

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

908 CIVIL APPLICATION NO.4569 OF 2017
IN SAST/11514/2017

WITH

CIVIL APPLICATION NO.4570 OF 2017

DHONDU MAHADU PATIL AND OTHERS

VERSUS

BHALCHANDRA TUKARAM PATIL AND OTHERS

...

Mr. S.P. Shah, Advocate for applicants

Mr. Girish Rane, Advocate for respondent Nos.1 to 3

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 23rd SEPTEMBER, 2021

ORDER :

1 Civil Application No.4569 of 2017 has been filed for getting delay of 424 days condoned in filing Second Appeal.

2 Heard learned Advocate Mr. S.P. Shah for applicants and learned Advocate Mr. Girish Rane for respondent Nos.1 to 3.

3 The applicants, who are the original defendants contend that present respondents had filed Regular Civil Suit No.153/2000 (Old Special Civil Suit No.50/1996) against them for removal of encroachment and

possession of 27 R land. The said suit came to be decreed. The applicants had filed Regular Civil Appeal No.12/2012. It came to be dismissed by learned Adhoc District Judge-1, Amalner on 05.11.2015. They want to file Second Appeal, however, there is delay of 424 days. The applicants had applied for the certified copies immediately and got the same. They came to Advocate, who advised them to file appeal before this Court. The applicants are old, amongst them, applicant Bhaskar Mahadu Patil was pursuing the litigation, however, he was not keeping well. When he expressed his difficulty to travel till Aurangabad, then his Advocate at Amalner advised him to hand over the documents and promised that he would transmit those papers to the Advocate in his contact, who is practicing before this Court. Accordingly, those papers were arranged. However, the appeal could not be filed. The reasons are not known to the applicants, but then there was Christmas vacation and Advocate was out of station. It is then stated that the messenger, who had taken those documents with him, had handed it over to the Clerk of the Advocate. The applicants were bona fide considering that the appeal would have been filed. However, they came to know around 18.03.2017 that the respondents are taking the steps to measure the land. Hence, again they contacted the Advocate at Aurangabad. The delay is unintentional. They prayed for condonation of the same.

4 Though the learned Advocate appearing for the respondents is strongly objecting, considering the negligence attributed to the Clerk of the Advocate, the delay deserves to be condoned, by taking liberal approach. The delay thus stands condoned. Registry to verify and register the Second Appeal.

5 Immediately with the consent of both the parties the Second Appeal was taken up for admission. Heard both sides.

6 The learned Advocate for the appellants submitted that both the Courts below have failed to consider that Article 64 of the Limitation Act would be applicable to the facts of the case and not Article 65 and if that is considered, then the suit would be beyond the period of limitation. The facts of the case giving rise would show that Gat Nos.1712 and 1713 were respectively owned by father of the plaintiffs and defendants. They were previously part of Sy.No.826. After the partition, the said division had taken place and Mutation Entry No.11476 was taken up. According to the plaintiffs, the demolition of the common bandh was started in the year 1984 and the plaintiffs had got measured the land through Government Surveyor on 14.02.1985. It was then found out that the encroachment by the defendants is to the extent of 27 R. In the year 1995 the defendants got their name mutated in respect of the disputed land as owner and Mutation Entry

No.11560 to that extent was taken by Talathi. After resistance was made by the plaintiffs, it was cancelled and then the suit has been filed. Thus, if the encroachment is in the year 1984, then the suit that was filed on 29.06.1996 would be beyond the period of limitation. Substantial questions of law are arising in this case. So also, he raises that the measurement has not been properly done.

7 Learned Advocate for the respondents supported the reasons given by both the Courts below and submitted that no substantial questions of law are arising in this case.

8 At the outset, it is to be noted that the suit of the plaintiffs is not based on previous possession, but it is on the basis of title and for removal of encroachment. It has come in evidence that at the time of partition in the year 1961 bandh was constructed from the middle of the well, which was situated in old Sy.No.826. Though this fact was earlier denied by the defendants; yet, in the cross-examination it appears that the defendant Bhaskar had admitted that Sy.No.826 was divided into two parts in 1961 by constructing East-West bandh and the well was in the Southern side share. He also admitted that the East-West bandh was constructed according to the area allotted respectively to the parties in the partition. Thereafter, as per the pleadings and evidence it has been established that the bandh was as

contended by the plaintiffs. Then the measurement had taken place in the year 1985. Since the suit is based on title, the time of limitation will start only when the defendants would claim adverse possession over the disputed area. It is not the case of the defendants that at any earlier point of time than in 1995 vide Mutation Entry No.11560 there was an attempt by them to claim ownership over the 27 R area. Therefore, both the Courts below have correctly held that the suit would be governed by Article 65 of the Limitation Act and not by Article 64.

9 As regards the measurement is concerned, there was no attempt on the part of the defendants to get it measured before the Trial Court or even before the First Appellate Court. Though the plaintiffs contended that the area of 27 R has been encroached upon, but they have not solely relied on that measurement only. But apart from the measurement, they are relying on the title. The title has been established through the admitted partition and, therefore, now no substantial question of law, as contemplated under Section 100 of the Code of Civil Procedure, 1908, is arising in this case, requiring admission of the Second Appeal. It deserves to be dismissed. Accordingly, it is dismissed. Pending Civil Application No.4570 of 2017 stands disposed of.

(Smt. Vibha Kankanwadi, J.)