

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**Sneha N.
Chavan**

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**INTERIM APPLICATION NO. 206 OF 2021
IN
SECOND APPEAL (ST) NO. 1252 OF 2021**

Namdeo Govind Shinde & Ors. .. Applicants
V/s.
Ramchandra Shrirang Jagtap & Ors. ..Respondents

Mr. Dilip Bodake for the Applicants.
Mr. Uday Warunjikar for the Respondent Nos.1 to 3.

CORAM : C.V. BHADANG, J.

DATE : 11th FEBRUARY, 2021

PC.

1. By this application, the applicants (original defendant nos. 1 to 3 and 10) are seeking condonation of delay of 5 years and 43 days in filing a Second Appeal.

2. The brief facts necessary for the disposal of the application may be stated thus:

That the respondent Nos. 1 to 3 filed Regular Civil Suit No. 170 of 2009 against the applicants and others, for removal of encroachment, possession and mesne profits etc. The learned Civil

Judge Junior Division at Baramati by a Judgment and Decree dated 27.01.2011, decreed the suit, directing the original defendants to remove the encroachment in land gut No. 389 to the extent of 19 R and to deliver vacant possession of the same to the respondent nos. 1 to 3 (original plaintiffs).

3. It appears that feeling aggrieved, the appellants (original defendant nos. 1 to 3 and 10) challenged the same in Civil Appeal No. 36 of 2011 before the learned District Judge at Baramati.

4. The learned District Judge by a Judgment and Decree dated 24.08.2015 has dismissed the appeal, thereby confirming the Judgment and Decree passed by the Trial Court. A perusal of the record shows that a measurement map at Exhibit 26 is directed to form the part and parcel of the said decree. It is undisputed that the respondents/decreed holders have filed an execution application, in which a warrant of possession has been issued.

5. It is in these circumstances, that the present application is filed for condonation of delay, in filing the Second Appeal challenging the Judgment and Decree passed by the first Appellate Court.

6. I have heard Mr. Dilip Bodake, the learned counsel for the applicants and Mr. Uday Warunjikar, the learned counsel for the respondent nos. 1 to 3. With the assistance of the learned counsel for the parties, I have gone through the record.

7. Mr. Bodake, the learned counsel for the applicants has submitted that the condonation is sought on the ground that the applicants, are labourers and illiterate. It is submitted that they are also of advance age and suffering from various ailments, in support of which the medical papers are produced from pages 16 to 118 of the compilation. It is next submitted that the concerned Advocate representing the applicants did not advice the applicants to challenge the appellate decree. It is submitted that the decree holders also represented that they will explore the possibility of settlement and therefore, the applicants may not challenge the said Judgment and Decree. Lastly, it is submitted that on account of the lock down and consequent suspension of the physical court working, the applicants were unable to approach within time. He, therefore, submitted that the applicants were prevented from circumstances beyond their own control from filing the appeal within time and thus, according to the learned counsel, the applicants have made

out sufficient cause, for not filing the appeal, within time. He, therefore, submitted that the delay be condoned.

8. Mr. Warunjikar, the learned counsel for the respondent nos. 1 to 3 referring to the affidavit-in-reply has submitted that there were several applications filed on behalf of the applicants before the Executing Court in the interregnum and therefore, in the submission of the learned counsel, it cannot be accepted that the applicants were prevented on account of any disability as to age/illness or illiteracy and/or want of advice in filing the Second Appeal. The learned counsel also pointed out that there is suppression of material facts, inasmuch as the applicant no.1 had entered into a *issar chitti* with the decree holders, which aspect, is now sought to be denied in the rejoinder. He, therefore, submitted that the applicants are not coming with clean hands and in any event, there is no case made out for condonation of the gross delay.

9. On behalf of the respondents, reliance is placed on the decision of the Hon'ble Supreme Court in ***Esha Bhattacharjee v/s. Managing Committee of Raghunathpur Nafar Academy and Ors.***¹

1 (2013) 12 SCC 649

10. I have carefully considered the rival circumstances and the submissions made.

11. The only question is whether the applicants have made out sufficient cause for condonation of delay and the answer is in the negative for the following reasons.

12. The condonation is sought on the ground that the applicants are poor labourers, who are illiterate and on account of their advance age and various ailments, were unable to take steps for filing the Second Appeal. It is submitted that they were not advised by the Advocate to challenge the appellate decree and there was also representation from the decree holders about a possibility of settlement/compromise. Lastly, it is submitted that on account of suspension of physical court working from March, 2020, no steps could be taken. In my considered view, none of these grounds, which are essentially of an omnibus nature, can be accepted. It has come on record that in the interregnum the applicants filed several applications before the Executing Court for various reliefs and thus, it cannot be accepted that for want of advice or a disability on account of age or ailments, the applicants were prevented from filing appeal. That apart, it appears that there were in all 11

defendants. The applicant No.4 is shown to be 45 years of age and thus, it cannot be accepted that all the applicants and for the matter of that the defendants were prevented on account of their age and ailments in filing the appeal within time.

13. As noticed earlier, the applicant No.4 is shown to be of 45 years of age and the applicants/ defendants could have taken steps for filing the appeal within time as there was a common interest involved in challenging the Judgment and Decree of removal of encroachment. The contention that on account of any representation from the decree holders, the applicants were prevented from filing the appeal within time, also cannot be accepted. In a given case a party can wait for a reasonable time in the event, any such attempt for settling the matter and a genuine effort in that regard is shown to be existing. However any such representation, even if there be any, would not justify an aggrieved party waiting for over five years in filing the appeal. In my view, the considerations which are relevant, essentially proceed on the principle that the party should be diligent in availing of the remedy which is not forthcoming in the present case.

14. Lastly, coming to the ground of lock down, even here the suspension of the physical court working was from the third week of March 2020 till the end of the year. Even, during this time, urgent filing of the matters was permitted and hearings were conducted through video conferencing. That apart, even if, this period is excluded, there is a delay of more than four years, which itself is of a substantial nature.

15. The Hon'ble Supreme Court in the case of Esha Bhattacharjee (supra) after taking survey of several decisions holding the field, has culled out the principles which are germane, while considering the prayer for condonation of delay. It has been *inter alia* held that although the courts can take a liberal view, where the delay is of a short duration, the cases where there is a gross or substantial delay, requires a stricter approach. The delay cannot be condoned on general/casual or fanciful grounds. In such cases, the delay cannot be condoned so as to expose the adversary to a further litigation. In the present case, the respondent nos.1 to 3 are prosecuting the legal remedy from the year 2009 and at the fag end when the decree is sought to be executed, the present application is filed by some of the defendants.

16. Considering the over all circumstances, I do not find that the applicants have made out any sufficient cause. The application is without any merit and is accordingly dismissed, with no order as to costs.

C.V. BHADANG, J.