

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

**SECOND APPEAL NO.593 OF 2011
WITH
CIVIL APPLICATION NO.13670 OF 2011**

- 1) Dattatraya S/o Laxman Misal,
Age-45 years, Occu:Driver,
R/o-Rablewandi Sugar, Tq-Shrigonda,
Dist-Ahmednagar,
- 2) Shri Santosh S/o Laxman Misal,
Age-42 years, Occu:Driver,
R/o-Loni Vaynknath, Tq-Shrigonda,
Dist-Ahmednagar.

**...APPELLANTS
(Orig. Defendant Nos.6 & 7)**

VERSUS

- 1) Govind S/o Narayan Misal
(Dead) Through his LR's:
- 1A) Smt. Shantabai S/o Govind Misal
(Dead),
- 1B) Appa S/o Govind Misal,
Age-46 years, Occu:Agri.,
- 1C) Sanjay S//o Govind Misal,
Age-35 years, Occu:Agri.,
- Respondent Nos.1A to 1C
R/o-Hirdewadi, Tq-Shrigonda,
Dist-Ahmednagar,
- 1D) Bababai Sonba Shikore,
Age-66 years, Occu:Agri.,
R/o-Khamgaon, Tq-Jamkhed,
Dist-Ahmednagar,

1E) Subhadra Tulshiram Davale,
Age-61 years, Occu:Agri.,

1F) Madhurabai Vitthal Hirde,
Age-51 years, Occu:Agri.,

Respondent Nos.1E to 1F
R/o-Hirdewadi, Tq-Shrigonda,
Dist-Ahmednagar.

1G) Chaturabai Popat Wadavkar,
Age-41 years, Occu:Agri.,
R/o-Patoda, Tq-Jamkhed,
Dist-Ahmednagar,

2) Bhau Bansi Misal,
Age-46 years, Occu:Agri.,
R/o-Adalgaon, Tq-Shrigonda,
Dist-Ahmednagar,

3) Dilip S/o Bansi Misal,
Age-41 years, Occu:Agri.,
R/o: C/o-Nandkishor Namdeo Shikare,
2/12/Padmavati Apartment,
Ramdaswadi Kalyan(P) 421304,

4) Dagdabai Namdeo Shikare
(Appeal against Respondent No.4 dismissed
as per Court's order dated:22-07-2016,

5) Bhau S/o Narayan Misal,
Age-76 years, Occu:Agri.,

6) Rama S/o Laxman Misal,
Age-46 years, Occu:Agri.,

7) Kondiba S/o Babu Misal,
Age-56 years, Occu:Agri.,

8) Sakhubai Kondiba Misal,
Age-56 years, Occu:Agri.,

- 9) Saraswati Namdeo Misal,
Age-56 years, Occu:Agri.,
- 10) Swati Nadeo Misal,
Age-28 years, Occu:Agri.,
- 11) Baburao S/o Namdeo Misal,
Age-27 years, Occu:Agri.,
- 12) Dwarkabai W/o Jijaba Kale,
Age-51 years, Occu:Agri.,
- 13) Badamabai Jijaba Kale,
Age-46 years, Occu:Agri.,

Respondent Nos.4 to 13 R/o-Kokangaon,
Tq-Shrigonda, Dist-Ahmednagar.

- 14) Yamunabai Laxman Hirde,
(Dead) Through her Lrs:
- 14-a) Vitthal Laxman Hirde,
Age-60 years, Occu:Agri.,
- 14-b) Pandurang Laxman Hirde,
Age-58 years, Occu:Agri.,
- 14-c) Rama Laxman Hirde,
Age-55 years, Occu:Agri.,
- 14-d) Anna Laxman Hirde,
Age-52 years, Occu:Agri.,
- 14-e) Dada Laxman Hirde,
Age-49 years, Occu:Agri.,
- 14-f) Madhukar Laxman Hirde,
Age-43 years, Occu:Agri.,

Respondent Nos.14-a to 14-f R/o-Hirdewadi,
Tal.Shridonga, Dist-Ahmednagar.

...RESPONDENTS
(Resp. Nos.1A to 1G Orig. Plaintiffs)

...
Mr.S.P. Salgar Advocate h/f. Mr.N.V. Gaware Advocate
for Appellants.
Mr.Yogesh Kale Advocate h/f. Mr. R.R. Karpe Advocate
for Respondents.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE OF RESERVING ORDER : 3rd DECEMBER 2021

DATE OF PRONOUNCING ORDER : 8th JUNE 2022

ORDER :

1. Present Appeal has been filed by original Defendant Nos.6 and 7 to challenge the order passed by the learned Principal District Judge, Ahmednagar in Civil Misc. Application No.57 of 2007 on 27th September 2011, whereby their application under Section 5 of the Limitation Act to condone the delay came to be rejected.

2. Heard learned Advocate appearing for the appellants and learned Advocate appearing for the respondents.

3. It has been vehemently submitted on behalf of the appellants that the impugned order is illegal. Learned Principal District Judge failed to exercise the discretion when the delay

caused in filing the appeal was properly explained. Defendant Nos.6 and 7 were served with the suit summons but they failed to appear and therefore, initially, suit had proceeded, ex-parte against them by order dated 7th April 2001. However, that order was got set aside by them below Exhibit-22 by order dated 14th August 2001. Thereafter they had filed written statement. The Advocate engaged by them had, thereafter, not informed the progress of the case and all of a sudden gave no instruction pursuant on 18th October 2004, without giving any kind of intimation to the present appellants. Thereafter the Judgment has been delivered on 20th October 2004. The said fact came to the knowledge of the appellants on 10th March 2007 and therefore, they had prayed for condonation of delay of 845 days in filing of the appeal. There was absolutely no negligence on their part but due to the negligence on the part of their Advocate to communicate the progress, they could not attend the further Court proceedings. Appellants had examined Dattatraya Laxman Misal to support the reasons, but he has been disbelieved. When the law requires that the Appellate Court should be considerate in considering the delay applications, the learned Principal District Judge appears to have adopted rigid

view and therefore, substantial questions of law are arising in this case, requiring admission of the Second Appeal.

4. Per contra, the learned Advocate appearing for the respondents has relied on the reasons given by the learned Principal District Judge while rejecting the application for condonation of delay and submitted that no reasonable ground was shown by the present appellants for condonation of delay of 845 days. Even the respondents have examined Appa Govind Misal to support their contention objecting the application. The plaintiffs / respondents had filed the said suit for partition and separate possession. Even, initially, the present appellants / defendants had not appeared before the trial Court and the matter had proceeded ex-parte. They got that order set aside and even took part in the proceeding by filing written statement. Thereafter they ought to have kept the track. It is not the job of the Advocate only to inform the progress of the case to the client, but even the client also should be in touch with the Advocate. It has come on record that the present appellants are residing at village Belwandi Sugar and village Loni Vyanknath respectively, which are at a distance of about 6 to 7 Kms. from each other. The proceedings were taken before the trial Court at

Shrigonda and the distance between those two villages and Shrigonda is about 10 to 12 Kms. Appellant – Dattatraya Misal has also admitted that he goes to Shrigonda for various reasons, oftenly. He could have definitely gone to the office of his Advocate to make inquiry as to what is the status of his litigation. Those precautions have not been taken by the appellants which are expected from a good litigant. Under such circumstances, the Principal District Judge was justified in rejecting the application on the ground that no sufficient and reasonable ground has been shown to condone the delay.

5. Learned Advocate for the appellants has relied on the decision in ***N. Balakrishnan vs. M. Krishnamurthy, 1998 AIR (SC) 3222***. In this Case, the Hon'ble Supreme Court had condoned the delay of 883 days when it was found that as a matter of fact it was the counsel who did not pursue the petition and allowed it to be dismissed in default and the appellant therein came to know about it on receipt of execution warrant.

6. Learned Advocate for the respondents has relied on the decision in ***P.K. Ramachandran vs. State of Kerala, 1998 AIR (SC) 2276***, wherein it has been observed that, the High

Court did not examine the reply filed by the appellant as reference to the same was conspicuous by its absence from the order. There was no explanation, much less a reasonable or satisfactory one offered by the respondent for filing appeal after 565 days. The order condoning the delay therefore, was not sustainable. It was then observed in the same decision that, law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds. Further reliance has been placed on the decision in ***Kamalbai Narasaiyya Shrimal and another vs. Ganpat Vithalrao Gavare, 2007(1) Bom.C.R.51***, wherein it was held that, poverty is cited as ground for the condonation of delay but it was not explained how this difficulty was surmounted by them after six months and therefore, when no proper explanation is given, delay cannot be condoned. Further reliance has been placed on the decision in ***Vithal S/o Dharmaji Potalwad (D) through LR and others vs. Akrambee w/o Abdul Raheman (D) through LR and others, 2014(6) ALL MR 392***, wherein this Court held that, plea that delay was caused due to ill health of the appellant, facts on record show that every attempt was made by appellant

to protract things, to delay execution and to defeat claim of respondents, no sufficient cause was made out to condone delay and therefore, the delay cannot be condoned. Accordingly, the delay was not condoned. Similarly, the delay was not condoned by this Court in ***Chandrakant S/o Laxman Kulbhaiyya and another vs. State of Maharashtra and others, 2015(2) Mh.L.J. 323, Shafi Yakub Pathan and others vs. akbar Ramjan Pathan Died Through Lrs, Nasir Akbar Pathan and others***, (Civil Application No.6021 of 2015), decided by this Court on 24th August, 2021.

7. At the outset, it can be seen that the delay that had occurred in filing the first appeal before the District Court, Ahmednagar, was 845 days. We cannot ignore the earlier act on the part of the present appellants also. Initially also they had not attended the Court though duly served. Again the trial Court was required to exercise the discretion and upon the grounds shown, the order of proceeding the matter ex-parte against them, came to be set aside and they were permitted to take part in the proceeding by filing written statement. After happening of this, it was the boundant duty of the appellants to pay more attention to the litigation, but it appears that they left it entirely to the

Advocate. No doubt the Advocate has duty to inform the clients about the stages of the litigation and what progress has been made. But, equal duty is also on the clients also to remain in touch with the Advocate and ask him about the progress of the case. It cannot be one sided from any angle. It is to be noted from the record of the trial Court, Exhibit-51 given by the Advocate representing the appellants that he informed the Court that though he had given messages to his clients, they are not remaining present and therefore the matter be adjourned. This application was given on 4th September 2004 and it came to be granted. At Exhibit-54, ultimately, on 18th October 2004, no instructions purshis has been given by the Advocate. Even in the no instructions purshis also, it is stated that messages were given, phone call was made, letter was given and personally also defendant Nos.5 to 9 therein were informed. The appellants have contended that they had changed their address. However, witness - Dattatraya Laxman Misal has not stated, as to why the appellants had not told about the change of address to their Advocate. If the Advocate would not have been informed about change in address, how he was supposed to know about it. Under such circumstance, everything cannot be left to the Advocate only.

8. The ratio in ***N. Balakrishnan vs. M. Krishnamurthy*** (supra), will not be applicable to the facts of the present case, as in the said case it was found that the Advocate had not pursued the petition and allowed it to be dismissed in default. Here in the present case, the concerned Advocate appears to have made efforts and he says that he had informed about the next date to the appellants. The appellants have not taken any action against the concerned Advocate with the Bar Council of Maharashtra and Goa. It is very easy to make allegations against a person who is not before the Court. Therefore, it cannot be said that the reasonable ground was proved by the appellants for condonation of delay. The ratio laid down in the authorities relied by the learned Advocate for the respondents, is applicable here. When no sufficient ground is shown for condoning the delay, then the learned Principal District Judge was justified in rejecting the application for condonation of delay. No substantial questions of law are arising in this case requiring admission of the Second Appeal. It deserves to be dismissed at the threshold, as, at the cost of repetition, no substantial questions of law as contemplated under Section 100 of the Code of Civil Procedure are arising in this case. One more fact noted is that, almost

everything is completed now regarding the execution of the decree and it appears from the record that has been received, even the possession has been given to the respective sharers.

9. Under such circumstances, the Second Appeal stands dismissed.

10. So also, Civil Application No.13670 of 2011, moved for stay, stands rejected.

[SMT. VIBHA KANKANWADI , J.]

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