

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.192 OF 2022
WITH
CIVIL APPLICATION NO.5883 OF 2022
IN
SECOND APPEAL NO.192 OF 2022**

Rajani @ Mangala Gopinath Joshi,
Age: 78 years, Occu: Household,
R/o: Pardeshpura, Opposite Datta Temple,
Sangamner, Tq: Sangamner, Dist. Ahmednagar ..Appellant
(Orig. Defendant No.2)

Versus

1. Shripad Bhimashankar Joshi deceased
through his Legal Representative,
- 1-A Sampada Aashish Deshpande,
Age: 42 years, Occu: Household,
R/o: 5-B, Anupam Society, Paralkar Marg,
Near Shivaji Park, Bhavani Shankar Road,
Dadar West, Mumbai-400028.
- 1-B Sukhda Vishal Dandekar,
Age: 42 years, Occu: Household,
R/o: 4th Floor, Sita Apartment, Above Hotel Sindudurg,
Ram Maruti Raod, Dadar West, Mumbai 400028.
2. Shrikant Bhimashankar Joshi (Deceased)
Age: 69 years, Occu: Business,
7, Govind Darshan, L.J. Road,
Dadar Mumbai-28.
3. Vasant Gopinath Joshi,
Age: 44 years, Occu: Business,
R/o: Pareshpura, Sangamner,
Tq: Sangamner, Dist: Ahmednagar.
4. Paresh Pratapkumar Shaha,
Age: 64 years, Occu: Business,
R/o: Bazar Peth, Sangamner,
Sangamner, Tq. Sangamner, Dist. Ahmednagar
presently residing
K-208, Adinath Co-operative Housing Society,
Satara Road, Pune. ..Respondents
(Original Plaintiffs)

...
Mr. R. B. Temak, Advocate for the Appellant.
Mr. D. P. Palodkar, Advocate for Respondent Nos.1A to 1B.

...
CORAM : S. G. CHAPALGAONKAR, J.
DATE : 17th JULY, 2023.

ORDER:-

1. The present second appeal takes exception to the judgment and order dated 07.01.2022 passed by the Ad-hoc District Judge-1, Sangamner, rejecting Miscellaneous Application No.57/2019 seeking condonation of delay, caused in filing appeal against judgment and decree dated 19.06.2018 passed by the Civil Judge, Junior Division, Sangamner in Regular Civil Suit No.567/2013 by which the suit filed by the respondents/original plaintiffs for recovery of possession in respect of the suit property has been decreed. (Hereinafter, parties are referred as per their original status before the Tribunal for the purpose of convenience and brevity).

2. The plaintiffs/respondents herein had instituted Regular Civil Suit No.567/2013 before the Civil Judge, Junior Division, Sangamner seeking relief of possession in respect of the suit property i.e. two rooms which are part of CTS No.2995 within the limits of Municipal Council Sangamner. The plaintiffs contend that the CTS No.2995/Municipal House No.2485/1986 is their ancestral property. They were residing in the suit property, however, due business exigencies they shifted to Mumbai. At the request of defendant no.3 he was permitted use of two rooms for storage goods. Subsequently, defendant no.3 without their consent handed over the possession of the property to defendant nos.1 and 2. The residential house of the plaintiffs at Mumbai has been demolished for redevelopment hence they have shifted to rented premise. They are senior citizens and wish to locate at their own house

at Sangamner i.e. suit property. However, defendants in spite of legal notice failed to hand over possession to them. Hence, they filed suit for possession.

3. Although, the suit summons was served upon the respondents, they failed to appear. Hence, suit proceeded ex-parte. The Trial Court after considering the oral and documentary evidence of the plaintiffs, decreed the suit vide judgment and order dated 19.06.2018. The defendant no.2/appellant filed appeal alongwith Miscellaneous Application No.57/2019 seeking condonation of delay of 515 days caused in filing the appeal stating that ex-parte decree has been passed against her. She had no knowledge of decree; therefore, the delay has been occasioned which is unintentional. The Appellate Court rejected the Miscellaneous Application No.57/2019 observing that in spite of service of summons, the defendants failed to contest the suit and only after receipt of the notice of execution, filed appeal alongwith application seeking to condone the delay which is not properly explained.

4. The present Second Appeal takes exception to the rejection of the application seeking condonation of delay and consequential dismissal of the appeal.

5. Mr. Temak, learned Advocate appearing for the appellant/orig. defendant no.2 would submit that the defendant is old lady. She is residing in suit premise alongwith her son, who is mentally retarded. The suit summons was received by defendant no.1-Vasant, who is another son of the defendant no.2, having bitter terms with the her. He failed to disclose about service of summons and filing of the suit to the defendant no.2. The defendant no.2 was unaware about the proceedings. Mr. Temak would further submit that defendant no.2 got knowledge of decree only when the execution warrant for possession was af-

fixed on the suit property in Regular Darkhast No.88/2018. Therefore, he urges that delay needs to be condoned.

6. Mr. Temak, learned Advocate submits that the liberal approach needs to be taken in the matter of delay condonation. He placed his reliance on the judgment of the Supreme Court of India in the matter of ***N. Balakrishnan Vs. M. Krishnamurthy***¹ to contend that the length of the delay is no matter, acceptability of the explanation is the only criterion. The Courts are required to consider the fact that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. He would submit that certain cost can be awarded to the respondents and opportunity can be given.

7. He further relies on the paragraph no.17 of the judgment of the Supreme Court of India in case of ***Bhivchandra Shankar More Vs. Balu Gangaram More and Others***², which reads as under:

“17. As pointed out earlier, an appeal under Section 96 CPC is a statutory right. Generally, delays in preferring appeals are required to be condoned, in the interest of justice, where there is no gross negligence or deliberate inaction or lack of bonafide is imputable to the party seeking condonation of delay.”

8. It is trite that, in the matter of delay condonation, liberal approach needs to be adopted. However, it has to be borne in mind that, if certain rights are created in favour of the respondents on account of such delay, the care needs to be taken that the necessary protection be given to the respondents also. It is also trite that the length of delay is

1 (1998) 7 Supreme Court Cases 123

2 (2019) 6 Supreme Court Cases 387

not important, but sufficiency of cause is a matter of concern for delay condonation. The enquiry into the merits of the matter may not be necessary, however, Court will always keep in mind that the genuine cause shall not be shut at rest for technical reason. In light of the aforesaid exposition of law, it is necessary to delve into the factual aspects of the present case. Pertinently, the suit has been instituted in the year 2013 by senior citizens seeking recovery of possession of their own house from the defendants, who are occupying premises only on the basis of permissive possession without paying single pai. Neither rent agreement nor is license agreement exist between parties.

9. The record shows that suit summons was served upon the defendants on the address at Pardeshpura, Opposite Datta Temple, Sangamner. The defendant no.1 is the son of the appellant, who is defendant no.2. It is contended that on behalf of the defendant no.2 that her relations with defendant no.1 are not cordial, therefore, she was not informed about service of summons. It is difficult to accept such contention since both the defendants are residing together in one and the same premises. Pertinently, after decree in the suit, the notice of execution was issued on the same address and same has been served upon both the defendants. The defendant no.2 do not dispute service of summons in execution. Apparently, palpably false reason has been put forth that defendant nos.1 and 2, who are mother and son are not in good terms. There is reason to believe that since the suit summons was accepted by defendant no.1, the appeal is filed only in the name of the mother i.e. defendant no.2 giving false excuse. The defendant no.1 has intentionally not joined himself appellant. The learned District Judge in the impugned order observed that the claim of the applicant that she has no knowledge of the proceeding in the suit cannot be accepted. No fault can be found in the observation of the learned District Judge.

10. Although, this Court would not go into the details of merits of the matter while deciding the limited issue of sufficiency of cause to condone the delay in filing the appeal, in the facts of the case, it is apparent that the defendant no.2 alongwith her son enjoyed property owned by the plaintiffs for more than 15 years without paying any rent. They do not have any legal right to continue with the possession. It is possible that defendant no.1, who is son of the defendant no.2 is pursuing litigation in her name with intention to draw undue benefit using sympathy and drawing bargaining power against the plaintiffs.

11. There cannot be dispute over the preposition of law espoused in the judgment of the Supreme Court of India in the matter of ***N. Balakrishnan Vs. M. Krishnamurthy*** as relies in ***Bhivchandra Shankar More Vs. Balu Gangaram More and Others*** (supra). However, in the facts of the case there is reason to believe that the explanation for delay of more than 17 months is put forth as a part of dilatory strategy and deliberate delay is caused to kill the time. This Court cannot ignore plight of the plaintiffs, who were fighting for possession of the own property at advance age although defendants' sans legal right to continue possession over suit property. In that view of the matter, no good grounds are made out to entertain the appeal, particularly no substantial questions of law arise for consideration in the facts of the case. Hence, appeal stands rejected.

12. In view of dismissal of Second Appeal, the pending Civil Application is disposed of.

(S. G. CHAPALGAONKAR)
JUDGE