

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

Civil Application (S) No.467/2019 in Second Appeal St. No.9542/2019

Haridas Tonpe and others Sau. Kokila Tonpe and others

Office notes, Office Memoranda of
 Coram, appearances, Court's orders
 or directions and Registrar's orders.

Court's or Judge's Orders

Shri V.N. Morande, Adv for appellants/applicants.
 Shri Kaustubh Topale, Adv for resp. nos. 1 and 2.

CORAM : S.M. MODAK, J.
Reserved on : 07th JULY, 2021.
Pronounced on : 16th JULY, 2021.

Hearing was conducted through Video Conferencing and the learned Counsel agreed that the audio and visual quality was proper.

2. The advice given by the Advocate "to defendant nos. 1 to 4 not to attend the appeal proceedings" whether can be considered as a sufficient cause for condonation of delay in preferring Second Appeal is the issue. There is delay of 1466 days i.e. almost 4 years.

3. I have heard learned Advocate for the appellants/defendant nos. 1 to 4 and learned Advocate for respondent nos. 1 and 2/plaintiff nos. 1 and 2. Respondent nos. 3 to 8 though served have not appeared.

4. The respondent no.1 Kokila is the first wife of appellant no.1 Haridas. Respondent no.2-daughter Kalpana is born out of the said wedlock. The said marriage is dissolved by mutual consent in the year 1986, this is disputed. Respondents Kokila and Kalpana filed a Partition Suit bearing R.C.S. No.133/2003 against appellant no.1 Haridas. Appellant no.2-

Lata is joined as defendant no.2 and she is described as second wife of appellant Haridas. Haridas does not dispute the said marriage and in fact claims that after lawful customary divorce with Kokila, he married with Lata. Appellant no.3-Deepika and appellant no.4- Rupesh were defendant nos. 3 and 4. They are offspring of the marriage between Haridas and Lata.

5. The suit was contested. The appellant Haridas denied the claim of Kokila. The trial Court i.e. 5th Joint Civil Judge, Junior Division, Wardha passed the following order :

- (a) Kokila, Kalpana and Haridas were declared 1/3rd share in the property (in respect of Sr. Nos. 1 and 2 of Schedule-A).
- (b) All the three were declared 1/21st each share (in respect of Sr. Nos. 3 and 4 of Schedule-A property).

6. The present appellants were not satisfied with the said judgment preferred regular Civil Appeal No.122/2011. They failed to convince the First Appellate Court. Accordingly, their appeal came to be dismissed on 03-01-2015. This led to filing of the present appeal.

7. It is true that that the parties are not required to attend the First Appellate Court. Because, generally evidence is not recorded therein whether to attend or not attend i.e. the issue is between the parties and their respective advocates. The appellants contend that they have not attended the Wardha District Court on the advice of their learned advocate. This is disputed by contesting respondents. It is true that any affidavit supporting the said contention is not filed.

8. It is important to note how the appellants got knowledge of the decree of the First Appellate Court. Appellant Haridas had given the land for cultivation on contract basis and in the month of March 2019 the said cultivator informed Haridas that he was restrained by the relatives of Kokila from cultivating the land. This was in the month of March 2019 i.e. almost 4 years from passing of the judgment. This is also denied by the contesting respondents. It is also true that any supporting affidavit is not filed. The appellants took time from 05-03-2019 till 25-03-2019 for obtaining certified copy of the judgment of the First Appellate Court. It can be excluded.

9. The learned Advocate for the contesting respondents in support of its contention relied upon the judgments in the case of

- (a) Kanta alias Shanti w/o Subhash Karkale vs Manjulabai alias Kholki¹,
- (b) Basawaraj and another vs The Special Land Acquisition Officer.²,
- (c) Sarda Transport vs United India Insurance Company Ltd.³ and
- (d) Sanjay Singh vs Central Himalayan Land Development.⁴

1. CAS No.19/2018 in SAST No.22803/2017.

2. 2013 AIR SCW 6510.

3. 2018(1) AIR BOM R 315.

4. AIR 2019 SC (Supp) 1747.

10. In addition to the submission for condonation of delay, learned Advocate Shri Morande pleaded one ground pertained to question of law. According to him, the wife and the daughter cannot file a partition suit during the life time of the husband/father.

CONCLUSION

11. It is true that in all the judgments relied upon by the contesting respondents, the delay was not condoned. This Court was pleased to reject the explanation offered by the applicants about "*not taking steps by the Advocate and not informing the outcome of the litigation by the Advocate to her*". This was in case of Kanta alias Shanti w/o Subhash Karkale vs Manjulabai alias Kholki¹ referred above. There was a delay of 20 years. Whereas, the Hon'ble Supreme Court in case of Basawaraj and another vs The Special Land Acquisition Officer² referred above laid down the principle behind the condonation of delay. Whether the decision of the Court will cause inconvenience or not, is not the issue but the Court has no choice but to enforce the statutory provision. The legal maxim "*dura lex sed lex*" which means "*the law is hard but it is the law*" stands attracted (para 12). It has also been held-

"if there is no sufficient cause which prevented the litigant to approach the Court in time delay without justification putting any condition whatsoever, amounts to passing an order in violation of statutory provisions and it tantamounts to showing utter disregard to the legislature". (para 15).

12. Hon'ble Supreme Court refused to interfere in the order of the High Court refusing to condone the delay.

13. In case of Sarda Transport vs United India Insurance Company Ltd.³ as referred above, this Court refused to accept an explanation "*advice given by the Advocate not to prefer an appeal*". In that matter, Second Appeal was filed along with delay condonation when the Bailiff came for attachment.

14. Whereas, in case of Sanjay Singh vs Central Himalayan Land Development⁴ referred above, there was a delay of 721 days. The Advocate has not informed about disposal of the suit. Even complaint was filed against him before the Bar Council of Delhi. The delay was condoned by the High Court. Whereas, the Hon'ble Supreme Court interfered in the said order. In that matter, the respondent has not taken effective steps to pursue the complaint filed against the Advocate.

15. On this background, when the averments in the application are perused we can find that the appellant was not attending the District Court, Wardha. It is but natural. The said appeal was of the year 2011 and decided by way of dismissal on 03-01-2015. The appellant has not received the communication sent by his Advocate about the decision. The appellant was awakened in the month of March, 2019, when he was asked to cultivate the land. So one can say that this is a case of sheer negligence on the part of the appellant. Why the appellant has not filed the affidavit of the Advocate appearing before the First Appellate Court. From the year 2011 till the year 2015 the appellant not on a single occasion has contacted the Advocate. As there were no pleadings to that effect. Attending the District

Court is one thing and remained in touch with the Advocate is another thing. The appellant has neither attended the District Court nor kept in touch with his Advocate. So, I do not think that the explanation can be considered to be a sufficient cause for condonation of delay. Four years is not a short period. So, the ratio laid down in case of *Basawaraj and another vs The Special Land Acquisition Officer*² will be fully applicable.

16. So, I am not inclined to exercise the discretion in favour of the applicant. The application is short of pleadings. The proposed substantial question of law cannot be considered now. Hence, the following order :-

ORDER

- (a) Civil Application (S) No.467/2019 is dismissed.
- (b) The parties to bears their own cost.

JUDGE