

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

SECOND APPEAL NO.162 OF 2014

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Anant s/o Maruti Pimpure,
age 48 years, Occ. Agriculture,
R/o Village Ghumphawadi,
Tq. & Dist. Latur.

..Appellant..
(orig. defendant no.2)

VERSUS

1. Bharat s/o Maruti Pimpure,
age 52 years, Occ. Agriculturist,
R/o. Village Gumphawadi,
Tq. & Dist. Latur, now residing
at village Padoli, Tq. Kallamb,
District Osmanabad. ..orig plaintiff..
2. Anusayabai w/o Babasaheb @ Balasaheb
Bhandare, age 38 years, Occ. Household,
R/o Shiradhon, Tq. Kalamb, Dist Osmanabad.
3. Sow. Putalabai w/o Vishwasrao Dhondge,
age 33 yrs, Occ. Household,
R/o Village Gaurwagholi, Tq. Kalamb,
District Osmanabad.
4. Sow. Ashabai w/o Rajendra Kanade,
age 37 yrs, Occ. Household,
R/o Hasegaon, Tq. Kalamb, Dist. Osmanabad
(Resp 2 to 4 orig deft. 1A to 1C)
5. Vasant Maruti Pimpure,
age 55 years, Occ. Agri and service
R/o Murud, Tq. & Dist. Latur.
6. Sow. Janabai w/o Maruti Pimpure,
age 70 yrs, Occ. Household,
R/o Nipani, Tq. Kalamb,
Dist. Osmanabad. Died. through L.rs.
7. Ratan @ Surekha d/o Maruti Pimpure,
now w/o Dhananjay Gund,
age 34 yrs, Occ. Household,

R/o Nipani, Tq. Kalamb, Dist. Osmanabad.

8. Angad s/o Gyanoba Shinde,
age major, Occ. Agril,
R/o Village Gumphawadi,
Tq. & Dist. Latur.

...Deleted...

9. Sukhdeo s/o Gyanoba Shinde,
age 60 years, Occ. Agril,
R/o Village Gumphawadi,
Tq. & Dist. Latur.

10. Baban s/o Gyanoba Shinde,
age 55 years, Occ. Agril,
R/o Village Gumphawadi,
Tq. & Dist. Latur.

(Resp 5 to 19-orig deft
3 to 8.)

.. RESPONDENTS..

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Mr. P.S. Chavan, Advocate for appellant.

Mr. R.K. Ashtekar, Advocate for respondent No.5.

Respondent no.6 - dead.

Respondent no.8 deleted.

Respondent nos.1 to 4, 7 served

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CORAM : S.G. CHAPALGAONKAR, J.

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RESERVED ON : 7th JULY, 2023.

PRONOUNCED ON : 17th JULY, 2023

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JUDGMENT :-

1. The appellant/original respondent no.2 approached this Court under section 100 of the Civil Procedure Code thereby assailing the judgment and decree passed by the Civil Judge J.D., Latur dated 30.8.2010 in R.C.S. No.323 of 1996 merged into appellate decree dated 20.8.2013 in Misc. application No.84 of 2012 filed along with Regular Civil Appeal seeking condonation of delay.

2. The respondent no.1 had instituted RCS No.323 of 1996 in the Court of Civil Judge J.D., Latur seeking a decree of partition and

separate possession in respect of various agricultural lands and the house properties alleged to have been jointly owned by the plaintiff and defendants. The trial court vide judgment and decree dated 30.8.2010 accepted the claim of the plaintiff for 1/5th share in the suit property. Aggrieved appellant (defendant no.2) as advised, filed an application under order 9 Rule 13 of the Civil Procedure Code since the decree was passed in his absence because he could not participate in the proceedings of Court after filing the written statement. The application for setting aside the ex-parte decree was registered as Misc. Application No.384 of 2010. During the pendency of this application, the appellant was advised to prefer substantive appeal against the decree passed by the Trial Court. Accordingly, a purshis was passed on 4.5.2012 through learned advocate Mr. D.S.Dalve stating that the appellant do not wish to prosecute the application and willing to file substantive appeal. The Trial Court disposed of the Misc. Application No.384 of 2010 as withdrawn vide order dated 4.5.2012. The appellant then approached the District Court, at Latur in Regular Civil Appeal accompanied by Misc. Application No.84 of 2012 seeking condonation of delay of 1 year 7 months and 3 days.

3. The appellate Court dismissed the application vide order dated 20.8.2013 holding that the appellant failed to make out the sufficient cause for condonation of delay.

4. Considering the aforesaid factual matrix, following substantial question of law is formulated and learned advocates appearing for both the parties are called upon to advance their submissions.

“Whether in the facts of the case, the First Appellate Court failed to appreciate the material on record that constitute sufficient cause to condone the delay?”

5. Mr. Chavan, learned advocate appearing for the appellant would submit that the parties are litigating for the civil rights relating to immovable property. The relationship is admitted. However, there is dispute regarding entitlement / right to claim the partition. He would submit that the appellant could not participate in the proceeding of the suit for various reasons. He would further submit that initially the appellant had engaged Advocate Mr. Salunke for prosecuting the suit. After decree in the suit was passed, as advised to the appellant, application for setting aside ex-parte decree in terms of Order IX Rule 13 of Civil Procedure Code was filed. During pendency of the said application, the appellant was apprised that since the decree is passed after filing written statement on record of the suit, his application would not be maintainable. Thereafter, the applicant filed purshis through another advocate Mr. Dalve with specific stipulation on the purshis that he wish to file appeal, and withdraw the application made for setting aside the ex-parte decree. The prayer was granted vide order dated 4.5.2012. Thereafter, the appeal was filed alongwith an application seeking condonation of delay before the District Court at Latur. Mr. Chavan would submit that the learned District Judge erroneously rejected the prayer for condonation of delay on the ground that the prosecuting remedy before wrong forum owing to wrong advise would not constitute sufficient cause; particularly, when the applicant was represented by one and the same advocate all along. Mr. Chavan, would submit that the observations of the District Court are inconsistent with the factual aspects.

6. Mr. Ashtekar, learned advocate appearing for respondent no.5 would submit that there is delay of more than one year and seven months in filing the appeal. Decree for partition and separate possession has been passed in favour of the plaintiff. He would point out that the applicant intentionally kept away himself from the suit proceeding after

filing the written statement and suffered the decree. He would further submit that the applicant is enjoying the property and with intention to deprive the plaintiff from the fruits of the decree, adopting various tactics so as to prolong the execution. He would further submit that intentionally the applicant was prosecuting his remedies before the trial court by filing an application under order IX Rule 13 of the C.P.C, although, he had no other remedy except filing of the appeal. The delay occasioned in filing the appeal before the District Court is rightly refused to condone by the learned District Judge. He would support the reasoning adopted by the learned District Judge in the impugned order and submit that no substantial question of law is arises for consideration.

7. Mr. Ashtekar, learned counsel appearing for the respondent no.5 places his reliance on judgments in the matter of **Basawaraj and another Vs. Special Land Acquisition Officer reported in (2013) 14 Supreme Court Cases 81** and **Postmaster General Vs. Living Media India Limited and another reported in (2012) 3 Supreme Court Cases 563.**

8. Having considered the submissions advanced by the respective parties, it can be gathered that the parties are litigating for their right to immovable properties. It is trite that such rights shall be decided after giving fair opportunity to establish the rival claims. Since the present appeal arises against the order by which the RCA is refused consideration owing to rejection of the application for delay condonation, obviously, this Court will have to examine if the appellant had made out sufficient cause to condone the delay. The Trial Court had passed the decree dated 30.8.2010 in RCS No.323 of 1996 for partition and separate possession. It is apparent that the appellant, who is legal representative of original respondent no.2 had filed his written statement alongwith other defendants at exhibit 31, and denied the claim regarding partition and separate possession raised in the plaint. Apparently, he was

represented by advocate Mr. B.G. Salunke in the suit. After passing the decree, as per advice of his advocate, the appellant had filed MCA No.384 of 2010 seeking setting aside of ex-parte decree resorting to the provisions of Order IX Rule 13 of the CPC. It appears that the appellant was advised to withdraw the said proceeding since it would not be maintainable. It is also apparent that advocate Shri D.S. Dalve was appointed by the applicant when he tendered purshis at exh.45. It can be presumed that the appellant has received advise to file the appeal when he changed his advocate. Stipulations in the purshis depicts that withdrawal of the application was sought with intention to file RCA. The learned Civil Judge J.D. Latur immediately passed the order below exhibit-1 and permitted withdrawal of the application on the same day. Thereafter, Civil M.A. No.821 of 2012 seeking condonation of delay alongwith RCA was filed on the same day i.e. 4.5.2012 before the District Court, at Latur. Apparently, the appellant has wrongly prosecuted his remedy under order IX rule 13 of the CPC during the period from 30.10.2010 till 4.5.2012 i.e. for almost 19 months. In view of the aforesaid factual background, the observations made by the learned District Judge while passing the impugned order that the appellant was not bonafidely litigating by filing the application for setting aside the ex-parte decree does not find support. The learned District Judge has erroneously observed that Advocate appearing for the applicant in application for setting aside the ex-parte decree and advocate appearing in the present matter is the same. The District court has also observed in paragraph no.8 of the order that the application for setting aside the ex-parte decree is withdrawn on the ground that the dispute is settled between the parties. True that there are such observations in the order permitting withdrawal of the application, however, purshis tendered by the appellant clearly stipulates that he has withdrawn the application with intention to file the RCA. In that view of the matter, this Court hold that the appellant has made out sufficient cause for condonation of delay

and the question of law needs to be answered in favour of the appellant. However, at the same time, it would be equitable to compensate the plaintiff as his right to get expeditious adjudication of the claim is prolonged because of mistakes of the appellant. Further the fact that the appellant is enjoying possession of the property which is subject matter of the suit cannot be ignored. Hence, the respondent/plaintiff shall be entitled to receive the costs of the Rs.15,000/-. The offshoot of the aforesaid discussion leads this Court to allow the appeal. Hence, following order.

O R D E R

- i. The Second Appeal is allowed.
- ii. The order dated 20.8.2013 passed on Misc. Application No.84 of 2012 by the Principal District Judge, Latur is hereby quashed and set aside subject to the condition that the appellant/applicant deposits the costs of Rs.15,000/- (Rs.Fifteen thousand) within the period of (1) one month from the date of this order with the District Judge, at Latur.
- iii. The Misc Civil Application No.821 of 2012 filed before the District Judge, Latur is hereby allowed.
- iv. The delay of 1 year 7 months and 3 days caused in filing RCA against the judgment and decree dated 30.8.2010 passed by the Civil Judge J.D., Latur in RCS No.323 of 1996 is hereby condoned.
- v. The appeal be registered for disposal in accordance with law.
- vi. The second appeal is disposed off. Pending civil application, if any, stands disposed off.

vii. Decree be drawn up accordingly.

[S.G. CHAPALGAONKAR]
JUDGE

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aaa/-