

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.7639 OF 2012
IN SAST/16615/2012

ASHROBA S/O SHRIPATI TAKAT AND ANR
VERSUS
BABARAO S/O SHAHURAO SOPANE AND ORS

...

Mr. K. S. Warad h/f Mr. S. V. Warad, Advocate for applicants.
Mr. Phulpagar h/f Mr. P. R. Katneshwarkar, Advocate for respondent
No.1.

Mr. R. B. Deshpande, Advocate for respondent No.3.

...

CORAM : SMT. VIBHA KANKANWADI, J.

Reserved on : 06.09.2021

Pronounced on : 12.10.2021

ORDER :-

. Present application has been filed for getting the delay of 1305 days condoned in filing second appeal. Present applicants are original defendant Nos.3 and 4. Present respondent No.1 is the plaintiff, who had filed Special Civil Suit No.165 of 1997 (Old Special Civil Suit No.159 of 1996) before learned Civil Judge Senior Division, Gangakhed Dist. Parbhani for declaration and permanent injunction. The said suit came to be decreed on 24.07.1998. Present appellants then challenged the said judgment and decree by filing Regular Civil Appeal No.48 of 2004 before learned District Judge-1, Gangakhed, Dist. Parbhani. After

hearing both the parties, the said appeal came to be dismissed on 29.08.2008. They want to file second appeal, however, there is delay as aforesaid. Hence, this application under Section 5 of the Limitation Act.

2. Heard learned Advocate Mr. K. S. Warad h/f Mr. S. V. Warad for applicants, learned Advocate Mr. Phulpagar h/f Mr. P. R. Katneshwarkar for respondent No.1 and learned Advocate Mr. R. B. Deshpande for respondent No.3.

3. It has been vehemently submitted on behalf of the applicants that vital rights of present applicants are involved in this case. They had challenged the judgment and decree passed by the learned Trial Judge before the first Appellate Court. In fact, the suit was unready, yet in the midst judgment was delivered *ex parte* by the learned Trial Judge and that is the main reason for challenging the said judgment and decree, however, the learned first Appellate Court had not taken into consideration all the facts and circumstances as well as law points involved. In the first appeal also, the applicants had no knowledge about the judgment and decree passed by the first Appellate Court. No communication was received by them from their Advocate, who was representing them before the first Appellate Court. They got the knowledge about the said judgment and decree in the month of January,

2009 and then they collected the papers. The applicants are the illiterate farmers from the rural area, which is away from the district place. The circumstances were beyond their control and the delay is unintentional. The delay deserves to be condoned.

4. Per contra, the learned Advocate Mr. Phulpagar holding for Mr. P. R. Katneshwarkar for respondent No.1 strongly opposed the application and submitted that it appears that there was delay caused in approaching the first Appellate Court also by the present applicants and they again claim that there is delay in approaching this Court, how the same reason or fact will repeat? Therefore, the delay is intentional and deliberate. Though the decree has been passed in favour of the plaintiff in the year 1998, he is not truly enjoying the benefit of the same. This is unnecessary dragging of the proceedings. It was also pointed out that the application stood abated as against respondent No.2 vide order dated 19.11.2012 passed by this Court.

5. It appears that the present appellants had filed the first appeal before this Court in the year 1999. It appears that when pecuniary jurisdiction got increased, the appeal was transferred to the District Court. The applicants are contending that though the appeal was decided on 29.08.2008, their Advocate had not informed them about the

decision. There is no material before this Court to cross check it. So also, there is no material to come to conclusion that the said statement is false. The fact remains that the applicants are illiterate, coming from rural area and, therefore, whatever reason has been given can be said to be reasonable and sufficient to condone the delay. The inconvenience that would be caused to respondent No.1 deserves to be compensated in terms of money. As regards the effect of abatement of the application/appeal as against respondent No.2 would be considered at the time of admission of the second appeal. Hence, the following order :-

ORDER

- I) Application stands allowed and disposed of.
- II) The delay caused in filing second appeal stands condoned, subject to deposit of cost of Rs.10,000/- in this Court within a period of one month.
- III) After the amount is deposited, registry to verify and register the second appeal.
- IV) The amount so deposited be given to respondent No.1, who is the contesting party.

[SMT. VIBHA KANKANWADI, J.]