

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

SECOND APPEAL NO. 564 OF 2019

Balu s/o Bhaurao Chavan,
Age: 41 years, Occ: Driver,
R/o: A/P-4-36-1210,
Near Bade Kirana, Bharat Nagar,
Garkheda Parisar, Aurangabad.

... Appellant
(Original Defendant)

VERSUS

Mrs. Vimal w/o Rajendra Bhagat,
Age: 41 years, Occ: Service,
R/o: House No. D-10/15,
Bhujbal Nagar, Jaisingpura,
Aurangabad.

...Respondent
(Original Plaintiff)

...
Advocate for Appellant : Mr. Menezes Joslyn A.
Advocate for Respondent : Mr. R.V.Gore
...

CORAM : - RAJESH S. PATIL, J.

DATE OF RESERVATION : 15.11.2022.
DATE OF PRONOUNCEMENT : 07.12.2022.

JUDGMENT :

1. Since a short question of law is involved whether the delay of 180 days is required to be condoned in filing the appeal before the lower Appellate Court, this Second Appeal is taken up for final hearing at the admission stage.

2. The appellant herein-original defendant has filed this Second Appeal, challenging the order of the District Judge -3, Aurangabad passed in Civil Misc. Application No. 272 of 2018, dated 21.06.2019.

3. By the impugned order, the District Judge-3, Aurangabad had rejected the application for condonation of delay of 180 days caused in preferring the First Appeal in District Court, against the ex-parte decree passed in RCS No. 78 of 2017.

4. The respondent herein-original plaintiff had filed a suit for recovery of Rs. 90,000/-, on the ground that it was a hand loan given to the appellant herein. The appellant herein-original defendant appeared in the suit through Advocate, but subsequently failed to file his Written Statement, hence Ex-Parte Decree was passed by the trial Court. Against the said Ex-Parte Decree, the appellant herein-original defendant preferred appeal along with a delay condonation application, praying therein to condone the delay of 180 days in filing the appeal. The appellate District Court dismissed the delay condonation application stating therein that there was no just and reasonable ground for condoning the delay.

5. The appellant has filed the present Second Appeal and has submitted that the District Court-3, did not consider the aspect

that, when the suit proceeded ex-parte the trial Court should have proceeded under Order VIII Rule 10 of the Code Civil Procedure, (for short 'CPC') instead of Order IX Rule 9 of the CPC.

6. This Court by order dated 16th December, 2019 admitted the Second Appeal on following questions of law :

“(i) Whether the Appellate Court while deciding the application for condonation of delay has ignored the fact that the trial Court proceeded with the suit under the provisions of Order IX Rule 6 instead of proceeding under Order VIII Rule 10 of the Code of Civil Procedure.

“(ii) Whether in the facts and circumstances present in the matter, the impugned judgment and order of the First Appellate Court needs interference in the second appeal.”

7. On the statement of the learned counsel for the appellant, that a sum of Rs. 85,000/- is already paid to the respondent-plaintiff in the execution proceedings, therefore, the Court has stayed the operation of the execution proceedings.

8. This Court by order dated 16.06.2022 issued notice for final hearing of the Second Appeal. The learned Advocate for the respondent has filed his appearance and opposes the prayer to the present application, which is taken up for final hearing.

9. The learned Advocate for the appellant argued that the appellant had regularly followed up with his Advocate in the lower

Court for update of the matter. The appellant had hardly studied upto 10th Standard and has no knowledge of law, hence he believed in the assurances of his Advocate, that the matter will be taken care of by the Advocate. The appellant is working as driver and is required to travel out of city for long tours, as per requirements of customers and he is paid on daily basis. The delay caused in preferring the appeal before the lower Court is not intentional. However, the appellate Court committed mistake by deciding the suit under the provisions of Order IX Rule 6 of the CPC, instead of order VIII Rule 10 of the CPC. Hence it is requested that the order passed by the lower Appellate Court be set aside and the delay be condoned and the appeal be heard on merits.

10. The learned Advocate for the appellant also relied upon two judgments to buttress his submission viz. **Esha Bhattacharjee Vs. managing Committee of Raghunathpur Nafar Academy and Others 2013 (12) SCC 649** on the guidelines of Delay Condonation Application and **the Collector, Land Acquisition, Anantnag and another vs. Mst. Katiji and Others 1987 AIR (SC) 1353**. The paragraph Nos. 2 & 3 are reproduced below :

“2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. “Every day’s delay must be explained” does not mean that a pedantic approach should be made. Why not every hour’s delay, every second’s delay? The doctrine must be applied in a rational common sense pragmatic manner.”

11. The learned Advocate for the respondent-plaintiff opposes the Second Appeal and stated that the present appeal has no merits and the lower Appellate Court was right in rejecting the Civil Misc. Application of condonation of delay. It is further argued on behalf of respondent that the present application and the appeal in the lower Court was filed only for prolonging the litigation. In fact, in the execution proceedings the Appellant was sent to the Civil Prison. He admitted that Rs. 85,000/- was deposited by the appellant and the said amount has been withdrawn by the respondent. He also relied upon the judgment of the learned Single Judge passed in **Conception Fernandes & Anr. Vs. Tasneem Shaikh (Mrs.) & Ors. 2014 (5) ALL M.R. 751** and referred to paragraph Nos. 14, 15 and 16 of the said judgment.

“14. A party can of course say, he being not a legal expert, would not know immediately that decision of his Advocate is not sound and so he would not be in a position to promptly exercise his choice of Advocates and would be able to do so only after passage of sometime, when he would learn or be told about the incorrectness of approach of his Advocate. Even this justification, in my opinion, cannot answer the test of due diligence. The reason being that a representative or Advocate and the party being represented in a case are not two separate

identities in that case, so far as conduct of the case is concerned. Whether an Advocate does on behalf of the client is considered to be done by the party himself. The acts of the Advocate before the Court are binding upon the party he represents and what he submits before the Court on facts is only what the party says and what he says in law is with the approval, express or assumed, of the party. In other words, all actions taken before the Court by an Advocate, are the actions of the party. So, there is no splitting of concept of due diligence, one of the party and the other of the Advocate, so as to enable the party to be excused for negligence of the Advocate just by showing his own diligence. If such a ground is to be taken as a good ground, it may provide an effective tool to the lazy and indolent parties to conveniently get over the rigour of due diligence test prescribed under the proviso to Rule 17, Order 6 CPC. All that he would have to do is change the Advocate blaming it on the previous Advocate.

15. Viewed in this way, I am of the opinion that the learned Civil Judge was right in holding that the amendment application could not have been allowed only on the ground that there was failure of the Advocate to raise the matter inspite of he been duly instructed by the petitioner.

16. Learned Civil Judge in para 20 of the impugned order has observed that the petitioners have not averred any facts to show that they had exercised due diligence before signing and verifying the Written Statement prepared by their Advocate on record. But, as rightly submitted by learned Counsel for the respondents, learned Civil Judge has made some amends in his approach to the amendment application and later on, as seen from his observation in paragraph 31, the learned Civil Judge considered the very ground of failure of the Advocate on record to incorporate the pleadings inspite of he being duly instructed and found that it was not a sufficient ground to enable the Court to exercise its discretionary power under Rule 17, Order 6 of the CPC. This later observation indicates

application of mind on the part of learned Civil Judge, to the facts and circumstances of the case, thereby satisfying the test laid down in the case of Rohit Kapadia (supra). The criterion is not whether any averment regarding due diligence is made, and the real test is whether the Court has, by taking into account the facts and circumstances of the case, decided as to whether or not the party could have raised the matter earlier after exercise of due diligence.”

12. The learned Counsel for the respondent argued that as held by the District Judge there is no due diligence shown by the appellant and blaming only on his Advocate will not suffice his case. Therefore, it is prayed that Second Appeal be dismissed.

ANALYSIS :-

13. The Appellant has claimed that he has followed up with his Advocate in the lower Court for update of the matter. He has barely studied up to 10th Standard and he is working for gain as driver who earns his salary by way of daily wages in the form of tours. The appellant has no knowledge about the legal requirements, hence he believed in assurances of his Advocate, that the matter will be taken care of by the Advocate.

14. The delay in filing the appeal was 180 days, however, the appellate Court did not find good ground to condone the delay.

15. The Judgment in **Shri Lotan Suresh Patil Vs. Shivaji**

Shikshan Sanstha & Ors. in Writ Petition No. 12069 of 2013, decided on 21.08.2014 is squarely applicable to the matter in hand. The paragraph No. 5 of the said judgment is reproduced herein below.

“5. The aforesaid parameters would indicate that the Court should adopt a liberal, pragmatic, justice-oriented and non-pedantic approach for condonation of delay. More importantly, the Apex Court has also made reference to the distinction between the inordinate delay and delay of short duration. In case of inordinate delay doctrine of prejudice is attracted while in the case of delay of short duration it may not be attracted. Therefore, in the case of short duration a strict approach is not warranted. The conduct, behaviour and attitude of the party, any inaction and negligence on its part needs to be considered. It also needs to be kept in mind that a party is not getting away with any fraud or misrepresentation.”

16. It is also pertinent to note that the ratio laid down by the Supreme Court in the Judgment **Rafiq & Anr. Vs. Munshilal & Anr. (1981) 2 SCC 788**, wherein it is stated that the party need not suffer due to the mistake of his Advocate. The paragraph No. 3 is reproduced herein below :

“3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of

the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. May be, we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned Advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs

amounting to Rs. 200 should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K. Saghi."

17. Taking into consideration the facts stated in this matter and the ratio laid down by the Supreme Court in **Rafiq & Anr.** (supra), **The Collector, Land Acquisition, Anantnag** (supra) and the Bombay High Court in **Shri Lotan Suresh Patil** (supra), I hereby allow the Second Appeal and set aside the order dated 21.06.2019 passed by the District Judge-3, in Civil Misc. Application No. 272 of 2018.

18. The delay in filing the First Appeal against the ex-parte decree is hereby condoned. The Regular Civil Appeal be numbered and be taken up for hearing on its merit. An endeavour should be made that the Regular Civil Appeal be heard expeditiously and in any case within a period of one year from the date of this order and the same be disposed of.

19. The Second Appeal is accordingly disposed of.

(**RAJESH S. PATIL**)
JUDGE