

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

**SECOND APPEAL NO.573 OF 2022
WITH
INTERIM APPLICATION NO.17128 OF 2022**

Dnyaneshwar Sopan Shivarkar (Mali) & Ors. Appellants.

V/s

Baban Dashrath Shivarkar (Mali) & Ors. Respondents.

Mr. Sushant Prabhune for the Appellants.

Mr. Himanshu Kode a/w. Janhavi Karnik for the Respondents.

CORAM : NITIN W. SAMBRE, J.

DATED : 19th OCTOBER, 2022

P.C.:

1. Heard.
2. The respondent nos. 1 to 3-original plaintiffs initiated Special Civil Suit No. 115 of 2015 for possession of the suit property which is consisting of a house property.
3. The present appellants/defendants suffered an ex-parte decree on 23/03/2018. Feeling aggrieved C.M.A. No. 9 of 2019 under Order IX Rule 13 was preferred by the appellants which was rejected on 28/01/2020 by Joint Civil Judge, Senior Division, Baramati.
4. The appellants thereafter preferred Regular Civil Appeal u/s 96(2) of CPC questioning the aforesaid ex-parte decree dated

23/03/2018. Since the appeal was preferred at belated stage Civil Misc. Application No. 20 of 2020 was preferred for condonation of delay.

5. The District Judge having noticed that there is no sufficient cause cited in support of prayer for condonation of delay, rejected the prayer vide judgment and order dated 02/05/2022. As such this second appeal.

6. I have heard the respective counsels.

7. Learned counsel for the appellants urge that based on the pleading in the application, oral evidence of the appellants have demonstrated sufficient cause for condonation of delay, which the First Appellate Court has failed to appreciate. So as to substantiate the said cause, support is drawn by the appellants from the pleadings in the application for condonation of delay, oral evidence recorded.

8. While countering the aforesaid submissions, learned counsel for the respondents/decreed holders would urge that the appellants have conducted themselves in such a way, which not only demonstrate absence of sufficient cause in support of condonation of delay but also were intentionally negligent in pursuing the remedy.

9. According to him, the First Appellate Court vide reasoned order has rightly inferred that the appellants have failed to demonstrate sufficient cause. As such, it is prayed that all the three Courts viz. Trial Court, the Trial Court in the matter of deciding the application for setting aside the ex-parte order, the Appellate Court while rejecting the prayer for condonation of delay has concurrently held against the appellants and as such, the appeal is liable to be rejected.

10. I have appreciated the said submissions.

11. The question of law which in my opinion warrants consideration is, whether the Lower Appellate Court was in error of rejecting the prayer for condonation of delay inspite of there being sufficient evidence and pleadings to infer the existence of sufficient cause.

12. It appears that the Special Suit No. 115 of 2015 was proceeded ex-parte and accordingly decreed on 23/03/2018. The service of suit summons is not disputed by the appellants/defendants. However, what has been claimed that they have instructed one of the close relatives Adv. Kavita Shivarkar to appear and defend the suit. It is claimed that the said lawyer during the pendency of the suit got married and shifted to

America and as such, the suit remain unattended causing substantial hardship to the appellants who are settled possession of the suit property since long.

13. The appellants for the first time came to know about the ex-parte decree when they received notice of execution of the decree dated 23/03/2018 in Darkhast No. 19/2018. It is claimed that immediately they have applied for certified copy and received the same on 17/12/2018.

14. It is further claimed that immediately thereafter the proceedings under Order IX Rule 13 were taken out for setting aside the ex-parte decree. Since the application for setting aside the ex-parte decree was time barred by nine months, a prayer for condonation of delay was also moved. The said application for condonation of delay was resisted by the respondents/decreed holder on the ground that the suit summons were duly served on the appellants/defendants. It is further claimed that the present appellants have filed R.C.S. No. 32 of 2015 in which the respondents have tendered their written statement in which they have specifically pleaded about institution of the present suit.

15. In the said proceedings for setting aside the ex-parte decree, the present appellants have examined the applicant no. 3-Prakash

Shivarkar at Exhibit-23 and has relied upon the copy of Exhibit-1 in Special Civil Suit No. 115 of 2015 at Exhibit-24 so also summons report given in the suit at Exhibits 26 to 28.

16. The Civil Court while dealing with the prayer has recorded a findings that Article 123 of Schedule-I of the Limitation Act prescribe limitation of 30 days for moving a prayer for setting aside the ex-parte decree. However, the said prayer has failed to consider, plea of the present appellants that they got the knowledge of the decree through notice received by them of Special Darkhast No. 19 of 2018 and have received the certified copy for taking out proceedings on 17/12/2018.

17. The application for setting aside the ex-parte decree was taken on 14/01/2019 i.e. within a period of one month from the date of receipt of the certified copy. The fact remains that the said application was rejected on the ground that the delay was not properly explained.

18. It appears that in the said application, the applicants have entered into witness box and deposed in support of prayer for condonation of delay.

19. The evidence recorded at Exhibit-23 specifically state that, the appellants were having knowledge of the Special Civil Suit No.

115 of 2015 however has come out with the case that the appellant's lawyer has not filed the appearance. There is no cross examination in earlier round of litigation i.e. for setting aside the ex-parte decree.

20. Though the counsel for the respondents has urged that the order of rejection of prayer for condonation of delay since in the matter setting aside ex-parte decree passed on 28/01/2020 was not questioned, the same has attained finality against inter se between the parties. He has also claimed that for condonation of delay before the First Appellate Court, identical cause was cited. However, the fact remains that the respondent nos. 1 to 3 in the matter of recording evidence of the witness of the appellant has not cross examined on the issue of engagement of lawyer by the appellants, the marriage of their lawyer and shifting of her to America. The said issue has not been duly appreciated by the Lower Appellate Court. So also in the cross examination, neither the order dated 28/01/2020 rejecting the prayer for condonation of delay in setting aside the ex-parte decree nor evidence the recorded therein was put to and confronted with by the respondents to the appellants.

21. As such, by drawing support from the judgment of the Apex

Court in the matter of **Rafiq & Anr vs Munshilal & Anr (1981) AIR 1400** it has to be held that the appellants were though diligent to engage a lawyer to represent their case, were incapacitate to defend the matter because of failure of lawyer who got married and shifted to America. In the aforesaid judgment of Apex Court, it has been held that the litigant may not be made to suffer for the default of the lawyer.

22. The settled possession of law has could be inferred from the judgment of the Apex Court in the matter of **N. Mohan Vs. R. Madhu (2020) 20 SCC 203** as regards maintainability of appeal even if the prayer for setting aside the ex-parte decree was rejected is well settled. Paragraph no. 16 of the aforesaid judgment is amply clear. As such, it has been inferred that the appellants for the first time got knowledge about the ex-parte decree on 17/11/2018 and as such the appellants have thereafter diligently taken steps for initiating the proceedings for setting ex-parte decree and also condonation of delay in preferring First Appeal before the Court below.

23. As such, there is sufficient cause in my opinion, is very much established.

24. In the aforesaid background, the case for setting aside the

impugned order of rejection of the prayer for condonation of delay is made out

25. In this view of the matter, the impugned order passed by learned District Judge on 02/05/2022 is hereby set aside.

26. Misc. Civil Application No 20 of 2020 is allowed subject to deposit of cost Rs.10,000/- by each of the appellants before the First Appellate Court i.e. total Rs.80,000/- in any case within a period of two weeks from today.

27. If the cost is so deposited, the respondents/decreed holders will be entitled to withdraw the cost of Rs.50,000/- and balance amount of Rs.30,000/- be made over to legal service authority in the Trial Court.

28. The interim order passed by this Court on 05/08/2022 is directed to be continued, till the decision of the appeal of the appellants.

29. The parties hereto are directed to appear before the Appellate Court in any case by 14/11/2022.

30. The parties hereto shall thereafter submit their written notes of arguments in any case by 12/12/2022.

31. The Appellate Court thereafter shall make every endeavour to dispose of the appeal by granting personal opportunity of hearing

by 15/02/2023.

32. The second appeal as such stands allowed in above terms.

33. Interim application also stands disposed of.

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by ANANT
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(NITIN W. SAMBRE, J.)