



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 13 OF 2018
WITH
CIVIL APPLICATION NO. 65 OF 2018
WITH
INTERIM APPLICATION (ST.) NO.8967 OF 2024

Smt. Karuna Sadashiv Raut and Ors.

... Appellants.

Versus

John Mohammed Gulammohanmmad and Ors.

... Respondents.

Mr. Sudhir V. Sadavarte for the Appellants.

Mr. A. Patel a/w. Ms.Najma Sharif for Respondent Nos.1 to 3.

Mr. Kishor S. Patil, for the Respondent No.5.

Coram : Sharmila U. Deshmukh, J.

Date : April 15, 2024.

P. C. :

1. Being dissatisfied by the order dated 8th December, 2015 passed by the Appellate Court rejecting the Misc. Civil Application No.37 of 2010 seeking condonation of delay of 2 years and 9 days caused in preferring the Regular Civil Appeal against the *ex-parte* judgment and decree passed in Regular Civil Suit No.4102 of 2000 dated 22nd May, 2008, the present Appellants who are the legal heirs of the deceased original defendant No.3 are before this Court.

2. The facts of the case are that Regular Civil Suit No.4102 of 2000 was filed seeking specific performance of contract and for declaration and for permanent injunction. In the judgment delivered by the Trial Court on 22nd May, 2008, it was noted that the defendants were tried to be served but the service was either refused or could not be effected as per the Bailiff report on record. It is also noted that during the pendency of the suit, the defendant no.3 died and his legal heirs were brought on record by amending the plaint. The Trial Court by the judgment dated 22nd May, 2008 decreed the suit.

3. As against this Misc.Civil Application No.37 of 2010 was filed by the present Appellants seeking condonation of delay of 2 years and 9 days. The Appellate Court on going through the record and proceedings found that during pendency of the suit, the original defendant No.3 was reported dead and the legal heirs were brought on record as defendant Nos.3A to 3C. The Appellate Court also noted that the certified copy of the Exhibit-1 reveals that the defendant nos.3A to 3C in spite of service of summons remained absent. The Appellate Court noted the cause which was shown for the delay that they became aware of the same only when the execution application was filed. The Appellate Court considered that the Appellants received knowledge about the pendency of the suit when they

received the suit summons of the said suit and dismissed the application for condonation of delay.

4. Heard Mr.Sadavarte, learned counsel appearing for the Appellants, Mr. Patel, learned counsel for Respondent Nos.1 to 3 and Mr. Patil, learned counsel for the Respondent No.5.

5. Mr. Sadavarte, learned counsel appearing for the Appellant would submit that the specific case which was pleaded was that no notice or summons was served upon the Applicants. He submits that the said fact is borne out from the material on record and points out to the application filed before the Executing Court seeking re-issuance of the summons upon the Appellants at the fresh address. He submits that as such it was clear that the summons was not served even during the pendency of the suit as they were not residing at the said address. He submits that the Appellate Court have not exercised the discretion judicially and as such substantial question of law arises.

6. *Per contra*, Mr.Patel, learned counsel appearing for the Respondents points out that the specific noting of the Trial Court on Exhibit-1 i.e. the plaint is that the defendant nos.3A to 3C remained absent after service of summons Exhibit-62 and hence the suit proceeded *ex-parte* against the defendant Nos.3A to 3C. He submits

that the Roznama on record also records that after the legal heirs were brought on record the notice was prepared and sent for service and that the summons was served upon the defendant nos.3A to 3C. He would further submit that the defendant no.3 had caused appearance to be filed in the suit and thereafter had not filed written statement and as such the suit proceeded *ex-parte* further without the written statement of the defendant no.3.

7. Considered the submission and perused the record.

8. The present Appeal has been initiated against the order of 1st Appellate Court refusing to condone the delay. It is therefore required to be seen whether the discretion which has been exercised by the Appellate Court has been properly exercised. The pleadings in the application seeking condonation of delay is that the legal heirs of the deceased-defendant No.3 were not served with any notice or summons and therefore, the written statement could not be filed in the suit before the Trial Court. Before this Court, the argument is sought to be developed as regards the present Appellants residing on a different address and therefore, the improbability of summons being served at the earlier address. However in the pleadings in Misc. Civil Application No.37 of 2010, no such contention has been raised by the Appellants. As the pleading is that the Appellants were not served

with any notice or summons, the same becomes a question of fact which required evidence to be led to demonstrate that due to certain reasons as such shifting of address the notice or summons could not be said to be served upon the Applicants. It appears from the judgment of the Appellate Court that no evidence was led by the Appellants for establishing the said fact. The Appellate Court has considered that the explanation tendered is that of acquiring knowledge of the *ex-parte* judgment and decree only upon receiving notice in the execution petition. As the judicial record indicates that the Appellants were served but had remained absent, the Appellate Court has rightly rejected the explanation tendered on the ground that the Applicants had notice of the proceedings as they were duly served in the suit. The Appellate Court has considered that the delay of two years was unreasonable, unexplained and unsatisfactory delay and that if the same is condoned the same would amount to commencing second phase of litigation. It is well settled that the law of limitation though harsh is required to be applied with full rigour especially in the cases where there is no sufficient explanation which is tendered for the delay. In the present case, there is no material which has been produced on record to establish that the Applicants were not served with any notice or summons which fact was specially within the knowledge of the Applicants and was therefore required to

be proved by leading the evidence being question of fact.

9. As there is no evidence to support the explanation tendered for condonation of delay, the discretion which was exercised by the Appellate Court cannot be said to be arbitrary. As such, no substantial question of law arises, second appeal stands dismissed.

10. In view of the disposal of second appeal, civil/interim application(s) taken out in this appeal, if any, does not survive and the same is disposed of.

11. At this stage, request is made for extending the interim relief which is operating since long. The request is opposed by the learned counsel appearing for the Respondent. As there is an interim relief operating in favour of the Appellants, I am inclined to extend the same for period of four weeks from the date of uploading of the present order on the official website of this Court.

[Sharmila U. Deshmukh, J.]