

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

**SECOND APPEAL NO. 356 OF 2023
WITH
INTERIM APPLICATION NO. 12994 OF 2023
IN
SECOND APPEAL NO. 356 OF 2023**

Ananta Bhiva Madhavi (since
deceased through legal heirs) :
Savitribai Ananta Madhavi and ors.

.... Appellants

v/s.

Deepakkumar Makhanlal Gupta and ors.

.... Respondents

Mr. Sandesh Patil i/b. Mr. Chintan Shah for the Appellants.
Mr. Amanchi Arjun for the Respondents.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 03rd NOVEMBER, 2023.

P. C. :-

. This Appeal was admitted on the following substantial question
of law :-

(a) Whether the order of rejection of an application for
condonation of delay is perverse and against the well-
settled principles of law.

2. With consent, heard learned counsel for the Appellants and
learned counsel for the Respondents. I have perused the records and

considered the submissions advanced by the learned counsel for the respective parties.

3. Learned counsel for the Respondents, relying upon the decision of the Apex Court in *Ratansingh v/s. Vijaysingh and ors. MANU/SC/0780/2000*, questions the maintainability of the Second Appeal contending that dismissal of an application for condonation of delay is not a decree.

4. It may be mentioned that one of the questions before the Apex Court in *Shyam Sundar Sarma v/s. Pannalal Jaiswal and others (2005) 1 SCC 436* was whether an appeal accompanied by an application for condoning the delay in filing the appeal is an appeal in the eye of the law, when the application for condoning the delay in filing the appeal is dismissed and consequently the appeal is dismissed as being time-barred by limitation, in view of Section 3 of the Limitation Act. The Apex Court observed that this question was considered in *Mela Ram and Sons v/s. The Commissioner of Income Tax, Punjab, 1956 SCR 166* and it was held that an appeal presented out of time is an appeal and an order dismissing it as time-barred is one passed in an appeal. The Apex Court further observed that in *Sheodan Singh v/s. Daryao*

Kunwar (Smt)*, AIR 1966 SC 1332** rendered by four Judges of the Hon'ble Supreme Court it was held that when a decision is given on merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, such dismissal when it confirms the decision of the trial court on the merits itself amounts to the appeal being heard and finally decided on merits whatever may be the ground for dismissal of the appeal. The Hon'ble Supreme Court observed that the principles laid down by a three Judge Bench in ***Mela Ram and sons and that stated in ***Sheodan Singh*** (supra) were not brought to the notice of their Lordships and thus the view expressed in ***Ratansingh v/s. Vijaysingh*** (supra), cannot be accepted as laying down the correct law on the question. This being the position, the challenge to the maintainability of the Second Appeal, is devoid of any merits.

5. Now coming to the merits of the matter, the Appellants herein had filed an appeal against the ex-parte judgment and decree dated 05/12/2015 in Regular Civil Suit No.406/2001 accompanied by an application for condoning the delay of 01 year, 07 months and 25 days in filing the appeal. The Appellants had claimed that the advocate representing them in the suit, had expired on 30/07/2013. It was

alleged that they were not aware of the death of their advocate and were also not aware that the suit was taken up for hearing. The Appellants claimed that they were under a bonafide impression that the suit was pending and that they learnt about the decree for the first time in the course of RTS proceedings initiated by the Respondents herein.

6. The First Appellate Court has rejected the application mainly on the ground that 13 long years had lapsed from the date the Defendants had put in appearance and the date of the decree. It is further stated that the Defendants had not taken steps and had not given any reasons for such long delay. It is stated that a litigant is expected to be diligent and not to rely solely on the advocate. The Appellate Court further observed that though the application for condonation of delay was filed on 03/10/2017, the Appellants did not pursue the same for long and this shows their malafide intention. The learned Judge held that the explanation given by the Appellants did not constitute sufficient cause. The Appellate Court having held that the Appellants had failed to make out sufficient cause, proceeded to observe that the sale deed executed in favour of the Appellants is *prima facie* illegal, void and against the law.

7. It may be noted that Section 5 of the Limitation Act, 1963 gives wide discretion to the Court to condone the delay and admit the appeal or any application other than an application under Order XXI of CPC, beyond the prescribed period of limitation subject to existence of ‘sufficient cause’. It is well-settled that the expression ‘sufficient cause’ should receive liberal consideration with focal point to advance the cause of substantial justice and decide the *lis* on merits, when no gross negligence, deliberate inaction or lack of bonafide is imputable to the party seeking condonation of the delay.

8. In ***Sheo Raj Singh (Deceased) through Lrs. and others v/s. Union of India and another, 2023 SCC OnLine SC 1278***, the Apex Court after considering the previous pronouncements has observed that :-

“ 29. Considering the aforementioned decisions, there cannot be any quarrel that this Court has stepped in to ensure that substantive rights of private parties and the State are not defeated at the threshold simply due to technical considerations of delay. However, these decisions notwithstanding, we reiterate that condonation of delay being a discretionary power available to courts, exercise of discretion must necessarily depend upon the sufficiency of the cause shown and the degree of acceptability of the

explanation, the length of delay being immaterial. Sometimes, due to want of sufficient cause being shown or an acceptable explanation being proffered, delay of the shortest range may not be condoned whereas, in certain other cases, delay of long periods can be condoned if the explanation is satisfactory and acceptable. Of course, the courts must distinguish between an 'explanation' and an 'excuse'. An 'explanation' is designed to give someone all of the facts and lay out the cause for something. It helps clarify the circumstances of a particular event and allows the person to point out that something that has happened is not his fault, if it is really not his fault. Care must however be taken to distinguish an 'explanation' from an 'excuse'. Although people tend to see 'explanation' and 'excuse' as the same thing and struggle to find out the difference between the two, there is a distinction which, though fine, is real. An 'excuse' is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something as just an 'excuse' would imply that the explanation proffered is believed not to be true. Thus said, there is no formula that caters to all situations and, therefore, each case for condonation of delay based on existence or absence of sufficient cause has to be decided on its own facts. ..."

9. In the instant case, it is not in dispute that the suit (Old Special Civil Suit No.29/1996) was originally filed in the Court of Civil Judge,

Senior Division, Thane. The suit was later transferred to the Court of Civil Judge, Junior Division, Bhiwandi and was re-registered as Regular Civil Suit No.406 of 2001. The Appellants were served with summons and they had put in their appearance through Advocate Hemant N. Patil and filed the written statement on 10/04/2002. The Appellants had stated that the matter was not taken up for hearing and that their advocate had told them that they would be informed the date of the hearing. The Appellants claim that the matter was taken up for hearing only in the year 2015. Their advocate had expired in the year 2013. They were not aware of his death and were also not aware that the matter which was pending since long, was taken up for hearing. The Appellants had specifically stated that they had learnt about the decree only in the course of RTS proceedings.

10. The records thus indicate that the Appellants had engaged an advocate, briefed him, filed a written statement and expected him to inform them the date of the hearing. It is not in dispute that the matter had come up for hearing after a period of over 13 years and the advocate representing the Appellants had expired during the interregnum period. The Appellate Court has not disbelieved or discarded the explanation given by the Appellants that they were not

aware of the death of their advocate or the fact that they were under a bonafide belief that the matter was still pending before the Court till they gained knowledge of the decree in the course of RTS proceedings. The reason for dismissal of the application is that the Appellants had not taken steps for 13 long years from 2002 and that a diligent litigant is not expected to stay idle and rely upon the advocate.

11. In *Secretary, Department of Horticulture, Chandigarh and another v/s. Raghu Raj, (2008) 13 SCC 395*, the Apex Court has expounded the principle that a party should not be made to suffer due to default on the part of his advocate. The Apex Court had made a reference to the previous decision in *Rafiq and another v/s. Munshilal and another, (1981) 2 SCC 788*, wherein it was observed that :- “*The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocate, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court’s procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. ...*”

12. In the instant case, the Appellants had engaged an advocate, who had assured them that the date of hearing of the suit would be communicated to them. It was due to the demise of the advocate that the Appellants had no knowledge of the date of hearing and the consequent decree passed against them. The explanation given by the Appellants was genuine and not an excuse. In such circumstances, the Appellate Court was not justified in discarding the explanation by observing that the Appellants, as diligent litigants, were not expected to depend upon their advocate. Moreover, while deciding the application for condonation of delay, the Appellate Court was required to consider whether the Appellants had made out sufficient cause to condone the delay in filing the appeal and was not justified in referring to the circumstances anterior in time or commenting on the conduct of the Appellants during the pendency of the application and attributing malafides to the Appellants. Furthermore, having dismissed the application for condonation of delay, the First Appellate Court was not justified in making observations on merits of the matter.

13. The Appellate Court has taken totally unrealistic and pedantic approach. The order is totally perverse and against the settled

principles of law and hence, cannot be sustained. Under the circumstances, the Appeal is allowed. The impugned order dated 14/12/2022 is set-aside. Consequently, the delay condonation application (Civil Miscellaneous Application No.301/2017) is allowed. The delay in filing the Appeal is condoned. The Appeal is ordered to be registered. The Appellate Court shall decide the appeal on its own merits after hearing both the parties.

14. Interim application stands disposed of in view of disposal of the Appeal.

(SMT. ANUJA PRABHUDESSAI, J.)

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