

(1)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.147 OF 2018
IN
SECOND APPEAL ST.NO.32314 OF 2016

Rajkumar Bhimrao Solunke
Deceased through L.Rs. -

1(a) Sakubai w/o Rajkumar Solunke
and Ors. = APPLICANT/S

VERSUS

1) Avinash Anantrao Kulkarni
and Anr. = RESPONDENT/S
(Orig.Defendants)

Mr.SP Salgar, Advocate h/for Mr.NV Gaware, Adv. For
Applicant/s;

Mr.AN Irpatgire, Advocate for Respondent Nos.1 & 2.

CORAM : SMT.VIBHA KANKANWADI, J.

RESERVED ON : 20/08/2021

PRONOUNCED ON : 07/09/2021

PER COURT :-

1. Present application has been filed for
condoning delay of 612 days in filing the Second
Appeal.

2. Heard learned Advocates appearing for the
respective parties.

3. It has been vehemently submitted on

(2)

behalf of the applicants that the applicants, who are the original plaintiffs, had filed RCS No. 202/2006 before the Civil Judge, Senior Division, Nilanga for permanent injunction. The said suit was decreed by learned Civil Judge, Senior Division, Nilanga on 21.2.2011. The present respondents – original defendants, challenged the said judgment and decree before the District Court at Nilanga by filing Regular Civil Appeal No. 30/2011. The said appeal was heard by learned District Judge-1, Nilanga. It has been stated in the judgment of the first Appellate Court that the original plaintiff-respondent has not contested the appeal. The appeal went *exparte* against him. The said appeal has been allowed on 15.11.2014 and thereby the judgment and decree passed by the learned Trial Judge has been set aside. The suit was dismissed. The original plaintiff-present appellants intend to file Second Appeal, however, there is delay, as aforesaid.

4. Original sole plaintiff - Rajkumar was looking after the court proceeding. However, he was suffering from ailment of liver and was

(3)

intermittently hospitalized since about 2 to 3 years. He was regularly taking treatment at Latur and Hyderabad. Due to his illness, deceased Rajkumar could not take necessary steps, though it appears that he was served with the notice in appeal. The family members were also required to take care of Rajkumar and, therefore, they could not also pay attention to the litigation. Ultimately, Rajkumar succumbed to his illness and thereafter the applicants were in grief. The applicants had also approached Advocate Mr. SV Kurle and had instructed to appear for them in the said Regular Civil Appeal No.30/2011. However, due to misconception that the Advocate had not put his appearance. The delay is unintentional. The judgment of the first Appellate Court is required to be set aside as it is perverse and for that purpose, the delay deserves to be condoned.

5. Per contra, learned Advocate appearing for the respondents submitted that the applicants have not given sufficient reasons much less reasonable to condone the delay. They were supposed to explain the delay of 612 days caused in

(4)

filing the Second Appeal. However, the appeal was before the trial court for about 3 years 7 months and 17 days; yet no steps were taken to contest the same at later point of time in the same proceedings.

6. Learned Advocate for the appellants-applicants relied on decision in the case of Collector, Land Acquisition, Anantnag Vs. Mst. Katiji and Ors. - 1987 AIR (SC) 1353, wherein it has been held that, - "liberal approach is required to be taken and refusing to condone the delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated."

7. In N. Balakrishnan Vs. M. Krishnamurthy - 1998 AIR (SC) 3222, it has been observed that, it is axiomatic that condonation of delay is a matter of discretion of the court and [Section 5](#) of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only

criteria.

8. At the outset, it is to be noted that at this stage, we are only concerned with the fact as to whether the delay of 612 days caused in filing the Second Appeal, has been properly explained or not. Merits of the case may not be minutely gone into, but then at the same time, we are also required to consider whether any meritorious matter would be thrown away. As regards facts of the case are concerned, there appears to be appreciation of the same by both the courts below.

9. In order to explain the delay of 612 days, the applicants are contending that deceased Rajkumar, who was sole plaintiff, was looking after the court proceedings. But, he was suffering from ailment of liver and, therefore, intermittently was hospitalized since last 2 to 3 years. The contents of the application have been kept as vague as possible. It is absolutely not stated as to since when Rajkumar was ill and how many days he was hospitalized. The applicants have not produced any documentary evidence to support

(6)

their contention that Rajkumar was suffering from liver ailment. There was definitely possibility of production of documents, as it would be in the custody of the applicants; yet though the Civil Application is pending since 2018, but it appears that even for that, the Second Appeal, though filed in 2016, (As stamp number indicates), it appears that the application was kept for removing office objections. This shows negligence on the part of the applicants also. They are contending that due to serious ailment, deceased Rajkumar was bed-ridden and the applicants were taking care of Rajkumar. In the application, date of death of Rajkumar has not been stated. Even if for the sake of argument it is accepted that they might be taking care of Rajkumar till his death; yet fact remains, in absence of document, it cannot be said that the delay has been properly explained. The matter was before the appellate court for more than three years; yet there was no attempt on the part of the applicants to appear and give instructions to the Advocate. Supporting affidavit of Advocate Kurle has not been brought though statement is made that the applicants had approached him and

(7)

according to the applicants, due to misconception, the Advocate could not appear. This is indigestible.

10. The ratio laid down in both the aforesaid citations cannot be disputed. However, when re-appreciation of facts and evidence has been done by the first Appellate Court, it cannot be said that a meritorious case would be thrown at the threshold. No reasonable ground has been shown to condone the delay. Hence, the application for condonation of delay stands dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV