

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.842 OF 2016
WITH CA/3105/2017 IN SA/842/2016

KAMLABAI POPAT DOMALE AND ANR
VERSUS
SHAHABAI BAJIRAO DOMALE (WITNOR) AND OTHERS

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Mr. V. R. Dhorde, Advocate for appellants.
Mr. R. S. Kasar, Advocate for respondent Nos.1 to 3.

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CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 04.10.2021

Pronounced on : 02.12.2021

ORDER :-

. Present appeal has been filed by original defendant Nos.1 and 5 challenging the judgment and order passed in Miscellaneous Civil Application No.342 of 2012 by learned Adhoc District Judge-3, Ahmednagar on 02.01.2016, whereby their application for condonation of delay of 2236 days in filing Regular Civil Appeal came to be dismissed.

2. Present respondent Nos.1 and 2 are the original plaintiffs, who had filed Regular Civil Suit No.145 of 1999 before learned Civil Judge Junior Division, Rahuri, Dist. Ahmednagar for partition and separate possession of the suit properties, which were stated to be the joint family

properties of the plaintiffs and defendants. The said suit proceeded ex-parte and was decreed on 03.08.2006. It was declared that the plaintiffs are having 1/2 share jointly in the joint family properties described in paragraph No.1 of the plaint. Directions were given for effecting partition and separate possession thereof. The present appellants were the original defendant Nos.1 and 5. They filed said Miscellaneous Civil Application No.342 of 2012 for condoning the delay in filing Regular Civil Appeal and it had been rejected. Hence, this second appeal.

3. Heard learned Advocate Mr. V. R. Dhorde for appellants and learned Advocate Mr. R. S. Kasar for respondent Nos.1 to 3.

4. It has been vehemently submitted on behalf of the appellants that in the application filed by present appellants before the first Appellate Court, they had specifically contended that after they were served in the suit, they have appeared through Advocate and sought time to file written statement, however, thereafter, their Advocate on record had not informed them about the progress in the suit. They made inquiry about the suit on 05.10.2012 and came to know that the suit has been decided ex-parte on 03.08.2006. If the Advocate has not done his duty, then it has to be taken as a good ground to condone the delay. The learned Advocate for the appellants submitted that, in fact, the original

defendant No.4 - Yashodabai Bajirao Domale had filed Regular Civil Suit No.121 of 1999 for partition and separate possession of the same suit properties and it was dismissed by learned 2nd Joint Civil Judge Junior Division, Ahmednagar on 17.03.2003 on the ground that there is already partition effected in respect of ancestral and joint family properties of the plaintiffs and defendants. Even the sale-deed in favour of defendant No.5 was challenged in that suit. By suppressing the fact of the said suit and its dismissal, the present plaintiffs have obtained the decree by fraud. In fact, the decision in Regular Civil Suit No.121 of 1999 to which the plaintiffs in this case were parties would operate as *res judicata*. In fact, the judgment and decree passed in Regular Civil Suit No.145 of 1999 based on fraud is nullity, as the present plaintiff No.1 Shahabai Bajirao Domale had deposed in Regular Civil Suit No.121 of 1999 on behalf of her mother Yashodabai i.e. plaintiff therein stating that there is already a partition in respect of joint family properties. This fact was tried to be brought on record before the first Appellate Court also, however, the application has been dismissed on the ground that no sufficient much less reasonable ground has been shown to condone the delay. Under the said circumstance, substantial questions of law are arising in this case requiring admission of the second appeal. It was further submitted that necessary pragmatic view has been taken

by the first Appellate Court though reliance was placed on the decisions of the Supreme Court wherein it has been held that there should be a liberal approach, when the parties are rustic and illiterate.

5. Per contra, the learned Advocate appearing for respondent Nos.1 to 3 strongly opposed for admission of the second appeal on the ground that whether the decree passed in Regular Civil Suit No.145 of 1999 is based on fraud or otherwise, cannot be gone into in this second appeal. The limited question, that can arise at this stage, is whether in Civil Miscellaneous Application No.342 of 2012, the applicants had given sufficient and reasonable ground to condone the delay of 2236 days in filing the Regular Civil Appeal. The applicants had examined Shivaji Vishwanath Parkhe i.e. appellant No.2, who in his examination-in-chief itself has admitted that he as well as appellant No.1 had engaged Advocate Mr. R. B. Pulate on 15.02.2001. He is simply saying that the concerned Advocate did not inform them the next date. How many times, he had gone to the Advocate for giving instructions or making inquiry about the progress in the matter has not been stated at all. He cannot just shift the liability on the shoulders of the Advocate, when he himself was duty bound to approach his Advocate to know the progress in the matter. He then says that he went to the Court on 05.10.2012 i.e. after gap of 11 years to make inquiry regarding suit and then came to

know that the suit was already decided on 03.08.2006 and, therefore, the observation by the first Appellate Court is that the delay in the present case is inordinate. It clearly shows that how the applicants were negligent in defending the matter. No substantial questions of law are arising in this case.

6. At the outset, it is to be noted that the second appeal challenges the judgment and order passed in Miscellaneous Civil Application No.342 of 2012, which was the application filed by the present appellants for getting the delay of 2236 days condoned in filing Regular Civil Appeal. The merits in the matter could not have been gone into. Secondly, the pleadings as well as the evidence led by the present appellants before the first Appellate Court would show that they were duly served with the summons in the suit in the year 2001. They appeared through Advocate before the Trial Court by filing Vakalatnama at Exhibit-14 and application for adjourning the matter for filing written statement at Exhibit-15 on 15.02.2001. Thereafter, it appears that they never remained present in the matter before the Court. Now, they are blaming that their appointed Advocate had not communicated next date to them. In fact, it would be the prime duty of the client to be in touch with the Advocate and to know the progress of the litigation from the Advocate. No doubt, equally the Advocate has professional duty to

inform the next date to the client. Applicants – appellants had not examined Advocate Pulate to support their contention that he never informed next date to them. Then, A.W. - Shivaji states that he made inquiry with the Court on 05.10.2012 regarding the progress of the matter and came to know that the suit was already decided on 03.08.2006. Thus, in his affidavit-in-chief itself, he is making it clear that for about 11 years, he never made inquiry either with the Advocate or with the Court employees about the progress in the matter. Any Court cannot come to rescue of a negligent litigant. In his cross-examination, it has come on record that even simultaneously revenue proceedings were going on between the parties since 1999. The appeals were still pending when he was cross-examined. Under this circumstance, we can presume that the appellants had the knowledge as to how a litigation progresses in any Court of law. At no point of time, it appears that he had ever tried to bring it on record that already a matter is filed and then decided by learned 2nd Joint Civil Judge Junior Division, Ahmednagar. In fact, even after the said decision on 17.03.2003 also, he could have appeared before the learned Civil Judge Junior Division, Rahuri, Dist. Ahmednagar and by placing the certified copy of the judgment in that case, could have asked for the dismissal of Regular Civil Suit No.145 of 1999, as this second suit was decided on

03.08.2006. In other words, even after the decision of Regular Civil Suit No.121 of 1999 on 17.03.2003, Regular Civil Suit No.145 of 1999 was pending for about three years.

7. No doubt, the Courts are not required to take pragmatic view or should be liberal in considering the applications for condonation of delay, especially when the parties are illiterate and are rustic, but it has also limitations. If the party itself is negligent and fails to make inquiry for about 11 years regarding the progress of the suit, such negligent party cannot be protected. The application for condonation of delay was rightly rejected by the first Appellate Court. No substantial question of law is arising in this case requiring admission of the second appeal. The second appeal, therefore, deserves to be dismissed at the threshold. Accordingly, it stands dismissed.

8. In view of dismissal of second appeal, Civil Application No.3105 of 2017 stands disposed of.

[SMT. VIBHA KANKANWADI, J.]

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