

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.303 OF 2021

Bapu S/o Laxman Sonwane = APPELLANT
(Orig.Plaintiff)

VERSUS

1. Ajinath s/o Laxman Sonwane
and Anr. = RESPONDENT/S
(Orig.Defendants)

Mr.SY Mahajan,Advocate for Appellant;

Mr.SK Shinde,Advocate for Respondent No.1.

CORAM : SMT.VIBHA KANKANWADI,J.

DATE : 29th November, 2021.

PER COURT :-

1. Present appeal has been filed by original plaintiff, challenging rejection of application moved for condonation of delay filed by him before the first Appellate Court as the delay had occurred in filing the First Appeal.

2. Present appellant-original plaintiff filed Regular Civil Suit No.259/2010 before 2nd Joint Civil Judge, JD, Paranda District Osmanabad for declaration of ownership and perpetual injunction. The said suit came to be dismissed on 19.7.2014. The plaintiff wanted to file an appeal

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before the District Court. However, there was delay and, therefore, he filed an application under Section 5 of the Limitation Act bearing Civil Misc. Application No.38/2019. The said application has been rejected by learned Adhoc District Judge-1, Bhoom, District Osmanabad. Hence, this Second Appeal.

3. Heard learned Advocates appearing for the respective parties.

4. It has been vehemently submitted on behalf of the appellant that the appellant had led evidence, however, at the fag end, there was no proper opportunity given by the learned Trial Judge. In absence of the plaintiff and his Advocate, arguments on the side of the defendants were heard and the matter was posted for judgment. But, on the same day, later on, an application was filed by the defendants for production of document. So also an application was made by learned Advocate for the plaintiff seeking permission to argue. It was allowed and on the next date, it is stated that further evidence has been recorded, i.e. cross was

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completed by setting aside "No cross" order. It was done on the application of the plaintiff. No doubt, the plaintiff had received that opportunity, but substantial question would be as to whether, after the matter was posted for judgment, a clock can be set in anti-clockwise position ?

5. Reliance has been placed on the decision in the case of Arjun Singh Vs. Mohindra Kumar and Ors. AIR 1964 SC 993, wherein it has been observed that, - "If the entirety of the "hearing" of the suit has been completed and the Court being competent to pronounce the judgment then and there, adjourns, the suit merely for the purpose of pronouncing judgment under Order XX Rule 1, there is clearly no adjournment of "the hearing:" of the suit, for, there is nothing more to be heard in the suit. It was precisely this idea that was expressed by the learned Civil judge when he stated that having regard to the stage which the suit had reached the only proceeding in which the appellant could participate was to hear the judgment pronounced and that on the terms of Rules 6 & 7 he would permit him to do that. If, therefore, the

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hearing was completed and the suit was not "adjourned for hearing", Order IX, Rule 7 could have no application and the matter would stand at the stage of Order IX, Rule 6 to be followed up by the passing of an ex parte decree making Rule 13 the only provision in Order IX applicable."

6. Further, a copy Roznama would show that thereafter the matter was adjourned for arguments and thereafter no submissions were allowed. Roznama of dated 16.7.2014 would show that Advocates are present, but then it does not say that submissions were heard. The Roznama does not say as to when the submissions were heard by the learned Judge. When there was such legal flaw in the judgment of the Trial Court, the appellant intended to file an appeal, however, there was delay. There was delay of four years 11 months and six days. The delay was caused as the appellant had no knowledge about the judgment and decree passed in the Appeal. No opportunity was given by the first Appellate Court to the applicant to lead evidence. Only on the basis of the application and Say as well as submissions, the application has been decided,

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which cannot be said to be proper procedure to decide the application for condonation of delay. The learned Advocate for the applicant, therefore, submitted that substantial questions of law are arising in this case. However, alternatively, a prayer has been made that the impugned order be set aside and the matter be remanded to the first Appellate Court, with direction to allow the parties to lead evidence and decide the application afresh.

7. Learned Advocate for the appellant has relied on the following citations, -

Sr.No.	CITATIONS
1.	LAWS(SC) 1987 2 4 = AIR 1987 SC 1353 – Collector, Land Acquisition, Anantnag, Vs. Mst.Katiji
2.	1989 (2)Bom.CR 15 – Baburao Deorao Wankheda Vs. Sewa Sahakari Sanstha and Anr.
3.	1998 (7) SCC 123 N.Balkrishnan Vs. M.Krishnamurthy
4.	LAWS (BOM) 1999 3 4 = 1999(2) MH.L.J. 272 – Sonerao Sadashivrao Patil Vs. Godawaribai Laxmansingh Gahirewar
5.	LAWS (SC) 2013 9 32 = AIR (SCW) 2013 0 6158 – Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy

6.	LAWS (SC) 2019 5 32 = SCC 2019 6 387 – Bhivchandra Shankar More Vs. Balu Gangaram More
7.	(2008) 8 SCC 321 – Peruman Bhabvathy Devaswom Vs. Bhargavi Amma
8.	AIR 2015 SC 2675 GMG Engineering Industries Vs. Issa Green Power Solution
9.	Civil Appeal No.6315/2021 (Arising out of Special Leave Petition (C) No.27874/2018 (decided on 8.10.2021) – Dr.Yashwantrao Bhaskarrkao Deshmukh Vs. Raghunath Kisan Saindane

8. Per contra, learned Advocate appearing for Respondent No.1, strongly opposed and submitted that no substantial questions of law are, in fact, arising in this case. Whatever steps were taken by the Trial Court were in favour of the appellant; yet he is aggrieved. When the application for condonation of delay was filed, there was huge delay of four years eleven months and six days. The application has been drafted in a very casual manner and the only ground stated is, that the appellant was not aware about the judgment and decree passed by the Trial Court for so many years. In his say, the respondent submitted that after the judgment and decree by the Trial Court, the

respondent had sent a notice to the applicant and the said notice was received by the applicant. Even the applicant has given answer to this notice and, therefore, he cannot say that the applicant has no knowledge about the decision of the suit. The respondent has filed a copy of the notice and RPAD receipt, which bears signature of the applicant. That has been considered by the first Appellate court and, therefore, there is no substantial question of law. No illegality has been committed by the first Appellate Court in rejecting the application for condonation of delay.

9. It is to be noted that we need not go into merits of the case right now as to whether any procedural lacunae or error has been committed by the learned Trial Judge as regards the delay is concerned. The applicant had come with a case that there is delay of four years eleven months and six days, which has occurred due to lack of knowledge of the judgment by the Trial Court. Now, the first Appellate Court has decided the application without

asking the applicant and respondents to lead evidence. This is a wrong practice. It ought to have been shown that an opportunity was given to the parties to lead evidence in support of their respective contentions. Even mere filing of affidavits will not be sufficient compliance. Unless the parties themselves opt for not to cross-examine each other without proof of notice RPAD receipt, it could not have been held by the first Appellate Court that those are the documents, which could be read in evidence or read as evidence. Further, though the respondents contended that the applicant had given reply to their notice, that reply was not produced by the respondents for the reasons best known to them. Under such circumstance, case is made out to set aside the impugned order and remand the matter to the first Appellate Court for taking up its proper procedure. Therefore, instead of framing substantial questions of law and keeping the appeal pending and taking some view at later stage, it would be appropriate and in the interest of justice to set aside the impugned order and remand the matter.

10. Since this Court has taken a decision to remand the matter by allowing the parties to lead evidence, we need not take into consideration the ratio laid down in the authorities/rulings cited by learned Advocate for the appellant. With these observations, following order is passed, -

ORDER

- i. The Second Appeal stands partly allowed;
- ii. The impugned Order dated 8.3.2021 passed by learned Ad-hoc District Judge-1, Bhoom, in Misc. Civil Application No. 38/2019, stands set aside;
- iii. The said Application is restored to the file of learned Ad-hoc District Judge-1, Bhoom, for deciding it afresh;
- iv. The learned First Appellate Court to give an opportunity to both the parties to lead evidence and then decide the matter on merits;
- v. The parties to appear before the First Appellate court on 3.1.2022.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV