

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

**APPEAL FROM ORDER NO.23 OF 2016
WITH
CIVIL APPLICATION NO. 5086 OF 2016**

**SUBHADRABAI NANDLAL AGRAWAL
VERSUS
FRANCIS JOHN FERNANDIS AND OTHERS**

...

Advocate for Petitioners : Mr. Sabnis Ameya N
Advocate for Respondent Nos.1 to 3: Mr. D. R. Jethliya

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 5th January, 2022

PER COURT :

. Heard both the learned advocates for the respective parties.

2. This appeal from order challenges the order passed by the learned 4th District Judge, Dhule in Misc. Civil Application No.44/2015, thereby rejecting the application seeking condonation of 69 days delay.

3. The appellant is the original defendant in Regular Civil Suit No.445/2000, against whom, a decree for perpetual injunction and recovery of possession was passed.

4. Being aggrieved by the judgment and decree passed in the suit, the appellant filed Civil Appeal No.98/2011 which came to be dismissed in default on 28-11-2014. The appellant therefore filed Misc. Civil Application No.44/2015 seeking condonation of delay of

69 days in filing the application for re-admission of Civil Appeal No.98/2011 on the ground that the appellant could not contact her advocate and the appeal came to be dismissed in default after some dates. The appellant is suffering from diabetes, arthritis and low memory. She is 60 years old lady and she has a very poor eyesight. According to the appellant, she has a very good case and fair chances of success if the appeal is heard and decided on merits. The said application is dismissed mainly on the ground that no sufficient cause is shown in the said application. This order is impugned in the present appeal.

5. I have heard the rival submissions of the respective advocates. Perusal of the impugned order, reveals that almost in each and every para, the first appellate court has observed that, it is a well settled position that the Courts must be lenient while deciding the applications for delay condonation. However, the reasons given by the appellant for condonation of delay were not accepted by the first appellate court.

6. First Appeal is a statutory remedy, which the appellant has availed. Her valuable right in respect of immovable property is involved in the matter. The appellant must get fair opportunity to contest her matter on merits. The appellate court ought to have considered the delay condonation application from this angle and ought to have condoned the delay by imposing suitable cost on the appellant.

7. The learned advocate for the respondents strenuously submitted that, even the Misc. Civil Application is filed belatedly after three years which shows that the appellant is trying to prolong the execution of the decree passed in favour of the respondents. The appeal was prolonged for three years by adopting delaying tactics. Therefore, this Court may not exercise discretion in favour of the appellant.

8. Be that as it may, since the first appeal is the statutory remedy available to the appellant to challenge the decree passed against her, this Court is of the opinion that, she deserves a fair opportunity to contest the appeal on merits. In that view of the matter, the impugned order cannot be sustained. Hence, the following order:

ORDER

(a) The impugned order passed by the District Judge-4, Dhule in Misc. Civil Application No.44/2015, is hereby quashed and set aside subject to the appellant paying cost of Rs.25000/- to the respondents.

(b) The appeal be decided on its own merits within a period of six months from the date of receipt of this order.

(c) In view of disposal of appeal, civil application is disposed of.

(NITIN B. SURYAWANSHI, J.)