

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CIVIL APPLICATION NO.4657 OF 2019
IN
SAST/6684/2019**

NANDABAI RAMLING AVDHUT AND ANOTHER
VERSUS
MAHANANDA @ ANNAPURNA KARANDE AND ANOTHER

.....
Advocate for Applicant : Mr. S.V.Deshmukh h/f Mr. R.A.Deshmukh
Advocate for Respondents : Mr. A. N. Nagargoje
.....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Order :
07-10-2021**

**Date of Pronouncing The Order :
04-01-2022**

ORDER :

1. Present application has been filed for getting the delay of 1061 days condoned in filing second appeal.
2. Present applicants are the original plaintiffs who had filed Regular Civil Suit No.38 of 2001 before learned Civil Judge, Junior Division, Bhoom for partition and separate possession. The said suit came to be decreed on 10-12-2007. They were granted 1/12th share each in the suit property when they were claiming in fact 1/2 share. Under the said circumstance, original plaintiff No.1 preferred Regular

Civil Appeal No.156 of 2014 (old RCA No.310 of 2010) before learned District Judge-1, Bhoom. The said appeal came to be dismissed on 01-01-2016. It will not be out of place to mention here that the present applicant No.2 was respondent No.3 in the first appeal, however, she had then again filed Miscellaneous Civil Application No.12 of 2018 for condonation of delay in filing first appeal before learned District Judge-1, Bhoom. The said application was objected by respondents No.1 and 2 therein by filing written statement and, thereafter, by filing pursis at Exhibit 10 stating that she would file second appeal, she had withdrawn that civil miscellaneous application on 28-01-2019. Now in this application for condonation of delay, the applicants intend to challenge the Judgment and decree passed by the Courts below in Regular Civil Suit No.38 of 2001 as well as Regular Civil Appeal No.156 of 2015, however, as there is delay of 1061 days, this application has been filed under Section 5 of the Limitation Act.

3. Heard learned Advocate Mr. S. V. Deshmukh holding for Advocate Mr. R. A. Deshmukh for applicants and learned Advocate Mr. A. N. Nagargoje for respondents.

4. The learned Advocate appearing for the applicants vehemently

submitted that both the Courts below have wrongly applied the law taking into consideration the fact that the father of the plaintiffs died in 1989 and son Chandrakant had died issueless in the year 1998. It was the view taken by both the Courts below that the case is not governed under Amendment to Section 6 of the Hindu Succession Act, 1956. The applicants are the old ladies, poor agriculturist and, therefore, they were dependents on the legal advice given to them. The delay has been occurred beyond their control and due to the financial difficulties they could not preferred the second appeal within limitation. The said delay deserves to be condoned.

5. The learned Advocate appearing for respondents No.1 and 2 relied on the affidavit filed on behalf of the respondents and also submitted that intentionally applicant No.2 had suppressed the dismissal of the appeal by the First Appellate Court on 01-01-2016, yet filed the application for condonation of delay. She had every knowledge about the dismissal of that appeal and, therefore, whatever reason that has been given, cannot be said to be legal and sufficient. The respondents are also equally old and illiterate. The financial condition of the applicant is sound.

6. Before proceeding further note will have to be taken to the

decisions which have been relied by the learned Advocate for the respondents. In *Ratan Lal Shah vs. Firm Lalmandas Ghhadammalal*, reported in AIR 1970 (SC) 108, wherein it has been held that :-

"The object of the Order 41, Rule 33 is to enable one of the parties to a suit to obtain relief in appeal when the decree appealed from proceeds on a ground common to him and others. The Court in such an appeal may reverse or vary the decree in favour of all the parties who are in the same interest as the appellant."

Further reliance has been placed on the decision in *Chandramohan Ramchandra Patil vs. Babu Koyappa Patil (Dead) Through L.Rs.*, reported in AIR 2003 (SC) 1754, wherein it has been held that :-

"In a suit for partition plaintiff and defendants are parties to equal status. If right a partition has been recognised and upheld by Court merely because only some of plaintiffs had appealed and not all, Court was not powerless. It could invoke provisions of Order 41, Rule 4 read with Order 41, Rule 33. Court may reverse or vary decree in favour of all parties by passing such order or decree which ought to have been passed or made although not all parties affected by decree had appealed."

Relying upon this ratio, it has been submitted that in Regular Civil Appeal No.156 of 2014 itself the present applicant No.2 could have prayed for varying the decree. There was no necessity for her to file separate appeal and pray for condonation of delay for filing such first appeal. We cannot give advantage or benefit of the time consumed by her before a wrong forum in this situation.

7. At the outset, it is to be noted that the appellants/original plaintiffs had filed suit for partition and separate possession of 1/2 share in the suit properties. That suit was partly decreed and they were given 1/12 share each. As aforesaid, only plaintiff No.1 had filed the said appeal, however, plaintiff No.2 was made as respondent No.3. The said appeal proceeded ex-parte against her and then the said suit has been dismissed. Now in this application the applicant No.2 is not coming with a case that she was not aware about the proceedings those were filed by applicant No.1. There is absolutely no explanation on that count. It is hard to believe that when applicant No.1 would have preferred the appeal, she would not have disclosed the said fact to applicant No.2 when they both together had filed the said suit. Though the applicant No.2/respondent No.3 before First Appellate Court was duly served,

she remained absent and allowed the appeal to proceed ex-parte against her. If she should have appeared in the matter, definitely she could have prayed for varying or setting aside the decree and modifying it by giving an entire decree as prayed. However, it appears that she filed civil miscellaneous application, that too after a considerable delay. In that application which was filed by her on 23-03-2018 she was challenging the decree passed by the Trial Court on 10-12-2007 and, therefore, she had prayed for condonation of delay of 10 years 3 months and 15 days. When in the written statement filed to the application the present respondents No.1 and 2 had brought the fact to the notice that already Regular Civil Appeal No.156 of 2014 was dismissed on merits on 01-01-2016, it appears that she had withdrawn the said application on 28-01-2019. Here, we are required to consider both the applicants in a different way. Applicant No.1 was definitely aware about the dismissal of her appeal on 01-01-2016, and as aforesaid for applicant No.2, she is not coming with a case that she was not aware about the decision by the First Appellate Court. Reason for the delay is the illiteracy but at the same time we cannot forget that the respondents are also equally illiterate and they are also coming from rural background. Respondent No.1 is in fact 70 years old lady. Respondent No.2 is 42

year old lady. Occupation of the applicants as well as respondents is stated to be agriculture. Therefore, taking into consideration these aspects, they are on equal footing and, therefore, no benefit of the illiteracy or financial condition can be given to the applicants. Reliance can be placed on the decision in *Kamalbai w/o Narasaiyya Shrimal and another vs. Ganpat s/o Vithalrao Gavare*, reported in 2007 (1) Mh.L.J. 807, has held that,

"Delay cannot be condoned only because it is unintentional. Mere poverty cannot be a ground for condonation of delay."

Therefore, it cannot be said that the reasonable ground has been shown for condoning the delay. We cannot go into the merits of the case as every opportunity was available to the applicants to bring that legal position to the notice of the Courts below. We are here concerned with whether reasonable and sufficient ground has been shown or not. At the cost of repetition for the reasons stated above, it cannot be said that case is made out to condone the delay. Hence, application stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-