

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

44 SECOND APPEAL NO.872 OF 2022

Suryakant s/o Malikarjun Katkar (Died)
Through its legal heirs.....

1. Smt. Anuradha w/o Suryakant Katkar,
Age; 52 years, Occ; Household,
2. Nita d/o Suryakant Katkar,
Age; 32 years, Occ; Household,
3. Reshma d/o Suryakant Katkar,
Age; 28 years, Occ; Household,
4. Priyanka d/o Suryakant Katkar,
Age; 27 years, Occ; Household,
5. Suraj s/o Suryakant Katkar,
Age; 26 years, Occ; Education,

All R/o; Near Water Tank,
Georai Road, majalgaon, Tq. Majalgaon,
District; Beed.

...Appellants
(Orig. Deft. Nos. 2/1 to 2/5)

VERSUS

1. Chandrakalabai w/o Sureshrao Borgaonkar,
Age; 67 years, Occ; Household,
R/o; Yusufwadgaon, Tq. Kaij, Dist. Beed. ...Orig. Pltff.
2. Bhimsshankar s/o Malikarjun Katkar,
Age; 77 years, Occ; Business,
R/o; Prop. Shri Shailya Jewellers, in front
of Chunamai, Majalgaon, Tq. Majalgaon,
Dist. Beed.
3. Ratnamala w/o Bhimsashankar Sakhare,
Age; 72 years, Occ; Household,
R/o; Kumbhar Vesh, Mangalawar Pet (East)
House No. 225, Solapur, Tq. & Dist. Solapur.

4. Sau. Wanmala w/o Trimbak Sontakke.
Age; 57 years, Occ; Household,
R/o; Plot No. A-1-304, near Shindewadi,
Bridge, Wakad, Pune 411027. ...Respondents
(Orig. Deft Nos. 1,3 & 4)

...
Advocate for Appellants : Mr.Salunke Vasant Digambarrao
Advocate for Respondent No. 3 : Mr.V.V. Bhavthankar
...

WITH
CA/17346/2022 IN SA/872/2022

CORAM : KISHORE C. SANT, J.

DATE : 07.09.2023.

PER COURT :

1. Heard the parties. Taken for final disposal by consent of parties.
2. This Second Appeal arises out of the order passed by the learned District Judge-1, Majalgaon dated 27.09.2022 in MCA No. 16 of 2020. The application for condonation of delay of 6 years, 6 months and 6 days came to be rejected.
3. The facts of the case in short are that the present appellants are the legal representatives of one Suryakant who was the original defendant No. 2 in RCS No. 114 of 2009 that

was filed by the present respondent No. 1 and some of the respondents seeking declaration partition and possession. RCS No. 114 of 2009 came to be decreed by the judgment and order dated 22.01.2014. One of the defendants i.e. Ratnamala filed an appeal in the Court of learned District Judge, Majalgaon. However, later on the said appellant withdrew the appeal by filing pursis on 25.07.2019 without the knowledge of the present appellants. Though they were a party to the appeal, no say was called by the learned District Judge and thus due to lack of knowledge they could not take any steps immediately. After coming to know about the withdrawal of an appeal the present appellants thought it fit to file an appeal challenging the decree. They had not filed an appeal immediately in 2014, for the reasons that Ratnamala's appeal was already filed and was pending. Only on coming to know withdrawal of the appeal, they decided to file a Regular Civil Appeal challenging the decree passed by the learned trial judge. Since there was delay, the applicants/appellants filed an application seeking condonation of delay in filing of an appeal before the District Judge. It is stated in the application that most of the applicants were out of Majalgaon for education and for service purposes etc. no appeal

could be filed immediately. It is stated that since the appeal is in respect of immovable property, the valuable rights of the appellants are being affected and thus, delay was sought to be condoned.

4. The learned District Judge issued notices to the parties, however, inspite of that no one has opposed the application and none of the respondents have filed even any affidavit opposing the say/affidavit to the application bearing No. CMA No. 16 of 2018. The learned District Judge, however, held that no sufficient cause is made out for condonation of delay and rejected the application. The appellants are thus before this Court.

5. A substantial question of law that arises for entertaining an appeal is that, “as to whether the learned District Judge has rightly considered the application affecting the valuable rights of the appellant.”

6. The learned Advocate for the appellants submits that when already an appeal was filed by Ratnamala there was no need to file another appeal as the decree was in respect of the partition of the properties wherein all the parties have equal

rights and equal say. Though, initially an appeal was filed and the same was withdrawn without giving any idea to the present appellants, it is for that reason the delay is caused in filing an appeal. The learned District Judge has taken very technical approach and has rejected the application. He relied upon the judgment reported in **1998, AIR SCW 3139- N. Balakrishnan Vs. M Krishnamurthy**.

7. Another judgment relied upon in the reported **2004 (6) BCR 861- Ashok Balaji Ratan Vs. Nagpur Improvement Trust, Nagpur**. In the case of **N. Balakrishnan** (supra) the Hon'ble Apex Court in paragraph No. 9 held that "the condonation of delay is a matter of discretion of the Court. The length of the delay is not material, what is material is explanation. For accepting explanation is sufficient as a result of positive acceptance." When delay is refused to be condoned by the First Court, the Superior Court would be free to consider the case on the point of delay afresh. It is further stated that it is to be remembered that in every case of delay there can be some lapses on the part of the litigant concerned, but that should not be a reason to turn down his plea and or to shut down the doors of the applicant. If the explanation is not found

to be malafide or is not deliberate strategy. The Court must show its utmost consideration to the statute. In the case of **Ashok** (supra) this Court has held ultimately if delay is not condoned and the grievance of the applicant is not open for scrutiny, it may amount to continuing the illegality and the same be avoided.

8. The learned Advocate for the respondents relied upon the following judgments :

(a) 2014 (5) Mh.L.J. 718 – Leela Fondu Mayekar and Others Vs. Damodar Datta Zuwarkar and another.

(b) 2016 (1) Mh.L.J. 184 – Rajendra Namdeorao Akre Vs. Rajkumar Bhalerao Balbudhe and another.

(c) 2016 (5) Mh.L.J. 429 – Padmsey Khimji Chheda an another vs Kesarben Laxmichand Dedhia and others.

9. In the case of **Leela** (supra) and **Rajendra** (supra) are the judgments passed by the High Court was based on the facts of the particular case. So far as the judgment in the case of **Padmsey Khimji** (supra) is concerned, this Court finds that it is in respect of Arbitration and Conciliation Act, whereby the award was passed and there was delay of 3014 days in filing the

appeal. Looking to the strict provisions of the Arbitration and Conciliation Act, the Court had passed the judgment. This Court, therefore, finds that the same is not applicable to the present case.

10. Coming to the facts of this Case, this Court finds that when earlier appeal was pending there was no reason for the present applicant to file another appeal. It is only after 25.07.2019 when an appeal was withdrawn by the said Ratnamala, they found it necessary to file an appeal. The application was therefore filed on 20.08.2018. Considering this there was delay of approximately one year and one month. The learned District Judge ought to have considered this aspect that though the delay stated was of more than 6 years but it was infact not such long delay as earlier appeal was pending before that Court. For the reasons stated in the applications, this Court finds that a liberal approach ought to have been taken by the Court.

11. For all these reasons this Court finds that Second Appeal needs to be allowed. The impugned judgment and order is quashed and set aside. The office of the District Court to register the appeal of the appellants. It is expected by the

appellate Court to decide the appeal as early as possible looking the fact that the decree is of the year 2014. In view of disposal of the Second Appeal. All pending Civil Applications stand disposed off.

(KISHORE C. SANT)
JUDGE

mahajansb/