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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 894 OF 2017**

Nayanbadshaha Shahabuddin Mujawar ... Appellant

Vs.

Pandurang Tukaram Kadam ... Respondent

Mr. Chetan G. Patil for the Appellant.

Mr. Shrishailya S. Deshmukh for the Respondents.

CORAM : GAURI GODSE, J.

DATE : 29th JULY 2024

ORDER :

1. This Second Appeal is filed by the original defendant to challenge the dismissal of his application for condonation of delay caused in filing the First Appeal in the District Court. The trial court has decreed the suit for specific performance on 11th April 2014. The application for condonation of delay of 563 days was filed on 2nd December 2015 to challenge the trial court's judgment and decree granting specific performance. The First Appellate Court, after examining the pleadings with regard to delay condonation application and the supporting oral evidence, has rejected the application. Hence, this second appeal.

2. Learned counsel for the appellant submitted that the First Appellate Court has referred to only some stray admissions in the appellant's cross examination and disbelieved the reasons given by the appellant in the delay condonation application. He submitted that in the delay condonation application, the appellant had specifically pleaded that he was not informed about the date of the hearing by his Advocate, and the Advocate had also not conducted the cross examination of the plaintiff's witness and no evidence was led on behalf of the appellant. He submits that once it is the appellant's specific case that he was never intimated by his Advocate about the date of the hearing, it is unbelievable that the appellant was present at the time of the hearing of the suit. He thus submits that the admission given by the appellant regarding he being present at the time of the hearing of the suit cannot be held against the appellant by ignoring appellant's pleadings in the application that he was not aware of the decision of the suit nor was he aware of the date fixed for hearing of the suit.

3. Learned counsel for the appellant thus submits that the Second Appeal raises substantial questions of law with regard to the misappreciation of the pleadings and evidence on record. To support his submissions, learned counsel for the appellant relies upon the decision of this court in the case of *Shewantabai wd/o.*

Kashinath Kumbhare (since deceased) Suresh Kashinath Kumbhare and Others Vs Purushottam s/o. Mahadeorao Ambatkar¹.

He submits that a similar issue had arisen in the said case where this court had framed the point as to whether the refusal to condone the delay would amount to a refusal to hear the appeal on merits. He thus submits that in view of similar facts of this case, this Second Appeal would also require consideration of the same question of law, including the other question of law that deals with incorrect appreciation of facts and evidence on record.

4. Learned counsel for the appellant has tendered a list of separate substantial questions of law which, according to him, are required to be considered by this court. Questions of law as framed by the learned counsel for the appellant read thus :

(i) Whether the learned Appellate Court was justified in dismissing the application filed by the appellant for condonation of delay when the Appellant had clearly made out a sufficient cause for the occurrence of delay, as the appellant was not aware of the judgment and decree passed by the learned Trial Court and that he got the knowledge of the same only when he received the notice of the execution proceedings initiated by the Respondents and after which he immediately filed appeal along

¹ (2014) (2) Mh. L. J. 848

with delay condonation application ?

(ii) Whether the learned Appellate Court was justified in only relying upon a stray statement made in the cross examination of the appellant and treating it as an admission by overlooking the other portion of his cross examination which is clearly consistent to the averments made by him in his delay condonation application as also to deposition made by him in his examination in chief ?

(iii) Whether the learned Appellate Court is justified in dismissing the delay condonation application which has eventually resulted in dismissal of his appeal without the same being heard on merit thus depriving the appellants of his valuable right of arguing the First Appeal on the issues of facts as well as law ?

(iv) Whether the learned Appellate Court is justified in completely overlooking the material aspect of the matter whereby the appellant had filed his Written statement in the suit thereby emphatically denying and disputing the averments made by the respondent in the plaint, however, the suit was decreed ex-parte as neither was evidence led on behalf of appellant nor were the witnesses examined by the respondent,

cross examined ?

(v) Whether the learned Appellate Court is justified in recording a perverse finding that the applicant though was present in the court during trial as also on the date of delivery of judgment, he did not file appeal within time ? That learned Appellant ought to have seen that the said fact is ex-facie improbable as there is absolutely no reason as to why the appellant who had filed a written statement thereby strongly controverting the averments in plaint would choose, not to participate in the trial inspite of being present during the trial ?

5. Learned counsel for the respondent submits that the reasons given in the application for condonation of delay are claiming ignorance about the date of hearing of the suit and the date of the decision. However, the appellant has not pleaded any source of knowledge or date of knowledge about the decision of the suit. He further submits that the pleading in the application for condonation of delay would indicate that the appellant has made an allegation against his Advocate, and the entire blame is put on the Advocate. He submits that on the face of averments in the application itself, it is clear that the appellant has taken a false stand. He submits that the trial court's judgment would indicate that the appellant was

represented by his Advocate.

6. Learned counsel for the respondents further submits that the admission given by the appellant in his cross examination that he was present at the time of hearing of the suit, coupled with the appearance of the appellant's Advocate seen in the trial court's judgment, is sufficient to conclude that the appellant has made a false statement in his application for condonation of delay. He thus submits that the First Appellate Court has dealt with the oral evidence and has recorded findings of facts on reasons given by the Court for not accepting the grounds for condonation of delay. He further submits that the grounds sought to be argued before this Court regarding not cross examining the plaintiff's witness and reliance placed on the written statement showing denial of the plaintiff's case would amount to hearing the merits of the suit for the first time in the Second Appeal.

7. He submits that none of the grounds on merits of the suit were dealt with by the First Appellate Court as only the application for condonation of delay is examined on merits by the First Appellate Court. Hence, grounds raised on the merits of the suit cannot be accepted as substantial questions of law for consideration by this Court in an appeal arising out of the dismissal of the delay

condonation application.

8. He further submits that all the proposed questions of law submitted by the learned counsel for the appellant are on re-appreciation of the facts and evidence on record, which is not permissible under Section 100 of the CPC. He thus submits that the Second Appeal does not raise any substantial question of law.

9. I have considered the submissions made by the learned Advocates for the parties. Perused the papers. The trial court had decreed the suit for specific performance on 11th April 2014. Learned counsel for the respondent is right in submitting that the trial court's judgment records appearance of the appellant's Advocate which indicates that the appellant was represented by his Advocate before the trial court at the time of the hearing. I also find substance in the argument made on behalf of the respondent that the appearance of appellant's Advocate shown in the trial court's judgment and appellant's admission in the cross examination that he was present at the time of the hearing of the suit is sufficient to conclude that the appellant has made a false statement in his application for condonation of delay that he was unaware about the hearing of the suit.

10. A perusal of the application for condonation of delay does not

disclose the source of knowledge or the date of knowledge of the decision of the suit. Vague allegations are made in paragraph 2 of the application, which amounts to making allegations against the Advocate. In paragraph 7 of the application, the appellant further stated that after receipt of the notice of execution petition, the appellant learnt about the trial court's judgment, and he approached another Advocate after receiving certified copies and filed an appeal before the District court. However, even the said aspect is not validated by any specific date of knowledge about the trial court's judgment and decree.

11. Thus, with these averments in the application for condonation of delay coupled with the admission given in the cross examination that he was personally present on all the dates fixed by the Court, I do not find any substance in the appellant's argument that he was unaware about the impugned decree. It is a well-settled principle of law that a litigant cannot take any advantage by making vague allegations against the Advocate while seeking condonation of delay. Allegations made by the appellant against the advocate cannot be accepted as a sufficient cause for condonation of delay. Thus, the reasons given in the application for condonation of delay cannot be accepted as sufficient cause for condonation of delay.

12. A perusal of the reasons recorded by the First Appellate Court indicates that on a thorough examination of the pleadings and the entire oral evidence, the Court disbelieved the appellant's reasons for condoning the delay to be genuine. Thus, the First Appellate Court rightly refused to exercise the discretion in favour of the appellant.

13. I do not find any illegality or perversity in the reasons recorded by the First Appellate Court. It is not the case where any particular evidence has been ignored, or a vital piece of evidence or any particular oral evidence has been ignored by the First Appellate Court. Hence, the arguments made on behalf of the appellant would amount to re-appreciating the evidence and facts on record, which is not permissible under Section 100 of the CPC.

14. In view of the facts of the case as recorded above, the decision of this court in the case of *Shewantabai* relied upon by the learned counsel for the appellant would be of no assistance to the appellant.

15. Hence, for the aforesaid reasons, the grounds argued on behalf of the appellant do not raise any substantial question of law required to be considered by this court under Section 100 of the CPC. The Second Appeal does not raise any substantial question of

law. Hence, the Second Appeal is dismissed. In view of the dismissal of the Second Appeal, Civil Application No. 1506 of 2017 is dismissed as infructuous.

[GAURI GODSE, J.]