

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.83 OF 2021

Appellant

(Ori. Def. No.3)

: **Smt. Bhimabai wd/o Shankarrao Savarkar,**
Aged about 65 years, Occ. Household,
R/o Rekhi (Kala), Tah. Seloo, Dist. Wardha,
Through Power of Attorney Holder
Sau. Kishori w/o Wasudeorao Raut,
Aged about 42 years, Occ. Household,
R/o Paloti, Tah. & Dist. Wardha.

-- Versus --

Respondents

(Ori. Ptf.)

: 1] Marotrao s/o Vishwanath Zade,
Aged about 74 years, Occ. Retd.
R/o Yashwant Nagar, Nagar Parishad Colony,
Hingnaghat, District Wardha.

(Ori. Def. No.1)

2] Madhukar s/o Vishwanath Zade,
Aged about 69 years, Occ. Agriculturist.

(Ori. Def. No.2)

3] Sachin s/o Madhukar Zade,
Aged about 36 years, Occ. Agriculturist.

Both 2 & 3 R/o Khandala, Tah. Samudrapur,
Dist. Wardha.

(Ori. Def. No.4)

4] Sushila Wasudeo Timande,
Aged about 56 years, Occ. Household,
R/o Bela, Tah. Umred, Dist. Nagpur.

(Ori. Def. No.5)

5] Pravin s/o Madhukar Zade,
Aged about 34 years, Occ. Agriculturist,
R/o Khandala, Tah. Samudrapur, Dist. Wardha.

(Ori. Def. No.6)

6] Manohar Parasramji Kharane,
Aged about 47 years, Occ. Agriculturist.

(Ori. Def. No.7)

7] Raju Parasramji Kharane,
Aged about 47 years, Occ. Agriculturist.

(Ori. Def. No.8)

8] Sanjay Parasramji Kharane,
Aged about 41 years, Occ. Agriculturist.

(Ori. Def. No.9)

9] Arun Parasramji Kharane,
Aged about 38 years, Occ. Agriculturist.

(Ori. Def. No.10)

10] Durvas Parasramji Kharane,
Aged about 36 years, Occ. Agriculturist.

6 to 10 R/o Post - Gumgaon,
Tah. Hingna, Dist. Nagpur.

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Shri G.M. Shitut, Advocate for the Appellant.
Shri U.P. Dable & Shri S.J. Parote, Advocates for Respondent Nos.6 to 10.

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CORAM : **S.M. MODAK, J.**
DATE : **6th SEPTEMBER, 2021.**

J U D G M E N T :-

Heard.

02] **Admit.**

03] Learned Advocate Shri S.J. Parote waives notice for respondent Nos.6 to 10. The matter is taken up for final hearing by consent of both the sides.

04] The appeal is admitted on the following substantial question of law :

“Whether the learned lower appellate court failed to consider that in absence of rebuttal to the contentions in

the application for condonation of delay, the averments on oath cannot be discarded?"

05] After issuance of notice, respondent Nos.6 to 10, who are defendant Nos.6 to 10, have appeared. Whereas, respondent Nos.1 to 5, though served, have not appeared. Though initially respondent Nos.6 to 10 have sought for adjournment for filing of reply, after considering the nature of controversy, they have shown their readiness to argue the matter on the basis of the available record.

06] It is a settled law that second appeal is maintainable against the order thereby refusing to condone the delay by the first appellate Court. It has been held that such an order also amounts to passing of a decree.

07] The Court of a District Judge-1, Hinganghat has passed the order, dated 25/01/2021 thereby delay condonation application bearing M.J.C. No.38/2019 preferred by the present present appellant/defendant No.3 was rejected. The non-applicants therein have contested the application by filing separate replies. The plaintiff/non-applicant No.1 filed reply on 12/03/2020, whereas, defendant No.1/Madhukar, defendant No.2/Sachin and defendant

No.5/Pravin (non-applicant Nos.2, 3 & 5) filed separate reply on the same date. Non-applicant Nos.6 to 10/defendant Nos.6 to 10 have also filed independent reply on the same date.

08] In delay condonation application, defendant No.3/present appellant has offered reasons. They are –

- (a)** Vision blindness of both eyes (defect of eyes vision) in old age,
- (b)** Muscular pain in knee joints of a leg.
- (c)** Forming of a belief that M.J.C. No.57/2017 filed by defendant No.2/Sachin for delay condonation application will be decided and waiting for disposal of that application (this is separate delay condonation application).

09] All the non-applicants as mentioned above have opposed the condonation of delay. The sum and substance of their opposition is as follows :

- (a)** Necessary documents about the ailments are not filed.
- (b)** Earlier such request of illness not made.

- (c) Defendant No.3 was aware about pendency of M.J.C. No.57/2017 and still not taking steps against the judgment of the trial Court.

10] The first appellate Court while rejecting the delay condonation application had given the following reasons :

- (a) Defendant No.3 was very much aware about the nature of proceedings, as she had given no objection in M.J.C. No.57/2017.
- (b) No medical evidence and disability certificate produced.

11] I have heard learned Advocate Shri Shitut for the appellant/defendant No.3 and learned Advocate Shri U.P. Dable assisted by learned Advocate Shri Parote for respondent Nos.6 to 10. Both of them have taken me through the available record. In support of the contention, the learned Advocate for the contesting respondents have also relied upon a judgment in the case of Kamalbai w/o Narasaiyya Shrimal & another vs. Ganpat s/o Vithalrao Gavare, reported in 2007(1) Mh.L.J. 807. This Court, while expressing opinion about the reason of unintentional delay occurred, has observed in paragraph 10 that "*it will be rather too*

wide interpretation if the condonation of delay is to be allowed only because there is no intention of a party to cause delay. The reason is not far to seek. It has been further observed that “there are no sufficient attending circumstances placed on record to bolster up such allegation.” The focus was not to interpret the sufficient cause by adopting excessive liberal approach, which would defeat the very purpose of Section 5 of the Limitation Act.

12] There cannot be any dispute about the interpretation offered as reproduced above. While dealing with the request for delay condonation, the Court has to balance the rights of contesting parties. That is to say, one who is offering an explanation and the second is the person, who is opposing the delay condonation application. Because, the rival side is always in a better situation due to inaction of the applicant seeking condonation of delay.

13] The learned Advocate for the appellant invited my attention to the reply filed on behalf of respondent Nos.6 to 10 in the M.J.C. in question. It is on page 25. In paragraph 3, there is a mention that “alleged certificate of doctor issued on which date is not mentioned in the application of the applicant and is liable to be rejected”. According to the learned Advocate for the appellant, the

said reference itself suggests that certificate of doctor has been filed. According to him, at the most, there can be a defect that the certificate does not bear the date. According to the learned Advocate for the appellant, the first appellate Court after going through the record had given a finding that no medical evidence or disability certificate has been filed. It is very well true that along with this appeal, copy of medical certificate is not filed. But, if we go by this reference in the reply filed before the first appellate Court, there is a reason to believe that there was a medical certificate very much available on the record of the first appellate Court. In view of this, the observation that no medical evidence was produced, can certainly be said to be perverse.

ANOTHER M.J.C.

14] It is a matter of record that defendant No.2/Sachin has filed M.J.C. No.57/2017. It's copy is filed on Page No.47. He has asked for condonation of delay of 63 days. It is very well true that being one of the defendants (and as the plaintiffs suit was decreed thereby shares were determined), he was aggrieved. It is also very well true that the present appellant/defendant No.3 was desirous of preferring a first appeal, because the trial Court has allowed her counter claim only partly.

15] Copies of Roznama in M.J.C. No.57/2017 are also filed at Page No.52 to 56. If one can have a look at it, one can find that the said M.J.C. was pending at the stage of taking steps against some of the non-applicants. The last Roznama is of 11/02/2020, which also says about steps not taken against non-applicant No.4. So, it is very much clear that when the present appellant filed M.J.C. No.38/2019 on 05/11/2019, M.J.C. No.57/2017 was pending at the stage of taking steps against some of the non-applicants. From the judgment challenged in this appeal, it is very much clear that the present appellant, who was non-applicant No.3 in M.J.C. No.57/2017, had given no objection. The court seized of M.J.C. No.57/2017 could not dispose of that application, as all the non-applicants therein were not served. It is but natural for the present appellant to wait for decision in M.J.C. No.57/2017. This appellant cannot be blamed for pendency of M.J.C. No.57/2017.

16] This Court feels that the first appellate Court has not taken a rational approach while appreciating the reason offered “as waiting for the disposal of M.J.C. No.57/2017”. It seems that she has waited for reasonable time. However, for the reason beyond her control, if M.J.C. No.57/2017 is not disposed of. It is but natural for this appellant to take independent steps in challenging the

judgment of the trial Court that is how she has preferred the present M.J.C.

17] It is submitted that both M.J.Cs. were pending before the same Court. In view of that the Court seized of both the proceedings, in fact was expected to decide both together. Just because defendant No.2, who is applicant in M.J.C. No.57/2017 has not taken steps for service on all the non-applicants therein, it does not mean that the Court was powerless. So, this Court feels that on one hand the first appellate Court has decided M.J.C. No.38/2019, whereas on the other hand has allowed the applicant of M.J.C. No.57/2017 to keep it pending. It is interesting to note that in M.J.C. No.38/2019, all the non-applicants were served and they have filed reply. If this is possible, why it is not possible in M.J.C. No.57/2017. There is a reason to believe that defendant No.2/Sachin, who is applicant in M.J.C. No.57/2017, has not taken effective steps in serving the non-applicants therein diligently.

18] So, this Court feels that the approach of the first appellate Court is not rational. So, this Court feels that the first appellate Court has failed in appreciating the material placed before it in support of condonation of delay. So, the question framed by this Court has to be answered in the affirmative.

19] So, the appellant has made out a case for condonation of delay. Though this Court has answered this question in favour of the appellant, this has to be subject to conditions. Respondent Nos.6 to 10 are required to be compensated by imposing certain costs on the appellant. Rest of the non-applicants do not deserve for costs, as they have not appeared in this proceeding. Hence, the order :

ORDER

- i. Second appeal is allowed.
- ii. Order dated 25/01/2021 passed by the Court of District Judge-1, Hinganghat in M.J.C. No.38/2019 is set aside.
- iii. The appellant to pay costs of Rs.5,000/- to respondent Nos.6 to 10. The costs be deposited before the first appellate Court.
- iv. M.J.C. No.38/2019 is allowed and delay of 807 days is condoned.
- v. The Court of District Judge-1 is directed to register the first appeal of the appellant after complying necessary procedure.

- vi.** Both the parties are directed to appear before the Court of District Judge-1, Hinganghat on 5th October, 2021 in the proceedings of first appeal.
- vii.** It is made clear that fresh notice will not be issued to respondent Nos.6 to 10 in that first appeal and notice to other respondents be issued.
- viii.** The appeal is disposed of accordingly.

(S.M. MODAK, J.)