

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

49 SECOND APPEAL NO.705 OF 2018

1. Gulab s/o Ganibhai Shaikh,

2. Lalubhai s/o Ganibhai Shaikh,

Both R/o; Talegaon, Tq. Sangamner,
Dist. Ahmednagar.

...Appellants
(Orig. Deft. No. 3 & 8)

VERSUS

1. Roshan Yakub Shaikh,

2. Noorjaan Shamshoddin Syed,

Both R/o; Kanadgaon, Tq. Rahuri,
Dist. Ahmednagar.

3. Bashir Bahub hai Shaikh,

4. Aminabi Babubhai Shaikh,

5. Munnabi Rasulbhai Shaikh,

6. Rasul Dadabhai Shaikh,

7. Dadabhai Papabhai Shaikh,
(Since deceased through Lrs.)

8. Sanjay Kondaji Dighe,

9. Dilip Patilba Dighe,

All 3 to 9 R/o; Talegaon,
Tq. Sangamner, Dist. Ahmednagar. ...Respondents.

(Orig. Pltffs. Nos. 1 & 2)

WITH
SECOND APPEAL NO. 695 OF 2018

1. Sanjay s/o Kondaji Dighe,

2. Dilip s/o Patilba Dighe,

Both r/o Talegaon, Tq. Sangamner,
District; Ahmednagar.

...Appellants
(Orig. Applicants)

VERSUS

1. Roshan s/o Yakuh Shaikh,

2. Noorjahan w/o Shamsuddin Syed,

Both r/o Kanadgaon, Tq. Rahuri,
Dist. Ahmednagar.

3. Bashir s/o Bandubhai Shaikh,

4. Aminabee w/o Bandhubhai Shaikh,

5. Gulab s/o Ganibhai Shaikh,

6. Munnabee w/o Rasulabhai Shaikh,

7. Rasul s/o Dadabhai Shaikh,

8. Lalubhai s/o Ganibhai Shaikh,

9. Dadabhai s/o Papabhai Shaikh
(Deceased)

Respondent Nos. 3 to 9
R/o; Talegaon, Tq. Sangamner,
District; Ahmednagar.

...Respondents
(Orig. Pltff./Respdt. Nos. 1& 2
& Orig. Defendants i.e.
Respdt. Nos. 3 to 9)

WITH

**WITH CA/10315/2018 IN SA/695/2018
WITH CA/10379/2018 IN SA/705/2018**

...

Advocate for Appellants : Mr.Kute Rajendra L.
Advocate for Respondent Nos. 1 & 2 : Mr.S.K. Shinde
Advocate for Respondent Nos. 8 & 9 : Mr. Shermale K. N.

...

**CORAM : KISHORE C. SANT, J.
DATE : 09.10.2023.**

PER COURT :

1. Heard the parties. Both the appeals are arising out of the same suit and since both the appeals are filed challenging the order passed by the learned District Judge, rejecting the applications for condonation of delay of 735 days caused in filing both the appeals, challenging the judgment and decree passed by the learned CJJD, Sangamner in RCS No. 312 of 2005. Both the appeals are taken together for decision.
2. Appeal No. 705 of 2018 was filed by the original defendant Nos. 3 and 8, whereas, an appeal No. 695 of 2018 was filed by original defendant Nos. 6 and 7.
3. The facts are that both the plaintiffs filed a suit for

partition against defendant Nos. 1 and 2. Defendant Nos. 3 and 8 are the purchasers of certain portion of land from Gut No. 44 and 47, wherein both the plaintiffs as well as defendant Nos. 1 and 2 are the parties to the said sale deed, who have sold the land to these defendants. So far as defendant Nos. 6 and 7, the properties are sold only by defendant Nos. 1 and 2. Defendant Nos. 6 and 7 have purchased lands in Gut Nos. 53 and 64 at village Talegaon Tq. Sangamner.

4. Plaintiff Nos. 1 and 2 lateron filed a suit for partition and separate possession of all the lands. It is the case of the plaintiffs that the parties had no authority to execute the sale deeds. The parties are the co-tenants and are governed by the Muslim Law.

5. In a suit defendant No. 3 was ex-parte. Defendant No. 8 though appeared, did not file Written Statement and the suit proceeded without their participation. So far as defendant Nos. 6 and 7 are concern the suit proceeded exparte as they had not appeared in the Court.

6, The learned trial Court passed a decree on 22.02.2012 by declaring that the sale deeds are not binding on

the plaintiffs. The plaintiffs were held entitled to receive 7/32 share each. Defendant No. 1 is held entitled to 7/16 share and defendant No. 2 is held entitled to 1/8th share in the suit properties. It is held, the sale deeds executed by defendant Nos. 1 and 2 in favour of defendant Nos. 3 to 9 are not binding on the plaintiffs. It is further declared that the lands sold under the sale deeds executed by defendant Nos. 1 and 2 in favour of defendant Nos. 3 to 9 are allotted to share of defendant Nos. 1 and 2.

7. It is the case of the appellants that only after receipt of notices in execution, they came to know about the judgment and decree and thereafter, they approached the appellate Court by way of filing an appeal. The delay is not deliberate. It is further the case of defendant Nos. 3 and 8 that the plaintiffs kept telling them that no relief is prayed against these defendants and it is for that reason defendant No. 3 did not appear in the suit and defendant No. 8 did not file his Written Statement. Defendant Nos. 6 and 7 also are coming with the similar case.

8. The learned appellate Court rejected the applications

stating that the reasons assigned for delay itself are false and the Court also considered the admission of defendant No. 8 in his cross-examination, wherein, he admitted that respondent Nos. 3 and 8 were aware about the filing of the suit against them. They had also appeared in the Court but did not file their say. It is also accepted that they had knowledge that No WS order was passed against them and an inquiry was also not made about the progress in the suit. The Court, therefore, held that no case is made out for condonation of delay. The question therefore, arises as to whether the case is made out for condonation of delay and to allow the second appeal.

9. The learned Advocate Mr. Kute argued the matter. Mr. Shermale for respondent Nos. 8 and 9 relied upon the judgment in **Civil Appeal No. 4669 of 2019 (arising out of SLP (Civil) No. 28938 of 2014)** – Bhivchandra Shankar More Vs. Balu Gangaram More and Ors. passed by the Hon'ble Apex Court and in paragraph No. 16 of the said judgment the Hon'ble Apex Court by relying upon the judgment in the case of **1998 7 SCC 123** – N. Balakrishna Vs. M. Krishnamurty, it is held that

“The appeal under Section 96 of 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.”

10. He has also produced on record a copy of the order passed by this Court in **Second Appeal No. 679 of 2013** – Karbhari Bajaba Dighe and Others Vs. Yamunabai Ramnath Dighe and another dated 06.01.2014 wherein, delay was condoned on the similar set of facts. In that case the parties were from the same village of Sangamner Taluka.

11. Mr. Shinde, the learned Advocate for respondent Nos. 1 and 2/the original plaintiffs relied upon the judgment reported in **AIR 1998 SC 2276** in the case of P.K. Ramchandran Vs. State of Kerala and another, wherein in paragraph No. 6 the Hon’ble Apex Court has observed that

“Law of limitation may harshly effect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds. ”

In this case it was observed that the High Court has not taken judicious approach and the order conducting delay was set aside. In that case the Hon’ble Apex Court has observed that the order passed by the High Court was passed without

recording any reason to the satisfaction of the Court while condoning delay.

12. The only reason assigned in that case was that the office of the Advocate General was fed up with the Arbitration matters, therefore the case was pending for the consideration of the Advocate General and in that view though delay was condoned by the High Court the said order was set aside by the Hon'ble Apex Court.

13. In the present case considering the nature of the dispute, this Court finds that an opportunity needs to be given to the parties by condoning delay. An application was filed for condonation of delay in the proceedings under the Arbitration Act. It is clear that the Limitation Act applies with its all its vigors and in that case the judgment was passed. With respect, the above ratio is not applicable to the facts of this Court.

14. Considering all the aspects, this Court finds that the delay deserves to be condoned. The District Court, therefore, needs to be directed to register the appeals and dispose off the same as far as within a period of one year from the registration of appeals.

15. Looking to the facts and the reasons for delay, this Court finds that respondents/original plaintiff Nos. 1 and 2 needs to be compensated while passing this order. Therefore, both appeals are allowed with costs of Rs. 25,000/- (Rs. Twenty Five Thousand only) each, to be deposited in the appellate court. Within four weeks from today. Subject to that both the appeals stand allowed. The decree and order passed by the learned District Judge in Misc. Application in appeal is set aside.

16. Office to send back the record and proceedings to the District Court, forthwith.

(KISHORE C. SANT)
JUDGE

mahajansb/