could not be obtained by him, but then after much inquiry he came to know that the respondent No.8 is alive and is residing at Usmanpur village. The applicant could not convey all these things to his Advocate in time. But when the decree was put for execution in the month of January, 2020, he received notice. At that time, he contacted his Advocate and realized that respondent Nos.7 and 8 are yet to be served. Applicant is

illiterate, and therefore, could not undertake the necessary steps.

4           The application has been objected by learned Advocate Mr. Milind Patil appearing for respondent Nos.1 to 3 stating that the decree was passed by learned Trial Court on 26.07.2006, it was confirmed by the First Appellate Court on 31.01.2011; yet, the appellant is not serious about the admission of his appeal and has not taken proper steps. The delay is absolutely not properly explained. The ground, that has been stated, is unreasonable and not bona fide. How only after the execution of the decree is insisted, then only the appellant could learn about the stage of appeal, is a question. He wants to protract the fruits of the decree to the respondent Nos.1 to 3.

5           At the outset, it is to be noted that when the matter was on board of this Court on 30.09.2013, it was made known to the appellant that the notice of respondent Nos.7 and 8 is returned unserved, with remark that the respondent No.7 is not residing on the given address and the notice of respondent No.8 stated that he was out of station at the relevant time of effecting service. Fresh notice was issued to respondent No.8 by order dated 13.11.2017. That means, for four years in between no steps were taken by the appellant. As regards respondent No.7 is concerned, no fresh address was given. Now, after a delay of 2309 days the appellant has come with a

fresh address. It is to be noted that the applicant is stated to be resident of village Chincholi, Tq. Partur, Dist. Jalna. The fresh address of respondent No.7 is stated as, "Mausa, Post – Pagavi, Tq. Mantha, Dist. Jalna". That means, he is residing in the same district. It cannot be stated that it is far away, so as to take delay of 2309 days. As regards respondent No.8 is concerned, though the fresh notice was issued by order dated 13.11.2017 and it was made returnable on 08.12.2017, it appears that thereafter again the appellant had not taken any steps and not even paid attention to the fact that the copy should be served on him. Interestingly in para No.3 it is stated that respondent No.8 is alive and is residing in Usmanpur village. However, while giving his address in para No.5 it is stated as, "R/o Chincholi, Post – Usmanpur, Tq. Partur, Dist. Jalna". Appellant himself is also resident of village Chincholi. Except 'Post – Usmanpur' the address is same. It was tried to be orally submitted by the learned Advocate for the applicant that the respondent No.8 had gone somewhere in search of job, but now he has returned back to the village. There is nothing on this line in the application nor supporting affidavit to that effect is there. The notices returned do not show anything on this line. Therefore, the delay, that has been caused for setting aside the earlier orders passed by this Court, is inordinate and has not been explained properly.

6           It is to be noted that the respondent Nos.1 to 3 are the original plaintiffs, present appellant was the original defendant No.1 and the *interse* relationship between them is real sisters and brother. Original defendant No.2 Bapurao, who is now respondent No.4 in the Second Appeal was also their real brother. When the matter was on board on 30.09.2013 it was reported that respondent No.4 Bapurao has expired, therefore, on that day this Court had ordered to bring legal representatives on record. It has not been done. On the contrary, the appellant has filed Civil Application No.2678 of 2020 under Order XXII Rule 5 of the Code of Civil Procedure for determination, which has been dismissed today itself by a separate order. Another fact to be noted is that respondent No.8 appears to be the son of respondent No.6. Respondent No.6 in the Second Appeal was original defendant No.4 Gangadhar. That means, the relationship between respondent No.8 and the present appellant is that of real nephew (brother's son). Under such circumstance, it is hard to believe that the uncle has no idea about whereabouts of the nephew and it would take him about 779 days to collect the information. On this ground also this cannot be the fit case where any discretion can be used in favour of the appellant. The respondent Nos.1 to 3 herein had filed the suit for partition and separate possession, which is decreed and though the Second Appeal is pending since 2011, the appellant is not taking the necessary steps also. This shows that the

application is not bona fide. It is just to protract the matter and keep the original plaintiffs away from the fruits of the decree. Hence, the application stands rejected.

( Smt. Vibha Kankanwadi, J. )

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