

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

SECOND APPEAL NO. 531 OF 2023

Rajaram Jyoti Katte & Anr.

.. Appellants

vs.

Krushna Vishnu Shirsat

.. Respondent

...

Mr. Priyal G. Sarda, with Shubham Sane, for the Appellants.

...

CORAM: SANDEEP V. MARNE, J.

DATE : 7th FEBRUARY, 2024.

P. C.:

1. By this Appeal, the Appellants challenge order dated 22nd March, 2018 passed by the District Judge-1, Vaduj rejecting Civil Misc. Application No. 2 of 2017 filed by the Appellants for condonation of delay of 5 years and 4 months in filing the Appeal challenging the judgment and decree dated 21st July, 2011, passed in Regular Civil Suit No. 76 of 2008.

2. It appears that the Plaintiff filed Regular Civil Suit No. 76 of 2008 for Specific Performance of Agreement for Sale dated 28th December, 2007. It is Plaintiffs' case that out of the agreed amount of consideration of Rs.76,000/-, an amount of Rs.60,000/- was paid to the Appellants/Defendants on the date of execution of

the registered agreement and the balance amount of Rs.10,000/- was to be paid on the date of execution of the Sale Deed. The Plaintiff alleged that he served notice dated 21st June, 2008, calling upon the Defendants to execute the Sale Deed. Since the Defendants failed to execute the Sale Deed, Regular Civil Suit No. 76 of 2008, was instituted by the Plaintiff in the Court of Civil Judge, Junior Division, Dahiwadi on 23rd June, 2008. The Defendants *suo moto* appeared in the suit on the same day i.e. on 23rd June, 2008, have filed a pursis stating that summons in the suit need not be issued on account of their personal appearance before the Trial Court. After filing the pursis dated 23rd June, 2008, the Appellants did not file written statement opposing the Suit. The Trial Court proceeded to decree the suit on 21st July, 2011, directing the Defendants to execute the Sale Deed upon Plaintiff depositing the balance amount of consideration in the Court. The Defendants were also directed to handover the possession of the suit property to the Plaintiff. It appears that the decree dated 21st July, 2011 was executed by execution of Sale Deed by the Court Commissioner in favour of the Plaintiff. The possession of the suit property was also taken away from Defendant and handed over to the Plaintiff on 28th January, 2014. The Appellants/Defendants did not bother to take any steps for over 5 years and thought of filing Appeal against the decree dated

21st July, 2011 in the year 2017. The Appeal was lodged alongwith Civil Misc. Application No. 2 of 2017 for condonation of delay of 5 years and 4 months in filing the Appeal. The District Court has proceeded to reject the Application by order dated 22nd March, 2018.

3. I have heard Mr. Sarda, learned counsel appearing for the Appellants. According to him, a fraud was played on the Appellants by their advocates who was prosecuting Regular Civil Suit No. 128 of 2004 on their behalf. That, the said advocate erroneously accepted brief on behalf of the Plaintiff against the Defendants. That, he misguided the Appellants to remain present in the Court on the day of lodging of Regular Civil Suit No. 76 of 2008, and made them sign the pursis for non issuance of summons. That the said advocate took disadvantage of trust of the Appellants on him and misguided the Appellants in filing the pursis on 23rd June, 2008. That, the Appellants believed in the representation made by the said advocate, and blindly believing him, signed the pursis on 23rd June, 2008. That the Appellants were not even aware about filing of Regular Civil Suit No. 76 of 2008, and were actually not informed about filing of the said suit or that the concerned pursis was being filed in the said Suit. That on account of absence of knowledge about institution of suit by the Plaintiff, the Appellants/Defendants were not even aware about passing of decree

dated 21st July, 2011. That in such circumstances, the Appellate Court ought to have condoned the delay as the Appellants were not even aware about passing of decree dated 21st July, 2011.

4. Mr. Sarda would further submit that in a case where ex-parte decree is passed and there is delay in filing the first appeal, it is incumbent upon the First Appellate Court to permit parties to lead evidence to prove the assertions made in the application for condonation of delay. That such Application cannot be filed merely on the basis of pleadings. In support of his contention, he would rely upon the judgment of this Court in ***Chandrakant Somnath Melge vs. Balasaheb Somnath Melge***¹.

5. I have considered the submissions canvassed by Mr. Sarda. In the present case, the Appellants/Original Defendants seem to be educated persons who have put their respective signatures on the pursis dated 23rd June, 2008. Therefore, there is no reason for this Court to believe that they did not know as to which writing was being signed by them. Upon filing of Suit by Plaintiff on 23rd June, 2008, the Appellants voluntarily appeared before the Court on the same day and filed pursis dated 23rd June, 2008. It is to be noted that the Trial Court is located at Dahiwadi, whereas the Appellants are residents of Village Gondawale, Taluka-Man, District-Satara.

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This means that the Appellants specially travelled to Dahiwadi for the purpose of signing and filing the pursis dated 23rd June, 2008. The effect of filing the pursis dated 23rd June, 2008 was to merely relieve the Trial Court of obligation to issue and serve summons on the Defendants. The Defendants, who had acquired knowledge of filing of Regular Civil Suit No. 76 of 2008, were duty bound to defend the suit by filing written statement. Though it is easy to blame an advocate for the purpose of seeking condonation of lapses committed by the litigants, in the present case, even if Defendants' allegations against the advocate are to be considered as correct, the act of filing pursis merely prevented service of summons. Defendants were free to file written statement and defend the suit. The Defendants could have engaged another advocate after noting their previous advocate fighting case against them. The Defendants, however, did not bother to check the progress of Suit till it was decreed on 21st July, 2011.

6. The conduct of the Defendants after decree of the Suit dated 21st June, 2011 also assumes importance. On account of Defendants' failure to execute the Sale Deed as per the decree of the Trial Court, the Court Commissioner executed Sale Deed on their behalf. Thereafter, the possession of the Suit property was taken away from the Defendants and handed over to the Plaintiff during execution proceedings on 28th January, 2014. At least at this

stage, the Defendants would have acquired knowledge of filing and decree of suit bearing Regular Civil Suit No. 76 of 2008. Despite possession of their property being taken away, Defendants did not take any steps for further period of 3 long years. In the year 2017, for reasons unknown, Defendants thought of contesting the proceedings against Plaintiff and lodged the Civil Misc. Application No. 2 of 2017 seeking condonation of delay in filing Appeal against the decree dated 21st July, 2011.

7. The conduct of the Defendants throughout the proceedings is such that no sympathy can be extended to them. It appears that Defendants executed a registered Sale Deed dated 28th December, 2007, and received consideration of Rs.60,000/- out of the agreed consideration of Rs.70,000 from Plaintiff. Despite voluntarily appearing before the Trial Court on 23rd June, 2008, they thought it appropriate not to defend the suit, possibly because, they did not desire to question the right of the Plaintiff to purchase the suit property through a Court decree. Even after the possession of the suit property was taken away from 28th January, 2014, Defendant did not have any objection.

8. In my view, therefore the filing of Civil Misc. Application No. 2 of 2017 by Defendants was gross abuse of process of law. The Appellants cannot be permitted to have their lapses condoned

by seeking to blame their advocate who had appeared on their behalf in previously instituted Regular Civil Suit No. 128 of 2004. The Appellants must share the responsibility for their own lapses.

9. Reliance of Mr. Sarda on the judgment of this Court in *Chandrakant Somnath Melge vs. Balasaheb Somnath Melge (Supra)* does not cut any ice. In the present case, leading of evidence was quiet unnecessary as the Appellants' lapse in not filing the Appeal even after loss of possession of suit property on 28th January, 2014, is clearly unexplainable.

10. No serious error can be traced in the orders passed by the Appellate Court. Even in filing the present Appeal, there was delay, which this Court condoned by order dated 19th July, 2023. Thus at every stage, the Appellants are responsible for delay.

11. No substantial question of law is involved in the Appeal. The Appeal is accordingly rejected.

SANDEEP V. MARNE, J.