

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.1646 OF 2018
IN
SECOND APPEAL (ST) NO.334 OF 2018**

Sou. Pratibha Avinash Salunkhe and Ors. ...Applicants

Versus

Shri. Anil Atmaram Pawar and Ors. ...Respondents

- Mr. Chetan G. Patil, for the Applicants.
- Mr. Pradeep Gole, for the Respondent Nos.1 to 3.

CORAM : VINAY JOSHI, J.

DATE : 15th SEPTEMBER 2023

P.C. :

1. This is an application in terms of section 5 of the Limitation Act, 1963 seeking for condonation of delay of 2 years and 120 days caused in filing Second Appeal challenging the judgment and order dated 9th June 2015 passed by the First Appellate Court whereby the application for condonation of delay was rejected.

2. The Applicants were the defendants of original suit (Special Civil Suit No.85 of 2004) filed by the Respondents for partition and separate possession. The said suit was came to be decreed on 7th

September 2009 by the Civil Judge, Senior Division, Satara. The Applicants initially applied for setting aside the judgment and order of the Civil Court in terms of Order IX Rule 13 of CPC stating it to be an ex-parte decree. However, simultaneously, he has also filed a regular Civil Appeal along with delay condonation application bearing Misc. Civil Appeal No.46 of 2014. The said application was dismissed on 9th June 2015 resulting into dismissal of the First Appeal. In the meantime, the Applicants have prosecuted the pending application filed under Order IX Rule 13 of the CPC, however, it was dismissed on 20th September 2017. Thereafter, the Applicant chose to file Second Appeal and accordingly, after obtaining certified copies filed Second Appeal on 5th January 2018 along with delay condonation application.

3. It is the applicants contention that in Trial Court, he has neither led evidence nor cross-examined the witnesses and thus, it was virtually an ex-parte decree. According to the Applicants, the property rights have been decided by the Trial Court without considering the merits. It is the Applicants contention that since beginning he was prosecuting to challenge the decree of Civil Court firstly, under Order IX Rule 13 as well as simultaneously, by filing

First Appeal. It is the Applicants contention that he was under an impression that though First Appeal with delay was disposed of he could prosecute the application under Order IX Rule 13 of CPC and thus, it has consumed time. Besides that, the Applicant has put forward the ground of medical captivity of his sister as well as his place of employment at Mumbai as a reason for delay.

4. The other side opposed the application by contending that the decree passed by the Trial Court was not an ex-parte one. It is submitted that in Trial Court, the Applicant has appeared, filed written statement, therefore, the decree cannot be termed as an ex-parte. Secondly, it is submitted that the Applicant was well aware about the ongoing proceedings. Though the application under Order IX Rule 13 was pending he could have filed Second Appeal but he did not. Besides that, it is contended that though there was a status-quo order, the Applicant has alienated the suit property during the pendency and thus, his conduct is to be noted.

5. So far as the factual aspect is concerned, there is no dispute in between the parties. It reveals from the judgment of the Trial Court that defendant has appeared in the proceeding but there was no cross-examination. Whether the said decree can be termed as an ex-

parte is a question of fact which has to be decided on the basis of the totality of the facts of the case. However, it reveals that when the First Appeal was disposed on 9th June 2015 the application under Order IX Rule 13 was pending which was dismissed on 20th September 2017. Thereafter, within 2 to 3 months Second Appeal has been filed with delay condonation application. Though the Applicant was not precluded to file Second Appeal no sooner the First Appeal was dismissed, however, it is a matter of record that he has prosecuted the application under Order IX Rule 13, may be under wrong impression. Second ground is about illness in the family and place of employment away at Mumbai. There is no reason to suspect said ground in absence of contrary material.

6. It is settled law that the Court shall adopt liberal and justice oriented approach while considering the application under section 5 of the Limitation Act. There is no presumption that the grounds canvassed are lacking bonafides unless otherwise shown. Always the Court shall endeavour to advance the justice, rather than throwing away on technicalities. It reveals that most of the time was consumed as application under Order IX Rule 13 was pending.

7. In view of above, the Applicant has made out a sufficient cause

to condone the delay. However, condonation of delay would force other side to one another round of litigation. Certainly, to that extent, other side can be adequately compensated.

8. In view of that, application is allowed subject to cost of Rs.25,000/- to be paid to other side within three weeks from today.

9. On deposit of cost amount, delay stands condoned and Second Appeal be registered and numbered accordingly.

10. Deposit of costs amount in Court would amount to sufficient compliance of this order. Other side is at liberty to withdraw the said amount.

11. Second Appeal be placed on 20th October 2023 on which both side shall appear.

[VINAY JOSHI, J.]