

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.5805 OF 2020
IN SAST/40384/2017

SYED SALIMUDDIN S/O SYED NASIRUDDIN

VERSUS

NAYYAR JAHAN BEGUM W/O SYED MOINUDDIN AND ANOTHER

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Mr. A.S. Kulkarni, Advocate for the applicant

Mr. A.P. Bhandari, Advocate for the respondent No.1

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 13th OCTOBER, 2021

PRONOUNCED ON : 03rd JANUARY, 2022

ORDER :

1 Present application has been filed for getting the delay of 399 days condoned in filing Second Appeal.

2 Heard learned Advocate Mr. A.S. Kulkarni for the applicant and learned Advocate Mr. A.P. Bhandari for the respondent No.1.

3 It has been vehemently submitted on behalf of the applicant that the applicant wants to challenge the Judgment and Decree passed in Regular Civil Suit No.906/2011, thereby the plaint came to be rejected under Order VII Rule 11(d) of the Code of Civil Procedure as hit by principle of *res*

judicata under Section 11 of the Code of Civil Procedure and the said order has been confirmed by the First Appellate Court in Regular Civil Appeal No.114/2013 before learned District Judge-7, Aurangabad dated 18.07.2016. The delay of 399 days has been caused due to the ill health of the General Power of Attorney of applicant. He was suffering from kidney stone and spondylosis, for which he has taken treatment. The applicant has good case on merits. Reliance has been placed on the decision in **Shrihari Hanumandas Totala vs. Hemant Vithal Kamat and others, Civil Appeal No.4665 of 2021** arising out of SLP (C) No.3899 of 2021, decided by Hon'ble Apex Court on 09th August, 2021, wherein it has been observed that when evidence is not tendered and the plaint, on the face of it, does not disclose any fact that may lead us to conclusion that it deserves to be rejected on the ground that it is barred by principles of *res judicata*. But then such application under Order VII Rule 11 of the Code of Civil Procedure must be decided within the four corners of plaint.

3.1 Further reliance has been placed on the decision in **The Jamia Masjid vs. Sri. K.V. Rudrappa (since dead) by LRs and others, Civil Appeal No.10946 of 2014**, decided by the Three Judge Bench of the Hon'ble Apex Court on 23rd September, 2021, wherein it has been held that -

“Issues that arise in a subsequent suit may either be questions of fact

or of law or mixed questions of law and fact. An alteration in the circumstances after the decision in the first suit, will require a trial for the determination of the plea of res judicata if there arises a new fact which has to be proved. However, the plea of res judicata may in an appropriate case be determined as a preliminary issue when neither a disputed question of fact nor a mixed question of law or fact has to be adjudicated for resolving it.”

It was also concluded that -

“While a compromise decree in a prior suit will not bar a subsequent suit by virtue of res judicata, the subsequent suit could be barred by estoppel by conduct.”

The learned Trial Court in this case has not considered the similarity in the issue of the earlier decided suit and the present suit and without there being any evidence proceeded to decide the application. In fact, prior to the said decision to reject the plaint by order dated 11.03.2013, similar application was rejected by the same Judge on 19.10.2012. Therefore, the present applicant has very good case as the substantial questions of law are arising in this case. The delay was unintentional and, therefore, it deserves to be condoned.

4 Per contra, the learned Advocate appearing for the respondent No.1, after taking this Court to the affidavit-in-reply filed on behalf of the respondent No.1, submitted that the ground that has been given for

condoning the delay is the ill health of the Power of Attorney. Health issue of Power of Attorney of the applicant cannot be the ground to condone the delay. The applicant has not produced any record to support the fact that he had approached some clinic or hospital. The delay is inordinate and cannot be condoned merely by asking.

5 There is no doubt that the delay of 399 days is inordinate, however, whether satisfactory explanation has been given or not, is a question. Unfortunately, though specific name of the clinic, where Power of Attorney has allegedly taken treatment has been stated; documentary evidence has not been produced. It will not be out of place to mention here that even the suit that was filed was through the same Power of Attorney. The appeal was also through the same Power of Attorney. Under such circumstance, the original plaintiff might be dependent on the said Power of Attorney. However, the original plaintiff is resident of Aurangabad and the General Power of Attorney holder is also from Aurangabad. It is hard to believe that for about 399 days the original plaintiff would not have come to know that the General Power of Attorney holder had given him entire information about the dismissal of his appeal in time; yet, as he was dependent on the Power of Attorney, he believed that the Power of Attorney would do the necessary steps for preferring an appeal. Affidavit of original

plaintiff has not been filed. Whatever verification has been done along with the application is that of the Power of Attorney and, therefore, when it is not accompanied by the documents and delay is inordinate, leniency cannot be shown. Every litigant should be alert about his rights. For some convenience to agitate that right the plaint can be presented through Power of Attorney, but when the plaintiff was seeking declaration that the Judgment and Decree passed in earlier instituted suit in the year 1966 should be declared as null and void, on the ground that it was obtained by suppressing and concealing various facts, then, the plaintiff should have been alert about his rights. He could not have afforded to only rely on the General Power of Attorney. The provision for appointment of General Power of Attorney is not for proxy litigation or purchased litigation. When plaintiff wanted to contend that he has substantial right in the property and when he could gather that the Power of Attorney is ill, he could have at least presented the Second Appeal in time.

6 The plaintiff may be having a good case on merits, but in view of the fact that he has failed to show reasonable, much less sufficient ground to condone the delay, we cannot go into the merits of the case. Under such circumstance, the application stands rejected.

(Smt. Vibha Kankanwadi, J.)