

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO.11490 OF 2019
IN SAST/14207/2019**

BALAJI S/O SHESHRAO ADIYAL AND ANOTHER
VERSUS
ASARAM MADHAVRAO CHITRAL AND OTHERS

.....
Advocate for Applicants : Mr. Siddiqui Sohel E.
Advocate for Respondents : Mr. S. N. Lale Yewatkar
.....

CORAM : SMT.VIBHA KANKANWADI, J.

**DATE OF RESERVING THE ORDER :
30-08-2021**

**DATE OF PRONOUNCING THE ORDER :
21-09-2021**

ORDER :

1. Present application has been filed for getting the delay of 445 days condoned in filing second appeal.
2. Present applicants are the original defendants and present respondents are the original plaintiffs who had filed Regular Civil Suit No.557 of 2013 before 2nd Joint Civil Judge Senior Division, Jalna for permanent injunction. The said suit came to be decreed and the present appellants were restrained from obstructing the possession of the plaintiffs over 175.6 Square Meter area of C.T.S.No.9806 situated

in Laxminarayanpura, Jalna.

3. The present applicants intended to file first appeal, however, there was delay of 73 days, hence they filed Miscellaneous Civil Application No.111 of 2016 under Section 5 of the Limitation Act before District Court, Jalna. The present respondents filed their say on 28-11-2016 and prayed for the dismissal of the application. It appears that on 06-11-2017 the learned First Appellate Court dismissed the application in default as the appellants/applicants and Advocate were absent since long and it was observed that the appellants/applicants appear to be not interested in proceeding with the matter. Now the present appellants/applicants intend to file second appeal, however, there is delay of 445 days. Hence, this application.

4. Heard learned Advocate Mr. Siddiqui for applicants and learned Advocate Mr. S. N. Lale Yelwatkar for respondents. In order to cut short, it is stated that both of them have made submissions in support of their respective contentions.

5. At the outset, it is to be noted that even before the First Appellate court there was delay of 73 days and it also appears that

the matter was not prosecuted properly before the First Appellate Court and, therefore, the Court had come to the conclusion that the appellants/applicants were not interested in pursuing the matter further and the application was dismissed in default, yet then the applicants are coming with a case that applicant No.1 was not knowing about the fact of dismissal of the application. Applicant No.2 is an old lady who remains continuously ill. Applicant No.1 is required to take her to hospital for admission and required to take care of applicant No.2. He contends that he also suffers from spinal problem and, therefore, he was under treatment with doctor Goyal. Dr. Goyal had advised him not to travel and not to walk continuously. He says that he was also admitted in the hospital of Dr. Goyal for treatment. He came to know about the dismissal of his application in the month of February 2019 and, thereafter, after getting the certified copies, he has approached this Court. It is to be noted that a medical certificate dated 09-02-2018 has been produced which says that applicant No.1 suffers from Lumbar spondylosis and he was advised bed rest from 04-11-2017 to 09-02-2018. Even on the face of the record it appears that that certificate appears to be doubtful. Only for lumbar spondylosis, it is stated that the applicant was advised bed rest from 04-11-2017 to 09-02-2018

i.e. almost three months. There is no other documentary evidence to support his contention that he was admitted in the said hospital for treatment. Further, the present application has been filed on 22-04-2019 so there is no explanation for the period from 10-02-2018 to 21-04-2019. Applicant No.1 cannot take shelter of the age of applicant No.2 as being a son he alone was required to look after the matter. Further, there is absolutely no documentary evidence produced by him to support his contention that applicant No.2 remains continuously ill and is required to be looked after continuously. He has not given how many family members he has in his house. It is impossible to imagine that he could not have taken a day off to consult his Advocate. Further, there is absolutely no explanation as to why they had not appeared before the First Appellate Court when that matter was pending with the said Court for about a year. When there was already delay before the First Appellate Court, the applicants ought to have been diligent enough in prosecuting that application. As aforesaid, there is absolutely no reason given for their absence before the First Appellate Court. There appears to be absolutely no reason to take any kind of doubt over the order that has been passed by the First Appellate Court. Anything cannot be considered with sympathy. If reasonable ground

is shown then only there is scope for using discretion. If absolutely no reason has been shown then question of using discretion and showing leniency does not arise. The delay of 445 days was huge and inordinate and there is absolutely no explanation given for the period from 10-02-2018 till 21-04-2019. Hence, the application deserves to be rejected, accordingly it is rejected. Application stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-

GAWADE
VIRENDRA
J

Digitally signed
by GAWADE
VIRENDRA J
Date: 2021.09.21
10:29:06 +0530