

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

**SECOND APPEAL NO.120 OF 2013
WITH
CIVIL APPLICATION NO.1559 OF 2013**

- . Kamaji S/o. Govindrao Gabhane,
Age: 60 Years, Occu.: Agri.,
R/o.: Kalamnuri, Tq.: Kalamnuri,
Dist.: Hingoli .. Appellant
Orig. Defendant

Versus

- . Sow. Prabhawati W/o. Janardhan Balkhande,
Age: 52 Years, Occu.: Household,
R/o.: Kalamnuri, Tq.: Kalamnuri,
Dist.: Hingoli .. Respondent
Orig. Plaintiff

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Advocate for Appellant: Mr. Vinayak M. Kagne
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CORAM:	ARUN R. PEDNEKER, J.
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Reserved on:	18.08.2023
Pronounced on:	23.08.2023

JUDGMENT:

1. Heard Mr. Vinayak M. Kagne, learned counsel for the appellant.

2. By the present second appeal the appellant is challenging the order passed by the appellate court in Miscellaneous Application No.6

of 2010, dated 02.11.2012, thereby rejecting the application for condonation of delay in filing the first appeal and thereby confirming the judgment and decree dated 02.05.2003 passed by the Civil Judge Junior Division, Kalamnuri in Regular Civil Suit No.140 of 2002.

3. The facts in brief are that the suit for declaration of ownership and recovery of possession was filed by the respondent / plaintiff against the defendant. It is the case of the plaintiff that 2 Are land i.e. 200 Sq. Metres was purchased from the original owner by her by a registered sale deed out of Survey No.199/4 situated at Kalamnuri. The defendant has purchased his land after the purchase by the plaintiff. The husband of the plaintiff is serving and, therefore, for the purpose of service the plaintiff used to reside at different places and she was residing at her house whenever she visit Kalamnuri. It is the case of the plaintiff that the defendant made encroachment over 7 X 20 Feet area towards northern side of the plaintiff's land

and started tethering cattle. When the plaintiff became aware about the encroachment, she requested the defendant to vacate the land. The defendant asked the plaintiff to measure the land and if in the measurement it is found that there is encroachment he will vacate it. Hence, on 04.06.2002, the plaintiff measured her land and it is concluded that defendant encroached over 1 X 20 Metres on the land of the plaintiff. Hence, the plaintiff asked for vacant possession of the land. However, the defendant refused to hand over the possession, so also, denied the ownership of the plaintiff over the same. Thus, the plaintiff filed the suit for declaration of ownership and possession of the encroached land.

4. Despite service of summons the defendant remained absent and, hence, the suit proceeded ex-parte against the defendant. The plaintiff adduced evidence. She filed a map of measurement, which shows that the defendant has encroached over 1 X 20 Metres area towards northern side of the land of the plaintiff. The defendant remained absent

and there is no rebuttal of evidence from the side of defendant. Thus, the plaintiff was declared owner of 2 Are of land out of Survey No.199/4 and the defendant was directed to deliver vacant possession of encroached area of 1 X 20 Metres on the Northern side of the land of the plaintiff within one month.

5. The defendant filed an appeal against the order of the trial court before the first appellate court on 18.03.2010 along with application for condonation of delay in filing the first appeal.

6. It was the contention of the applicant that the suit filed by the respondent was decided ex-parte and that he was not aware of the judgment of the trial court. The judgment was passed behind the back of the appellant. The respondent meanwhile had filed an application for correction of judgment and decree. The said application for correction of judgment and decree bearing Miscellaneous Application No.1 of 2008 was served

upon the applicant. The applicant, thereafter, appeared before the lower court and he came to know about the passing of the judgment and decree on 20.11.2008. Due to bad financial condition that the applicant failed to file appeal against the judgment and decree. The applicant, thereafter, with a delay of 15 months and 18 days filed the appeal before the appellate court. The delay is computed from the date of knowledge of judgment by the applicant.

7. It is the contention of the appellant that the the matter being related to the immovable property he will loose the rights over the same and the delay is not deliberate but is caused due to bad financial position. As the applicant is a labour, he was not in a position to bear the expenses of appeal and fee of pleader. Therefore, the delay caused of 15 months and 18 days needs to be condoned.

8. The respondent had appeared and submitted that in fact the delay is for the period of 7

years. The applicant defendant did not mention any reason of failure to attend the suit, in spite of service of suit summons. The applicant remained absent before the lower court, after service of suit summons. So, it is not proved that he was not having any knowledge about the suit, as he was served with the suit summons. The lower court had decided the suit on merits i.e. on considering the documentary evidence. The appellate court on consideration that, although, the applicant was in receipt of suit summons, Exhibit- 5, on 03.12.2002, in Regular Civil Suit No.140 of 2002, it was obligatory on the part of the applicant to show the date of knowledge as 03.12.2002 and that itself is a fault and suppression of reality. The appellant having not explained the delay satisfactorily, thus, the application was dismissed against which the appeal is filed before this court.

9. In the appeal memo also the appellant has not disputed that he has not received the summons on 03.12.2002. The appellant was aware of the

court proceedings, as such, there was delay of 7 years itself in challenging the order passed by the trial court. The delay being not satisfactorily explained and the delay being very large, the same cannot be condoned.

10. In view of the same, no substantial question of law arises for consideration in the present second appeal and the same is dismissed. The pending civil application is also disposed of.

[ARUN R. PEDNEKER, J.]

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