

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

SECOND APPEAL NO. 581 OF 2014

Rohinibai Shankarrao Zagade and others ... Appellants

Versus

Darku Murlidhar Jagtap – deceased
through his legal heirs

1-a) Sunita w/o Sanjay Koralkar and others ... Respondents

....

Mr. D. A. Mane, Advocate h/f Mr. Milind Patil, Advocate for
appellants

Mr. S. B. Kadu, Advocate for respondent No.1

....

CORAM : R. G. AVACHAT, J.

DATED : 12th JULY, 2022

PER COURT :-

. The challenge in this Second Appeal is to the order dated 02.04.2014, rejecting the appellants' application (No.20 of 2013) for condonation of delay in preferring first appeal against the judgment and decree dated 17.08.2006 passed in Regular Civil Suit No. 526 of 2002.

2. Heard.

The learned Advocate would submit that the issue involved in the suit and the consequential appeal pertained to the

appellants' right, title and interest in the immovable property. Although he had marked appearance in the suit, his Advocate had not informed about the progress of the suit. The suit, thus, came to be decided in his absence. He came to know about the decree having been passed in the suit only when he received a notice of execution proceeding thereof. According to the learned Advocate, the *lis* needs to be decided on its own merits. He would further submit that the first appellate Court took a very pedantic view to reject the application. He, therefore, urged for allowing the appeal remanding the suit back to the first appellate Court.

3. The learned Advocate for the respondents would, on the other hand, submit that delay is of little over 6 ½ years. The same has not been properly explained. The first appellate Court has given good reasons for rejection of the delay condonation application. He, therefore, urged for dismissal of the appeal.

4. Considered the submissions advanced. True, there is delay of six years and six months in preferring first appeal against the judgment and decree passed in R.C.S. No.526 of 2002. The appellants herein were the defendants in the suit. It was a suit for

partition and separate possession of the land admeasuring 48R. From the pleadings itself, the plaintiff admitted that the entire suit land was in possession of the appellants herein as a lessees. Moreover, post decree in the suit, one of the appellants purchased 16R land from one of the co-owners. Thus, admitted facts undoubtedly indicate that if the impugned order is not interfered with, the appellants would be prejudicially affected in their rights in the immovable property.

5. The appellants have put the blame on their Advocate. They have submitted on affidavit that their Advocate did not inform them the progress of the suit and consequential decision therein.

6. The Hon'ble Apex Court vide decision dated 05.02.2019 in the case of ***The Commissioner, Mysore Urban Development Authority vs S. S. Sarvesh*** in Civil Appeal No.1463 of 2019, in para 19 and 20, has observed thus:-

*“19. Indeed, this case reminds us of the subtle observations of the learned Judge – Vivian Bose, J., which His Lordship made in one of the leading cases of this Court in **Sangram Singh vs. Election Tribunal, Kotah**, AIR 1955 SC 425.*

20. Vivian Bose J., speaking for the Bench, in his distinctive style of writing made the following observations while dealing

with the case arising out of Order 9 and reminded the Courts of their duty while deciding the case. The observations are apt and read as under:

“A code of procedure must be regarded as such. It is procedure something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that effect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”

7. In para 22 of the very judgment, the Apex Court has observed thus:

*“In our view, the Courts below should have seen that the first appeal is a valuable right of the appellant and, therefore, the appellant-Authority was entitled for an opportunity to prosecute their appeal on merits. If the appellant’s advocate did not appear may be for myriad reasons, the Court could have imposed some cost on them for restoration of their appeal to compensate the respondent (plaintiff) instead of depriving them of their valuable right to prosecute the appeal on merits. This is what Justice Vivian Bose has reminded to the Courts while dealing with the cases of this nature in **Sangram Singh** (supra) to do substantial justice to both the parties to*

the lis. Indeed, dismissal of the appeal in default and dismissal of the appeal on merits makes a difference. The former dismissal is behind the back of the litigant and latter dismissal is after hearing the litigant. The latter is always preferred than the former.”

8. In view of this, although there is huge delay, the same is duly explained with a contention on affidavit that the Advocate of the appellants did not inform them the progress of the suit. In view of this Court, ends of justice would be met if the appellants are saddled with some heavy cost for allowing the appeal. In the result, the appeal is allowed in terms of following order:-

ORDER

- (i) The Second Appeal is allowed.
- (ii) The order dated 02.04.2014, rejecting the appellants' application (No.20 of 2013) for condonation of delay in preferring first appeal against the judgment and decree dated 17.08.2006 passed in Regular Civil Suit No. 526 of 2002, is hereby set aside.
- (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 receipt of copy of this order.
- (iv) The appellants shall deposit with the appellate Court a sum of Rs.1,25,000/- towards costs to be paid to the plaintiff in

the suit and other defendants whose interest is affected due to delay in preferring the appeal. The cost shall be deposited within a period of three weeks.

- (v) It is condition precedent for the appellate Court to hear the appeal. Once the amount is deposited, the same be paid to the respective parties in equal proportion.

[R. G. AVACHAT, J.]

SMS