

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

SECOND APPEAL NO. 504 OF 2019

Dadaji S/o Sukhdev Chahande,
Aged 78 years, Occ.: Cultivator,
R/o. Dholsar, Tahsil. Lakhandur,
Dist. Bhandara.

.... **APPELLANT.**

// VERSUS //

1. Smt. Kaushalyabai Natthu Mandape (Dead),
Through Legal representatives:
 - 1A. Purushottam S/o Natthuji Mandape,
Aged 56 years, Occ. Cultivator,
 - 1B. Rekha D/o Natthuji Mandape,
Aged 45 years, Occ. Household,
Both R/o Dhanori, Post. Koduril,
Tahsil. Pauni, Dist. Bhandara.
2. Mukunda @ Makharan Mahadev Pillewan,
Aged 43 years, Occ. Labour,
R/o MHADA Colony, Sainagar,
Bhandara Road, Nagpur,
Tahsil & District. Nagpur.
3. Satyabhama W/o Suryabhan Meshram,
Aged about 67 Yrs., Occ. Housewife,
R/o Khairi (Diwan), Post. Aasgaon,
Tahsil: Pauni, District: Bhandara.

4. Smt. Ratnamala @ Ratnakala Duryodhan
Thaware, Aged 63 years, Occupation: Nil,
R/o Padole Nagar, Wathoda Ring Road,
Post: Bagadganj, Nagpur
Tahsil & District. Nagpur.

(ORG.PLFFS.)
.... **RESPONDENTS.**

Shri O.W.Gupta, Advocate for Appellant.

Shri S.G.Karmarkar, Advocate for Respondent Nos.1 (A,B), 2 to 4.

CORAM : ANIL S. KILOR, J.

DATED : NOVEMBER 23, 2021

ORAL JUDGMENT :

1. The present appeal is arising out of rejection of application for condonation of delay in filing First Appeal, vide order below Exh.1, dated 5th August 2019 passed by District Judge-2, Bhandara.

2. The facts in brief are as under: (The parties are referred to as per their status before the trial Court):

3. The respondents/plaintiffs had filed a suit for partition and separate possession. The appellant was the original defendant in the said suit.

4. The said suit was decreed on 30/07/2018 in favour of the plaintiffs. However, because of the ill-health and advance age of the appellant, he could not file appeal within limitation and a delay of 260 days had been caused.

5. The learned lower Appellate Court vide impugned order below Exh.1, dated 5th August 2019 rejected the application for condonation of delay, the same is under challenge in the present appeal.

6. I have heard the learned counsel for the appellant. None for the respondent, though served.

7. Shri Gupta, learned counsel for the appellant submits that the Court has not considered the age of the appellant and also the affidavit filed on record stating that the appellant is partially blind. He submits that there is no denial to the said facts by the respondent and in spite of that the learned First Appellate Court has rejected.

8. It is submitted that it is a settled law that in the matter of

delay the Court should adopt liberal approach, however, contrary to the same, the learned lower appellate Court has rejected the application on highly technical ground.

9. For this purpose, he placed reliance on the judgment of this Court in the case of *Sk.Ibrahim Sk. Rasool ..vs.. Mohammad Zahir Mohammad Sharif*, dated 4th September 2017 in Second Appeal No. 157 of 2017.

10. This Court on 25th November, 2019, framed following Substantial Question of Law :

“Whether the First Appellate Court committed an error in not considering supporting affidavit and not condoning delay of 263 days caused in filing first appeal?”

11. Admittedly, as on this date the appellant is 78 years old and on the date of filing of the application for condonation of delay he was 77 years old and it has been noted by the learned lower appellate Court.

12. It is also an admitted fact that the appellant is a cultivator and he resides in village Gholsa where sufficient medical

facilities are not available. In that view of the matter and more particularly when an affidavit was filed by the appellant to state that he is partially blind, the learned lower appellate Court ought to have considered the same.

13. This Court in the judgment of *Sk. Ibrahim* (supra) in paragraph No.8 has held thus:

“8.Considering the age of the appellant and the fact that he had stated that on account of ill-health the appeal could not be preferred within a period of limitation, I find that one opportunity for contesting the proceeding on merits deserves to be granted. It is to be noted that the original plaintiff had filed two suits for possession. Both the suits were decreed. The appeal challenging the decree in Reg. Civil Suit No. 33/2007 is still pending before the appellate Court. I find that by compensating the respondent no.1, the delay can be duly condoned.”

14. In the aforesaid case, this Court condoned delay looking to the age and ill-health of the applicant, subject to payment of costs.

15. I am also of the considered view that in the present matter, in view of the similar facts involved, same view should be taken.

16. Accordingly, I have reached to the conclusion that the delay caused in filing the First Appeal shall be condoned subject to costs to be paid by the appellant. Hence, I have answered the Substantial Question of Law in the above terms. Accordingly, I pass the following order:

- i) The appeal is allowed.
- ii) The delay of 263 days, caused in filing the First Appeal, is condoned, subject to payment of costs of Rs.2,500/- to each of the plaintiff, within eight weeks from today.
- iii) The amount of costs shall be deposited in the lower appellate Court.
- iv) On deposit of the costs, learned lower appellate Court shall register First Appeal and decide the same on merits in accordance with law.

The appeal is **disposed of** accordingly.

(ANIL S. KILOR, J)

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