

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 39 OF 2019

Bhaskar Bapurao Gavade
Aged 47 years, occ: Agriculturist
R/o: Karhawagaj,
Tal. Baramati, District Pune

...Appellant

Vs.

1. Bapurao Tatyaba Gavade
Aged 72 years, occ: Agriculturist
R/o: Karhawagaj,
Tal. Baramati, District Pune
2. Sunil Bapurao Gavade,
Aged 42 years, occ: Service and Agriculturist
R/o: Karhawagaj,
Tal. Baramati, District Pune
3. Sidheshwar Ramchandra Raikar
Deleted
4. Ashok Jijaba Barmate (Gavade)
Aged 42 years, occ: Agriculturist
R/o: Malegaon,
Tal. Gevrai, District Beed
5. Bhanudas Tatyaba Barmate (Gavade)
Deleted

...Respondents

Mr. Rahul S. Kadam - Advocate for the Appellant

CORAM : S. M. MODAK, J.

DATE : 25th AUGUST, 2022

JUDGMENT :-

1. Heard learned Advocate Shri Rahul Kadam for the

Appellant/original Plaintiff.

2. Before the trial Court there were in all five defendants. Defendant No. 5A to 5D are the legal representatives of deceased Respondent No. 5- Bhanudas. Defendant No. 1-Bapurao is the father of the plaintiff whereas another son is Defendant No.2- Sunil. Defendant Nos. 3, 4 and 5 are the purchasers of the respective lands from father-Defendant No. 1.

3. Defendant Nos. 1 and 2 only have contested the suit. It was dismissed. There is delay of three years in preferring the first appeal. The First Appellate Court as per Order dated 11/10/2017 passed in Civil Misc. Application No. 77 of 2015 refused to condone the delay in filing First Appeal. As it is settled provisions of law that refusal to condone the delay in First Appeal also amounts to passing of decree for the reason that such decision amounts to dismissal of the Appeal.

4. Notice is served on Respondent Nos. 1, 2 and 4 whereas Respondent Nos. 3 and 5 were deleted. As said earlier, present Respondent Nos. 1 and 2 were the contesting Respondents before the First Appellate Court. The Respondent Nos. 1, 2 and 4 have not appeared herein in spite of the service. Considering the short controversy the Appeal is taken up for final hearing.

5. Admit the appeal by framing substantial questions of law:-

(i) Whether the First Appellate Court has wrongly refused to condone the delay caused in filing First Appeal?

(ii) What Order?

6. The Original plaintiff has quoted following two reasons for condonation of delay.

(a) The plaintiff was desirous of settling the dispute with his own father and brother and when realized that they are not going to settle the matter, he had chosen to prefer an appeal.

(b) The Mediator Bhanudas Baramate (Gavade) is his uncle and he was assisting the Appellant in settling the matter with father and the brother and he expired.

7. The aforesaid reasons does not appeal to be conscience of the First Appellate Court and delay was not condoned. The First Appellate Court gave two following reasons :-

(a) There is no positive evidence to substantiate the theory of settlement talks going on with Defendant No. 1 and 2.

(b) Date of death of Bhanudas Baramate (Gavade) is not stated in the application.

8. According to the learned Advocate Shri Rahul Kadam, there is no

reason for the Appellant to delay filing of an Appeal under the purported reason of settlement of talks. According to him, why the Appellant will say that his uncle Bhanudas has expired unless he has really expired.

9. The relationship of the plaintiff with defendants nos. 1 and 2 are not disputed. One can say these facts from the judgment of the trial Court. The Plaintiff was compelled to file a suit because he was not given due share by way of partition. In fact Defendant Nos. 1 has sold away the properties by executing the three different sale deeds. Even there after the defendant No. 1 went to the extend of pleading that he sold the lands for the purpose of legal necessity.

10. The First Appellate Court while refusing to condone the delay has not considered the factual background, why the plaintiff was compelled to file the suit even the First Appellate Court has not considered the fact that defendant no. 1 was determined not to give any share to his son-plaintiff.

11. It is true that there are various judgments given by the Hon'ble Supreme Court which guides us about the approach to be taken while dealing with the request for condonation of delay. No doubt the approach should be liberal and it ought not be technical. It can be looked into from

two angles. One is about bonafideness of the reasons and second is about material produced in order to justify the reason.

12. This Court feels that the First Appellate Court has mixed up both the issues. Why the Plaintiff will say that his uncle Bhanudas Baramate (Gavade) has expired if same may not be true. Giving the date of death is by way of giving better particulars. The plaintiff who is fighting for getting the share in the properties against his own father and son who have been denied a share by the trial Court, why he will prolong filing of the appeal by giving imaginary ground of settlement.

13. This Court feels that the First Appellate Court has taken two technical view while appreciating the reasons for delay. Such view cannot be justified. The judgment by the trial Court was delivered on 09/04/2012 and plaintiff obtained the certified copies on 05/03/2013 and the said judgment of the Trial Court challenged in the year 2015. So delay is of almost three years. Litigant who is having expectation that his grievance can be meted out without approaching the Court then certainly he will prefer that. So after dismissal of the suit, the plaintiff had chosen the path of the settlement and approached the First Appellate Court when settlement talks have failed.

14. So this Court feels that those reasons can be considered as sufficient reasons for the condonation of delay.

15. Hence substantial questions of law answered in the affirmative. At the same time, the contesting Respondent Nos. 1 and 2 needs to be compensated for the expenses they might have incurred in opposing the delay condonation application before the First Appellate Court. Hence the following Order is passed :-

ORDER

- (i) Second Appeal No. 39 of 2019 is allowed subject to payment of cost of Rs. 5,000/- to be paid to the Respondent Nos. 1 and 2 in equal proportion.
- (ii) The Order dated 11/10/2017 passed by the Adhoc District Judge-2, Baramati, District Pune in Civil Misc. Application No. 77 of 2015 is set aside.
- (iii) Civil Misc. Application No. 77 of 2015 is allowed and the Appeal be registered.
- (iv) The cost be deposited before the First Appellate Court within a period of three weeks from today and once deposited the First Appellate Court is directed to disburse that cost to the Respondent Nos. 1 and 2.

[S. M. MODAK, J.]