



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH AT NAGPUR**

SECOND APPEAL NO. 379 OF 2022

1) Arun S/o. Shamraoji Gawali,

Aged about 63 years, Occupation Cultivator,

2) Laxman S/o. Shamraoji Gawali,

Aged about 62 years, Occupation Cultivator,

3) Annapurnabai Rambhau Dahaghane,

Aged about 52 years, Occupation Household,

4) Sindhu Ravindra Sontakke,

Aged about 45 years, Occupation Household,

5) Ashok S/o. Shamraoji Gawali,

Aged about 58 years, Occupation LIC Agent,

Appellant nos. 1 to 5 resident of Sindi (Railway),

Tahsil – Seloo, District – Wardha

6) Bhagirathibai Shamraoji Gawali (dead)

**... Appellants
(Original defendants)**

.. Versus ..

Rambhau Daultarao Gawali,

Aged about - 85 years, Occupation Cultivator,

Resident of Sindi (Railway), Tahsil Seloo,

District Wardha.

**...Respondent
(Original plaintiff)**

Shri S.V. Bhutada, Advocate along with Shri Y.J.Maheshwari,
Advocate for appellants.

Shri T.S.Deshpande, Advocate along with Shri A.D. Deshpande,
Advocate for respondent.

CORAM : SMT. M.S. JAWALKAR, J.

DATED : 25/08/2023

ORAL JUDGMENT

At the request of parties, the matter is taken up for final hearing at the stage of admission, on the following substantial question of law:-

“Whether the learned First Appellate Court was justified in rejecting the application preferred by the appellants under Section 5 of the Limitation Act, 1963 seeking condonation of delay in filing the First Appeal by overlooking the fact that the delay caused in preferring the appeal cannot be intentional and deliberate as the delay would cause hardship to the appellants and no prejudice would be caused to the respondent ?”

2. The present appeal is filed being aggrieved by the judgment and order passed by learned District Judge-3, Wardha dated 12/09/2022 in Misc. Judicial Application No. 95/2022, thereby rejected the application preferred by the appellants to condone the delay in filing the appeal.

3. The brief facts of the case can be summarized as under:-

The respondent/plaintiff had filed a suit for declaration, confirmation of possession and perpetual injunction in respect of field survey no. 244, Mouza No. 161/2023, situated at Sindi (Railway), Tahsil and District Wardha.

4. It is the contention of the appellants/defendants herein that they engaged a lawyer and instructed the lawyer to file a Written Statement and to look after the case and to appear and contest the matter. The appellants were unaware that the lawyer had not been attending the proceedings and did not file the W.S.. The learned Trial Court proceeded with the matter without W.S. and passed the judgment and decree dated 20/04/2017, thereby confirmed the possession of the respondent and restrained the appellants. The passing of the order was not within the knowledge of the appellants and it was specifically allowed. Only when the appellants received notice from Tahasildar Seloo, they came to know that the matter was decided and thereafter, they approached to their advocate. After inquiry, they learnt about passing of the judgment on 20/04/2017. They placed on record the copy of notice received from Tahasildar, Seloo which is of dated 15/06/2022. Immediately thereafter, the

application for condonation of delay is filed on 08/07/2022. The learned First Appellate Court rejected the application for condonation of delay on the ground that there is no oral evidence of any of the applicants to show reasonable cause in not filing appeal within time. The learned Appellate Court also held that there is no evidence to show that prior to 15/06/2022 and since giving information, documents to their advocate after receiving summons of suit, why the applicants did not approach directly to their advocate or attended the dates of Court proceedings. It is also observed by learned Appellate Court that the party should not be negligent for considerable period and must be vigilant to the proceedings.

5. The learned counsel for the appellants relied on ***Improvement Trust, Ludhiana V/s. Ujagar Singh and ors.*** reported in ***(2010) 6 SCC 786***, wherein in para nos. 12, 16 & 19, the Hon'ble Apex Court held as under:-

“12. In other words, it has been contended that whatever best was possible to be done by the appellant that had been done, therefore even though there has been some delay, on account of non-communication of the passing of

the impugned order challenged in appeal, delay should have been condoned and the matter should not have been thrown at the threshold. To show its bona fides various order-sheets passed by Trial Court and the Executing Court have been brought to our notice. The envelop maintained by Mr. P.K.Jain, Advocate, for keeping the brief, has been filed to show that dates of hearing were mentioned therein.

16. While considering the application for condonation of delay no straitjacket formula is prescribed to come to the conclusion if sufficient and good grounds have been made out or not. Each case has to be weighed from its facts and the circumstances in which the party acts and behaves. From the conduct behaviour and attitude of the appellant it cannot be said that it had been absolutely callous and negligent in prosecuting the matter.

19. In our opinion, ends of justice would be met by setting aside the impugned orders and matter is remitted to the Executing Court to consider and dispose of appellant's objections filed under Order 21 Rule 90 of CPC on merits and in accordance with law, at an early date. It is pertinent to point out that unless mala fides are writ large on the conduct of the party, generally as a normal rule, delay should be condoned. In the legal arena, an attempt should always be made to allow the matter to be contested on merits rather than to throw it out on such technicalities."

6. The learned counsel for the appellants also relied ***Raheem Shah and anr. V/s. Govind Singh and ors.*** reported in ***2023 SCC OnLine SC 910***, wherein the Hon'ble Apex Court reiterated the guidelines involved in the case of ***Collector, Land Acquisition, Anantnag V/s. Mst. Katiji*** reported in ***(1987) 2 SCC 107***, wherein the Hon'ble Apex Court laid down some principles to be adopted while deciding any application for condonation of delay, as it is realized that,

- “1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
- 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*
- 3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.*
- 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*

5. *There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.*

6. *It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”*

7. From the aforesaid judgment relied on by the appellants, it is clear that, generally, a litigant does not delay in filing the appeal unless he gain by delaying the matter. The Hon’ble Apex Court observed that *“it is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in hierarchy.”*

8. The learned counsel for the respondent vehemently opposed the appeal and relied on the judgment of this Court in the case of ***Kanta @ Shanti W/o. Subhash Karkale V/s. Manjulabai @ Kholki W/o. Haribhau Tarare and anr.*** reported in ***2020(1) Mh.L.J. 918*** and submitted that merely blaming to the counsel that he has not communicated, it is not sufficient. He has to examine the advocate, he has to make the party to the advocate

so that the advocate can reply the allegations made in the application.

9. I have heard both the parties at length. Though it is true that there was delay of around 5 years, it is not impossible that the advocate would have asked the litigant that, he would communicate when to remain present. It is common practice that in a suit, Advocate used to call parties to remain present when the matter is fixed for recording evidence. It appears that the appellants engaged a lawyer and further instructed the lawyer to file a Written Statement and to look after the case and to appear and contest the matter. They were not aware that the lawyer is not attending the proceedings. The matter was proceeded without W.S. and the judgment and decree was passed on 20/04/2017. After receiving notice from Tahasildar, Seloo, they got knowledge of judgment in the suit and applied for certified copy. Thereafter, they filed application for condonation of delay in preferring the appeal. Only for this reason that they have not contacted to their counsel, could not justifiable and there was no deliberate or intentional act on the parts of the defendants. They deserve opportunity to lead evidence. In fact, from getting knowledge of passing of order, there is no delay in filing the

appeal. As such, it would not be appropriate to throw out the appeal at the threshold on the technical ground of delay, specifically when there are justifiable reason for no filing the appeal earlier. In my considered view, the delay is not intentional or deliberate, however, the inconvenience caused to the respondent cannot be overlooked. It can be taken care of by imposing the costs of Rs. 10,000/-. As such, I proceed to pass the following order:-

ORDER

- (1) The Second Appeal is allowed subject to costs of Rs. 10,000/- to be paid to the respondent/plaintiff.
- (2) The judgment and order passed by learned District Judge-3, Wardha in M.J.C. No. 95/2022 on 12/09/2022 and judgment and decree passed by learned Jt. Civil Judge, Junior Division, Seloo in R.C.S. No. 18/2015 on 20/04/2017 are hereby quashed and set aside.
- (3) The R.C.S. No. 18/2015 is hereby restored to its original number for fresh trial.
- (4) The parties to appear before learned Jt. Civil Judge, Junior Division, Seloo on 11/09/2023 at 11.00 a.m.
- (5) Accordingly, the appeal stands disposed of.

[SMT. M.S. JAWALKAR, J.]