

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

935 CIVIL APPLICATION NO.13732 OF 2016
IN SAST/17238/2016

PRABHAKAR SUKDEO TAGWALE AND OTHERS

VERSUS

NATHU RAVAJI RAJPUT DIED THROUGH LRS AND OTHERS

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Mr. B.R. Waramaa, Advocate for applicants

Mr. S.L. Awchar, Advocate for respondent Nos.2(A)(1) to 2(A)(3)

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 05th AUGUST, 2021.

PER COURT :

1 Present application has been filed for condoning the delay of 5577 days in filing Second Appeal.

2 Heard learned Advocate Mr. B.R. Waramaa for applicants and learned Advocate Mr. S.L. Awchar for respondent Nos.2(A)(1) to 2(A)(3).

3 It has been vehemently submitted on behalf of the applicants that applicants are the original plaintiffs, who had filed suit for partition and separate possession bearing Regular Civil Suit No.139/1981. Their suit came to be decreed on 10.01.1995. The defendants had filed Regular Civil Appeal

No.47/1995 before the District Court, Jalgaon. That appeal came to be allowed on 28.11.2000 and the decree passed by the learned Trial Judge was set aside. The applicants contend that applicant Nos.1 and 2 are below the level of prudence and they were not aware about the date fixed before the First Appellate Court and also the decision in the appeal. There was no communication received by them from their Advocate. They got to know about the decision in the appeal only in June, 2001. Thereafter, they had tried to engage a local Advocate, who advised them to arrange for the funds or to apply to the legal aid. Accordingly, with the help of that Advocate they had sent an application to the Legal Aid Committee of this Court. Certain compliances were directed by the said office by its letter dated 07.12.2001. In the meanwhile, the plaintiffs had also requested the local Advocate to help them in securing necessary documents and certified copies. Once again the Legal Aid Committee had issued letter to applicant No.1 Prabhakar on 29.04.2004 requesting the compliances. After the compliance was made, they received communication that their matter has been assigned to Advocate from the Legal Aid Panel. That communication was received by them on 06.07.2004 and then they were under the impression that the appeal has been filed. They waited for couple of years and ultimately their relative Mr. Bhagwan Patil had come to Aurangabad in 2011. He went to the Legal Aid office and it was transpired that the concerned Advocate had given opinion

that it is not a fit case for Second Appeal. According to the applicants, the said fact was not disclosed to the applicants, but then again they contacted the Advocate. Their financial condition is poor, therefore, it was hard for them to incur the expenses. Somehow, they could collect the amount and came to Aurangabad in 2015, tried to engage an Advocate, but taking into consideration the expenses those were collected they went back. In the meantime, son of applicant No.2 Subhash got married and then with the help of that son and daughter-in-law initiative was taken to file the appeal. It was submitted that the delay is unintentional. It was occurred due to the poor financial condition of the litigants and their poor understanding capacity. The delay deserves to be condoned, as the vital rights of the present applicants and their share in the property has been negated.

4 Per contra, the learned Advocate appearing for the respondent Nos.2(A)(1) to 2(A)(3) strongly opposed the application and submitted that the delay is huge and inordinate. Whatever reasons have been tried to be given are not sufficient, much less reasonable. The record, that has been filed, would also show that though he had applied for the legal aid in 2001, till 2004 he had not produced the basic documents, which would have decided his entitlement for legal aid. Thereafter, it appears that Advocate Mr. Gholap was appointed and he was requested to consider the papers and give

opinion, as to whether it is a fit case for filing the petition in the High Court for relief claimed. According to the applicants, this Advocate Mr. Gholap had given opinion that it is not a fit case. Under such circumstance, they cannot again try to push their proceeding by engaging another Advocate. Even on merits they are not having good case. The facts, which were not considered by the learned Trial Judge, were considered by the First Appellate Court. The plaintiffs are, in fact, asking for a partial partition without giving any reason as to why they have left out those two properties, in which a common ancestor was initially inducted as tenant. The learned First Appellate Court has given clear and correct position of fact and law, and therefore, arrived at the conclusion that in absence of all the properties not brought into the hotch pot, the suit was not maintainable. Under such circumstance, after such long delay it need not be condoned.

5 At the outset, it can be seen that even the applicants are accepting that it is an inordinate delay in filing the appeal. Such submission has been made in paragraph No.7 of the application itself. The appeal was decided on 28.11.2000. Important point to be noted is that the present applicants were the respondents before the First Appellate Court and they had engaged a competent Advocate to represent themselves. Now, except bare words that their Advocate had not communicated the decision in the

appeal, there is nothing. It cannot be presumed that the concerned Advocate will not discharge his professional duty. Further, the matter was pending before the First Appellate Court for about five years. The applicants contend that they came to know about the decision in appeal in June, 2001. How they came across that news, is not disclosed. But then it appears that they had tried to engage Advocate to file Second Appeal, but then they are contending that they have no financial capacity. Both the applicants appeared to be the agriculturists and it is not their case that before the Trial Court as well as First Appellate Court they had sought legal aid through Legal Aid Committees. It appears that only applicant No.1 had filed application in 2001 to the Legal Aid office of this Court and then by letter dated 07.12.2001 he was called upon to produce certain documents, which were necessary to decide, as to whether legal aid can be provided to the applicants or not. Further, it appears that till 29.04.2004 he has not made the compliances of those documents, and therefore, once again the Establishment Officer, High Court Legal Services Sub-Committee, Aurangabad gave letter for the compliance. Then it appears that, that was complied with and then Advocate Mr. Gholap was appointed. Order to that effect was given to Advocate Mr. Gholap. Copy of the letter was given to the applicant No.1 on 06.07.2004. Thereafter also, one more communication was made by the Legal Aid office of this Court on 25.08.2004 for the supply of paper book of the First

Appellate Court. It has not been placed on record by the applicants, as to whether they had complied with the requirements. Definitely, the opinion would have been given by the learned Advocate Mr. Gholap that it is not a fit case for filing Second Appeal, would be after the documents were supplied. Now, the applicants are contending that they had not received further communication from the Legal Aid office. But then they had not made any kind of inquiry till 2011. This is a huge delay and inaction on the part of the applicants. The applicants are trying to contend that they are below the level of prudence or even statement is made that the relative was aware about the IQ (Intelligence Quotient) of the applicants. Important point to be noted is that at any earlier point of time in the litigation, no such plea appears to have been taken. Applicant No.1 has examined himself before the learned Trial Judge. So, applicants cannot say that they are below the level of prudence. Not making inquiry about his own work or not taking steps for filing Second Appeal, when the applicants had knowledge that there was no alternative but they will have to file it, can be said to be the grounds for not condoning the inordinate delay. If they want their share to be determined as per their own contention, then they ought to have acted swiftly. Not taking any kind of action since 2004 to 2011, is totally unjustifiable period.

merits of the case; yet, here it is to be noted that admittedly, it appears that plaintiffs were seeking partition in two properties only, but it was proved by the defendants that there were two more properties of the family, and therefore, the First Appellate Court has considered and it was brought on record that defendant No.1 further proved that the two sons Sukdeo, Lotu and Shenfadu were jointly allotted field Sy.No.286 and 473. They had then sold Sy.No.473 to one Fulchand Laxman. That means, though the existence of other joint family properties/ancestral properties was brought on record and it was admitted by the plaintiff, learned First Appellate Court held that since all the properties are not brought in common hotch pot, the suit was not maintainable. Since it would have raised question of fact only and not substantial question of law, on that count also the application could not have been allowed. However, since the applicants have failed to give reasonable and sufficient grounds to condone the delay, the application stands rejected.

(Smt. Vibha Kankanwadi, J.)

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