

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

**SECOND APPEAL NO.458 OF 2022  
WITH  
INTERIM APPLICATION NO.3488 OF 2022  
IN  
SECOND APPEAL NO.458 OF 2022**

Harischandra Ravji Mogal & Ors. ...Appellants  
Versus  
Shivanand Pandharinath Khairnar & Anr. ...Respondents

.....

Mr. Sanjay P. Shinde for Appellants.  
Mr. Pratik B. Rahade for Respondent No.1.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.**

**DATED : 8<sup>th</sup> JUNE, 2022.**

**P.C.:-**

1. With consent the matter is heard finally.
2. This Appeal is directed against Judgment dated 30<sup>th</sup> March 2022, whereby learned Civil Judge Senior Division, Niphad dismissed the Application to condone the delay of 7 months 28 days in preferring an Appeal against the Judgment and decree dated 30<sup>th</sup> August 2016 in R.C.S. No.49 of 2012 (Old Special Civil Suit No.33 of 2009).

3. Heard learned counsel for the Appellants and learned counsel for the Respondents. I have perused records and considered the submissions advanced by the learned counsel for the respective parties. The question raised in this Appeal is whether the first Appellate Court failed to exercise its jurisdiction to condone the delay in judicious manner.

4. Respondent No.1-Original Plaintiff had filed a Suit for specific performance against Harishchandra R. Mogal and other Defendants. Harishchandra R. Mogal-Original Defendant No.1 put in his appearance through an Advocate, filed the written statement and contested the suit. A perusal of the Judgment of the Trial Court reveals that the Advocate representing the Defendants had neither cross-examined the three witnesses i.e. PW5, PW6 and PW7 examined by Respondent No.1-Original Plaintiff nor advanced arguments on behalf of the Defendants. The Suit was decreed without hearing the Defendants.

5. Defendant No.1-Harishchandra R. Mogal challenged the said Judgment in an Appeal which was filed alongwith an Application for condonation of delay of 7 months and 28 days. The reasons for the delay, as stated in the Affidavit dated 24<sup>th</sup> November 2021 are that

Harishchandra R. Mogal had suffered paralytic stroke during the pendency of the Suit due to which he was unable to appear before the Court. Harishchandra R. Mogal expired during the pendency of the Delay Condonation Application. The Appellants, who are the legal representatives of Harishchandra were brought on record. The Appellant No.1B filed his Affidavit, wherein he affirmed that his father Harishchandra R. Mogal, who was pursuing the Suit, had suffered paralytic attack on 15<sup>th</sup> March 2015 and that he was under medical treatment till 12<sup>th</sup> April 2017. He has stated that his father was unable to walk and consequently unable to appear before the Court. He learnt about the decree passed in the Suit only on receipt of notice in the Execution Proceeding No.19 of 2017, it is only thereafter that they consulted their Advocate and as per his advice they filed an Appeal alongwith the Application for condonation of delay. This witness has stated that he had brought his father to the Court in another proceedings on a wheel chair. He has further stated that since the time of his sickness, his father was unable to appear before the Court on his own.

6. The Applicants had also examined Dr. Tushar Ramnath Ghuge, who has also confirmed that Harishchandra R. Mogal had

suffered paralytic attack on 15<sup>th</sup> March 2015 and that he was under his treatment till 12<sup>th</sup> April 2017.

7. The material on record thus clearly indicates that Harishchandra R. Mogal, Original Defendant No.1, had suffered paralytic stroke during the pendency of the Suit and he was unable to appear before the Court due to his sickness. The Advocate representing the Defendants had chosen not to cross-examine the witnesses and/or argue the matter, possibly for want of instructions. The advocate on record did not inform the Defendants about the Judgment. They learnt about the Judgment only on receipt of the notice in execution proceeding. The reasons assigned by the Defendants in my considered view constitute sufficient cause.

8. In the case of *Manoharan Vs. Sivarajan and others (2014) 4 SCC 163*, the Apex Court has reiterated that the power to condone the delay in approaching the Court has been conferred upon the Courts to enable them to do substantial justice to parties by disposing the cases on merit. If the explanation given does not smack malafide or is not shown to have been put forth as a part of a dilatory strategy, the Court must show utmost consideration to the suitor. In the case in hand, the appheants have explained the delay with cogent reasons. The delay

was not deliberated. Hence, the learned Judge was not justified in taking a pedantic approach, particularly when the prejudice, if any, caused to the Respondent could be compensated with costs.

9. Under the circumstances, the Appeal is allowed with cost of Rs.5,000/-. Impugned Order dated 30<sup>th</sup> March 2022, passed in Miscellaneous Civil Application No.21 of 2017 is set aside. The delay is condoned. The Appeal is Ordered to be registered. The District Judge is directed to decide the Appeal on its own merits after hearing the respective parties. Learned District Judge is requested to dispose of the Appeal as expeditiously as possible.

10. Second Appeal stands disposed of.

11. In view of disposal of Second Appeal, Interim Application does not survive and hence it is also disposed of.

**(SMT. ANUJA PRABHUDESSAI, J.)**