

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

915 CIVIL APPLICATION NO.15294 OF 2019
IN SAST/36238/2019

VITTHAL RAOSAHEB HOLAMBE

VERSUS

MADHUKAR VAIJNATH BURANDE AND OTHERS

...

Mr. S.A. Ambad, Advocate for the applicant/appellant

Mr. Kedar Warad, Advocate h/f Mr. S.V. Warad, Advocate for respondent

Nos.1 to 3

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 02nd SEPTEMBER, 2021.

ORDER :

1 Present application has been filed for condonation of delay of 137 days caused in preferring Second Appeal. Present appellant is the original plaintiff, who had filed Regular Civil Suit No.97/2008 (Old R.C.S. No.201/2006) before Civil Judge Junior Division, Sonpeth, Dist. Parbhani for declaration of ownership and perpetual injunction. The said suit came to be dismissed on 23.12.2016. He wanted to file appeal challenging the said Judgment and Decree, however, there was delay and, therefore, he filed

Miscellaneous Application (Requiring Judicial Enquiry) No.10/2017 for condonation of delay. The said application came to be rejected by District Judge-1, Gangakhed, Dist. Parbhani on 05.04.2019. Hence, he wanted to file the Second Appeal, however, there is again delay of 137 days. Hence, the present application.

2 Heard learned Advocate Mr. S.A. Ambad for the applicant/appellant and learned Advocate Mr. Kedar Warad holding for learned Advocate Mr. S.V. Warad for respondent Nos.1 to 3.

3 Learned Advocate for the respondents while objecting relied on the decision of this Court in **Kamalbai w/o Narasaiyya Shrimal and another vs. Ganpat Vithalrao Gavare, 2006 SCC OnLine Bom 1126**, wherein it has been observed that - *Delay cannot be condoned only because it is unintentional. So also, mere poverty cannot be a ground for condonation of delay.* It was then further submitted that Courts cannot exceed period of limitation on equitable ground. The expression “sufficient cause” cannot be erased from Section 5 of the Limitation Act by adopting excessive liberal approach which would defeat the very purpose of Section 5. There must be some cause which can be termed as a sufficient one for the purpose of delay condonation.

3.1 Further, reliance has been placed on the decision in **Patel Motibhai Naranbhai and another vs. Dinubhai Motibhai Patel and others, (1996) 2 SCC 585**, wherein it has been held by the Hon'ble Supreme Court that - "*Court should not come to the aid of a party where there has been unwarrantable delay in seeking the statutory remedy.*" He submitted that before the First Appellate Court there was delay and even before this Court there is delay. So, the Court should not support the party, who is negligent. Respondent No.2 Jagdish Madhukar Burande has filed affidavit-in-reply.

4 At the outset, it is to be noted that the application before the First Appellate Court was to get delay of one month and two days condoned in preferring First Appeal. That has been rejected and the appellant submits that after the application was rejected, he had applied for the certified copies, but since he is illiterate, agriculturist and in view of drought situation in the vicinity, he was facing various difficulties. Another fact that is required to be noted is that it appears that the learned First Appellate Court has not given the opportunity to lead evidence to the applicant and only on the basis of submissions has rejected the application. It was the delay of one month and two days only and, therefore, in view of **Collector, Land Acquisition, Anantnag vs. Mst. Katiji, AIR 1987 SC 1553** liberal approach ought to have been taken. In the case before this Court of **Kamalbai w/o Narasaiyya**

Shrimal (supra) the note of the decision in *Collector, Land Acquisition, Anantnag vs. Mst. Katiji*, AIR 1987 SC 1553 was taken, however, it was distinguished on the point of facts. In the case of **Kamalbai** (supra) there was delay of six months and it was the decision in Writ Petition, wherein, the order of rejecting the application for condonation of delay was challenged. Here, it is a Second Appeal and for filing the Second Appeal, there is delay of 137 days. It appears that the certified copies appears to have been obtained just after one month, however, it was within limitation of the appeal. But then the applicant is saying that due to illiteracy and no legal knowledge he could not approach immediately. When the Hon'ble Supreme Court as well as this Court is projecting for access to justice at all levels; yet, due to illiteracy the schemes like free legal aid are not reaching to the needy persons, we cannot blame a particular person or a particular institution for the same. Definitely, endeavour has to be made that such legal aid is made available from the grass root level up to Hon'ble Supreme Court to the needy persons. Therefore, per se the illiteracy may not be a ground to condone the delay, but it is a reality. The persons coming from the rural area and especially the agriculturists, who are suffering due to the drought situation, for them liberal approach is definitely required. Therefore, the delay caused before this Court in filing Second Appeal deserves to be condoned. Accordingly, it is condoned.

5 By the consent of both the parties, Second Appeal is taken for admission. As aforesaid, there appears to be no opportunity given to the appellant to lead evidence to explain the delay. Under such circumstance, whether the rejection of the application for condoning the delay by the First Appellate Court was justified or not, is required to be considered. Therefore, Second Appeal deserves to be admitted. It is, therefore, **admitted**. Following are the substantial questions of law.

1 Whether the First Appellate Court was justified in rejecting the application for condonation of delay without giving an opportunity to lead evidence to the appellant ?

2 Whether the Second Appeal deserves remand ?

6 Issue notice to the respondents. Learned Advocate Mr. Kedar Warad holding for learned Advocate Mr. S.V. Warad waives notice for respondent Nos.1 to 3.

7 Call Record and Proceedings.

(Smt. Vibha Kankanwadi, J.)