

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

SECOND APPEAL NO. 464 OF 2016

Milind Sudhakar Rao Tehare	... Appellant
Versus	
Sanjaykumar Ramkrishna Tak	... Respondent

....

Mr. V. C. Solshe, Advocate for appellant
Mr. C. R. Deshpande, Advocate for respondent

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CORAM : R. G. AVACHAT, J.

DATED : 04th JULY, 2022

PER COURT :-

1. The challenge in this Second Appeal is to the rejection of the application for condonation of delay in preferring First Appeal against the judgment and decree dated 05.02.2013, passed by the learned Civil Judge Junior Division, Manwat in Regular Civil Suit No.35 of 2012. Consequent to the rejection of the application, the First Appeal stood dismissed.

2. Heard.

It is the case of the appellant (defendant in the suit) that the suit was initially filed in the Civil Court at Gangakhed. The suit, thereafter, came to be transferred to the Civil Court at Manwat in

February, 2012. He had not been served with the notice of the suit, post its transfer to the Court at Manwat. Consequently, he could not remain present before the trial Court to contest the suit. Thus, the suit came to be decreed relying on unchallenged evidence of the plaintiff. The Advocate for the appellant, on his own, preferred application under Order 9 Rule 13 of the Code of Civil Procedure. It is only a few days before he preferred the application for condonation of delay, he learnt from the villagers that the respondent (plaintiff) claimed to have won the case. There was, therefore, delay of little over 02 years, 07 months and 13 days in preferring the First Appeal. The appellate Court ought to have taken a liberal view. It was the suit for specific performance of agreement for sale. Without there being evidence of payment of a sum of Rs.1,25,000/-, the trial Court accepted the case of the respondent – plaintiff. According to him, no prejudice is likely to be caused to the respondent – plaintiff since he is in possession of the suit property. The learned Advocate, therefore, urged for allowing the appeal, remanding the matter back to the First Appellate Court for deciding it on its own merits.

3. Shri C. R. Deshpande, learned Advocate for the respondent would, on the other hand, submit that averments in the application for delay condonation were false to the knowledge of the appellant herein. The appellant had himself moved an application under Order 9 Rule 13 C.P.C. Moreover, he appeared in the proceeding for execution of the decree. As such, it is the case that he came to know about the suit having been decreed a few days before, he moved the application for condonation of delay is a false statement. According to the learned Advocate, the Court shall not come to the rescue of such litigation. He, therefore, urged for dismissal of the appeal.

4. Considered the submissions advanced. What has been submitted by the learned Advocate for the respondent is correct. The fact is that the subject matter of the suit is an immovable property, agricultural land. It has been in possession of the respondent-plaintiff. The suit is for specific performance and for agreement for sale. In execution proceedings, sale-deed has been executed pursuant to the decree passed by the trial Court. The fact is however that, on transfer of the suit from the Court of Gangakhed to the Court at Manwat, notice issued to the appellant herein returned

unserved since he had shifted to Pune. Many a time, it happens that Advocate on his own drafts application. Mofussil pleadings are to be construed liberally. It is always desirable that a litigation is decided on its own merits. According to the appellant, a sum of Rs.1,25,000/- is shown to have been paid him in cash. It is a matter of evidence/merit. Since in view of this Court the matter needs to be heard on its own merits after giving an opportunity of hearing to the appellant herein and there would be no prejudice to the respondent – plaintiff as he has been in possession of the suit land, ends of justice would be met if the Second Appeal is allowed by imposing costs.

5. For the aforesaid reasons, the appeal is allowed in terms of following order:

ORDER

- (i) The Second Appeal is allowed.
- (ii) The application for condonation of delay in preferring the First Appeal is hereby set aside, subject to cost of Rs.15,000/-, to be deposited by the appellant-defendant in the First Appellate Court for being paid to the respondent-plaintiff, there.

(iii) The appeal is remanded back to the First Appellate Court for deciding it on its own merits within time frame of eight months from the date of receipt of copy of this order.

6. In view of disposal of Second Appeal, pending civil application No.9750 of 2016 is disposed of.

[R. G. AVACHAT, J.]

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