



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

SECOND APPEAL NO. 482 OF 2021

Vishnu Baburao Wahale
(Deceased through LRs)

- 1-A) Sunita Vishnu Awahale
age 42 years, occ. Agriculture
r/o Hasta, Tq. Kannad
Dist. Aurangabad.
- 1-B) Asmita Vishnu Awahale
age 13 years, occ. Education
r/o as above.
- 1-C) Amruta Vishnu Awahale
age 10 years, occ. Education
r/o as above.
- 1-D) Abhishek Vishnu Awahale
age 8 years, occ. Education
r/o as above.

(Respondents No. 1-B to 1-D are
minor therefore represented through
their guardina i.e. appellant No. 1-A
mother)

.. Appellants

Versus

Sandu Sakharam Awahale
(Deceased through LRs)

- 1-A) Shantabai Sandu Awahale
age 75 years, occ. Agriculture
r/o Hasta, Tq. Kannad
Dist. Aurangabad.
- 1-B) Popat sandu Awahale
age 45 years, occ. Sevice

r/o Chatrapati Shivaji College
Hiwarkheda Road, Kannad
Dist. Aurangabad.

1-C) Chandrakala Namdeo
age 55 years, occ. Household
r/o Tunki, Tq. Vaijapur
Dist. Aurangabad.

1-D) Shakuntalabai Vinayak Bhingare
age 40 years, occ. Agriculture
r/o Kankawati Nagar, Kannad
Dist. Aurangabad.

1-E) Kantabai Popat Jangle
age 45 years, occ. Agriculture
r/o Tapargaon, Tq. Kannad
Dist. Aurangabad.

1-F) Kesharbai Laxman Malode
age 47 years, occ. Agriculture
r/o Devnala, Tq. Kannad
Dist. Aurangabad.

.. Respondents

Mr. S. S. Bora, Advocate for appellants.
Mr. M. B. Ubale, Advocate for respondents.

CORAM : R. M. JOSHI, J.

RESERVED ON : 8th FEBRUARY, 2024.

PRONOUNCED ON : 14th FEBRUARY, 2024.

JUDGMENT :

1. This appeal under Section 100 of Code of Civil Procedure takes exception to the judgment and order dated 6th August, 2021 passed in Misc. Civil Application No. 265/2019 rejecting application

for condonation of delay caused in preferring appeal against judgment and decree dated 22nd July, 2014 passed in Regular Civil Suit No. 265/2012.

2. Admit. By consent of both sides, taken up for final disposal at admission stage.

3. In order to appreciate contentions of both sides it is essential to take into account certain relevant facts which can be narrated thus :-

Appellants are widow and children of original defendant (now deceased) in Regular Civil Suit no. 265/2012. Original plaintiff i.e. predecessor of present respondents filed suit for removal of encroachment, possession and damages in respect of 10 R land on the allegation that defendant had encroached upon the said land. Plaintiffs and defendants are adjoining land owners. In the said suit, summons was served on defendant through his wife and as he failed to appear in the said suit, decree came to be passed in his absence. Original defendant filed application bearing Miscellaneous Civil Application No. 21/2015 taking exception to the judgment and decree passed by the Trial Court when he got knowledge about said

decree on receiving notice in Regular Darkhast No. 3/2015 filed by plaintiff. The said application under Order 9 Rule 13 of Code of Civil Procedure came to be filed before the Trial Court. Original defendant committed suicide in the year 2016 leaving behind him present appellants. The said application filed by original defendant was prosecuted for about four years and thereafter the same was withdrawn by appellants. Appellants filed appeal against the impugned judgment and decree passed in Regular Civil Suit No. 265/2012 and applied for condonation of delay therefor.

4. The said application is opposed by legal heirs of original plaintiffs/respondents. It came to be rejected by passing impugned judgment and order. Being aggrieved by the said order, this second appeal.

5. Learned counsel for appellants submits that the learned First Appellate Court has failed to take into consideration the fact that original defendant No. 1 challenged the judgment and decree passed by the Trial Court immediately after getting knowledge of the same. The said promptness on his part indicates that no malafides can be attributed to the appellants in not filing the appeal in time. It

is submitted that two remedies are available for challenging ex-parte decree and both remedies can be resorted simultaneously. It is his contention that the First Appellate Court has not taken into consideration the status of the appellants as well as the situation in which the present appeal came to be filed. It is his submission that no prejudice muchless any irreparable loss will be caused to the respondents if the application is allowed and appeal is decided on merits. To support his submissions, he placed reliance on judgment of Apex Court in case of Bhavchandra Shankar More vs. Balu Gangaram More and others, **MANU/SC/0687/2019**.

6. Learned counsel for respondents opposed the application by contending that for the purpose of condonation of delay sufficient reason must be made out by the applicant. According to him, without any reason or justification the application came to be withdrawn. According to him, since the said application was filed before the competent Court of law, Section 14 of Limitation Act would not come to the aid of the applicants. He relied on following judgments to substantiate his contentions :-

- (i) Nandkishor Kanhyalal Agrawal vs. Dhule Municipal Corporation & another,

2012(1) Mh.L.J. 918

- (ii) Maharashtra Rajya Sahakari Adiwasi Vikas Mahamandal
Maryadit Through its Regional Manager vs. Kanti Shantilal
LAWS(BOM)-2002-7-174

7. The law on the point of condonation of delay is fairly settled to say that the Court needs to be liberal in condoning delay provided malafides are not attributable to the applicant or there is inaction or deliberate/intentional delay on the part of applicant. It depends on facts and circumstances of each case to hold as to whether sufficient cause has been made out for condonation of delay. Here in this case, facts as they reveal from the record show that the original defendant after getting knowledge of the decree on receiving summons in Regular Darkhast No. 31/2015 had preferred application under Order 9 rule 13 for setting aside exparte decree. The said application was pending for a period of about four years. Even from the judgment and order passed by the First Appellate Court, it cannot be said that the said pendency is attributed to the original defendant. Merely because the application was pending for four years, the same cannot become a ground to allege malafides against defendants. It needs to be mentioned that after filing of the application original defendant Vishnu died and amendment was

carried out by adding present appellants as legal representatives of deceased defendant. It is thus clear that even after death of defendant, present appellants were pursuing the said application.

8. Filing of application immediately after knowledge of judgment and decree passed by the Trial Court demonstrates the bonafide intention on the part of the original defendant/appellants to take exception to the same. Thus, it cannot be said that any inordinate delay has been caused in challenging the said ex parte decree. Though it is not specifically pleaded by the appellants that on legal advice they withdrew the said application filed under Order 9 Rule 13 of Code of Civil Procedure and decided to file appeal. However, from the record it is clear that appellant No. 1 is said to be an illiterate lady and there is nothing on record to indicate that she was possessing any legal knowledge in order to take decision on her own for withdrawal of the application. In such circumstances, benefit needs to be given to the appellants that in all probability on advice of their advocate such withdrawal is done.

9. The law on the point of challenge to ex-parte judgment and decree is fairly settled to say that it is open for the defendant to

file application under Order 9 Rule 13 of Code of Civil Procedure so also to prefer an appeal under Section 96. Both these remedies can be simultaneously resorted to. In such circumstances, when application was already filed before Trial Court it was open for the appellants to keep the said application pending and to prefer appeal against the impugned judgment and award. In any event, in both proceedings it is incumbent for appellants to show sufficient cause for non appearance before the Trial Court. Thus, practically, there would not be any prejudice caused to the respondents if the appeal is allowed to be prosecuted by appellants.

10. What the Court is required to see is as to whether there is inordinate delay or the appellants have slept over its right for a long unjustified period and thereafter malafide has sought to exhaust available legal remedy. Filing of application under Order 9 Rule 13 of Code of Civil Procedure and prosecuting the same after his death by present appellants clearly indicates that there was always intention on their part to prosecute the proceeding against the exparte judgment and decree passed by the Trial Court. In considered view of this Court, the learned First Appellate Court has failed to take into consideration the overall facts and circumstances

of the case, in which appeal came to be filed subsequently. The findings recorded by the First Appellate Court about the appellants having not made out any case for condonation of delay is contrary to the case of the rival parties and evidence on record. This, therefore, becomes a substantial question of law and deserves to be answered in favour of the appellants.

11. Having regard to the aforestated discussion, appellants have succeeded in making out a case for condonation of delay caused in preferring appeal against the judgment and decree dated 22nd July, 2014 passed in Regular Civil Suit No. 265/2012.

12. In the result, impugned judgment and order passed by First Appellate Court deserves interference. Civil Misc. Application No. 265/2019 stands allowed. Having regard to the time lapsed from the date of passing of the judgment and decree in Regular Civil Suit No. 265/2012, the First Appellate Court is directed to dispose of appeal as expeditiously as possible and in any event within a period of six months from today.

13. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb