

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

33 CIVIL APPLICATION NO.10807 OF 2015
IN SAST/14709/2015

JANMOHAMMAD BABULAL PATHAN AND OTHERS
VERSUS

CHAGAN @ CHAGANMAHARAJ GULABBHAI SHAIKH AND OTHERS

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Mr. A.S. Bajaj, Advocate for applicants

Mr. N.V. Gaware, Advocate for respondent Nos.1 to 3

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 02nd AUGUST, 2021.

PER COURT :

1 Present application has been filed for getting 373 days delay condoned in filing Second Appeal.

2 Heard learned Advocate Mr. A.S. Bajaj for applicants and learned Advocate Mr. N.V. Gaware for respondent Nos.1 to 3.

3 Learned Advocate for the applicants strongly submitted that the First Appellate Court had not considered the facts and the dispute between the parties properly, and therefore, the appellants, who were the applicants before the First Appellate Court as well as who were the original plaintiffs

had filed review petition before the same Court and it took about one year 12 days to decide. Ultimately the review has been rejected leaving no option for the appellants to come before this Court. He submitted that the suit was for partition, separate possession and injunction. It came to be partly decreed. Relief of injunction was granted, however, relief of partition and separate possession was rejected. When the said decree was challenged by the original plaintiffs, then it ought to have been considered that the said proceedings would be restricted to partition and separate possession. As regards injunction, that is, the relief that was claimed and granted by the learned Trial Judge, the defendants had not filed any separate appeal. In spite of this fact, the points for determination were not properly framed and considered by the learned First Appellate Judge and it appears that the First Appellate Judge proceeded to consider the appeal under the impression that the appellants are the original defendants and it can be so seen from para No.1 of the Judgment and accordingly by framing point for determination the appeal was dismissed. It prompted the appellants to file the review petition but it has been rejected. The delay is not deliberate, and therefore, it deserves to be condoned.

4 Learned Advocate Mr. N.V. Gaware representing the respondent Nos.1 to 3 strongly opposed the application and submitted that when the

appellants were having knowledge that their review itself is not maintainable, they ought not to have wasted the time by preferring review. There was no confusion in the mind of the learned Judge of the First Appellate Court and any way the review itself was not maintainable. Under such circumstance, the appellants-applicants cannot seek benefit of inclusion of prosecuting the matter before the First Appellate Court by way of review. The reasons given are not reasonable, much less sufficient.

5 At the outset, it is to be noted that the total delay appears to be 373 days from the date when the Regular Civil Appeal No.138/2010 was decided. However, in the meantime, the present appellants had filed Review Petition No.1/2014 before the same Court. The First Appeal was filed on 15.01.2014 and the review petition was filed on 25.02.2014. The review petition was decided on 07.03.2015 i.e. about one year 12 days. Time was spent and if the benefit of prosecuting the review is given to the applicants, then the delay might be only 8-10 days.

6 As aforesaid, the suit was for partition, separate possession and injunction, which came to be decreed partly and only the relief of injunction was granted. The First Appellate Court Judgment starts with sentence, "This appeal has been preferred by appellants who were defendants in the Trial Court in Regular Civil Suit No.1/2004." and then it is stated that the suit was

for perpetual injunction has been decreed. The point that was framed for consideration was “Whether the plaintiffs prove their ownership and possession over the suit property and obstruction to it at the hands of defendants ?” Thus, it is to be considered, as to whether the First Appellate Court Judge was under confusion and has taken the wrong facts into consideration, but that can be done only in the Second Appeal. But then it appears that when the appellants were of the opinion that the First Appellate Court Judge went on the basis of wrong facts in mind, it appears that it had prompted them to knock the doors of the same Court by way of review petition. That review petition has been rejected. Under such circumstance, it can be said that it was a bona fide attempt on the part of the applicants to get their dispute adjudicated. Therefore, definitely, when it is a bona fide attempt, that period deserves to be exempted. Then it remains only 8-10 days delay and taking into consideration this duration and the points involved, the said delay deserves to be condoned. Hence, the application stands allowed and disposed of. The delay stands condoned. Registry to verify and register the Second Appeal and place it for further consideration on 17.08.2021 for admission.

(Smt. Vibha Kankanwadi, J.)