

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.239 OF 2022
WITH
CIVIL APPLICATION NO.7030 OF 2022**

Jaikishan s/o. Kishanlal Damani,
Age:67 years, Occ. Business,
r/o. Shivkrupa, 74, Income Tax Colony,
Pratap Nagar, Nagpur

..Appellant

Vs.

M/s. Kiran Pipe Industries,
I.S.O. 9001/2000 certified company,
Manufacturers of I.S.I. mark rigid pvc pipes,
through G.P.A. holder-
Shri Vikas s/o. Digamber Devalkar,
Age:51 years, Occ. Service,
r/o. M-84, Additional M.I.D.C. Area,
Behind Khedi Petrol Pump, Jalgaon

..Respondent

Mr.Sachin S. Deshmukh, Advocate for appellant
Mr.Sanket S. Kulkarni, Advocate for respondent

**CORAM : R.G. AVACHAT, J.
DATE : JUNE 08, 2022**

ORDER :-

With the consent of learned counsel for the parties, the
appeal is heard finally at admission stage.

2. The challenge herein is to the judgment and order refusing
to condone the delay in preferring first appeal against the judgment

and decree dated 07.10.2019 passed by learned 3rd Joint Civil Judge, Senior Division, Jalgaon, in Special Civil Suit No.74 of 2015.

3. The appellant herein is defendant in the suit. It was a suit for recovery of a sum of Rs.11,55,003/- due on account of sale of goods on credit. The trial Court decreed the suit in toto with interest at the rate of 15% per annum. The said decree was sought to be challenged in the first appeal. There was delay of little over 500 days in preferring the first appeal.

4. The first appellate Court refused to condone the delay on the ground that the appellant did not lead oral evidence to show sufficient cause for condonation of delay. The Court found the appellant to be negligent in prosecuting the proceedings. He tried to blame the Counsel who, allegedly, failed to communicate him about the progress of the suit. In view of the first appellate Court, the status of the proceedings in the suit could have been ascertained on-line. The appellant was a businessman. He, therefore, could not claim ignorance thereof.

5. Learned counsel for the appellant would submit that with a view to give the appellant an opportunity of hearing, the appeal may be allowed, remanding the matter back to first appellate Court to decide it on merits. According to him, the appellant is a Nagpur based person. The suit has been decided by the Court at Jalgaon. The Advocate representing the appellant in the suit did not keep him posted about the progress of the proceedings. Turning to the merits of the matter, learned counsel would submit that based on the sole testimony of a power of attorney of the original plaintiff, the suit came to be decreed. Learned counsel meant to say that the appellant has a very good case on merits.

6. Learned counsel for the respondent would, on the other hand, submit that the appellant was grossly negligent. He did not lead oral evidence in proof of the reasons that caused delay in preferring the first appeal. According to learned counsel, it was a commercial transaction. If the Court is inclined to allow the appeal, the appellant may be directed to furnish security towards satisfaction of the decretal amount.

7. Considered the submissions advanced. Perused the impugned judgment and decree. Without making any observation about merits of the matter, suffice it to say that the appellate Court ought to have allowed the delay condonation application by imposing costs. Same would have furthered the cause of justice. Since the first appellate Court has failed to do so, this Court is inclined to allow this appeal in terms of the following order:-

ORDER

(i) The Second Appeal is allowed, subject to cost of Rs.2,000/- (Rupees Two Thousand).

(ii) The order impugned herein is hereby set aside with a direction to the first appellate Court to decide the first appeal on merit, after giving opportunity of hearing to the parties thereto.

(iii) Pending the first appeal, there shall be stay to the execution of the decree dated 07.10.2019 passed by learned 3rd Joint Civil Judge, Senior Division, Jalgaon, in Special Civil Suit No.74 of 2015, on condition that the appellant shall deposit with the trial Court 30% of the principle amount allegedly due from him and shall further give a bank guarantee in the equal amount (30% of the

principle amount) as a security, within a period of two months herefrom.

(iv) Failure on the part of the appellant to comply with the above directions, the stay of execution of the decree, to stand vacated without reference to this Court.

(v) In view of disposal of the Second Appeal, Civil Application also stands disposed of.

[R.G. AVACHAT, J.]

KBP