



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.240 OF 2017
WITH
CIVIL APPLICATION NO.534 OF 2016
IN
SECOND APPEAL NO.240 OF 2017

Dattatray Tukaram Gaikwad
Age 60 yrs. Occ. - Business
R/at Khanapur Tal.- Khanapur,
Dist- Sangli

...Appellant/
Applicant

Versus

1. Dr. Kiran Jinendra Narade
Age – 56, Occ. - Profession
R/o Khanapur, Taluka – Khanapur,
Dist- Sangli

2. Bhimashankar Tukaram Gaikwad
Age- 56 yrs. Occ.- Business
R/o Khanapur Taluka -Khanapur
Dist- Sangli

...Respondents.

Adv. Ranjeet Patil for the Appellant/Applicant.

Adv. Akshay Kulkarni i/b Ashutosh Kulkarni for Respondent No. 1.

Coram : Sharmila U. Deshmukh, J.

Date : March 13, 2024.

ORAL JUDGMENT :

1. Being dissatisfied by the Judgment dated 8th December, 2014
passed by the Appellate Court in Misc. Civil Application No. 242 of

2012 dismissing the Application filed by the original Defendant No. 1 seeking condonation of delay of 81 days caused in filing the Appeal against the judgment dated 16th November, 2010 passed by the Trial Court in Special Civil Suit No. 95 of 2005, the present Appeal has been filed.

2. The facts of the case which are not disputed is that by judgment dated 16th November, 2010 the suit was partly decreed holding that the Plaintiff is entitled to specific performance of part of the contract dated 21st February, 2005 and is entitled to get the sale deed executed from the Defendant No. 1 to the extent of undivided 1/3rd share of Defendant No. 1 in the suit properties and the Trial Court further directed the Defendant No. 1 to pay a sum of Rs. 1 lakh to the Plaintiff as refund of the proportionate earnest money.

3. As against this, First Appeal was preferred by the original Defendant No. 1 before this Court and by reason of enhancement in the pecuniary jurisdiction of the Court, was thereafter transferred to the District Judge Sangli and renumbered as Misc. Civil Application No. 242 of 2012. The delay in filing the First Appeal before this Court was of 81 days and the explanation which was put forth was that the application for the certified copy was made on 1st December, 2010 and the same was ready on 29th April, 2011. However, due to the medical

ailment of the Appellant, he was advised bed rest for the period of two months and thereafter the certified copy was received him through his advocate on 8th August, 2011. The Appellate Court has declined to considered the same as a sufficient explanation for the delay of 81 days and has dismissed the Application.

4. Heard Mr. Ranjeet Patil, learned counsel for the Appellant and Mr. Akshay Kulkarni, learned counsel for the Respondent.

5. Learned counsel appearing for the Appellant would submit that the only reason for dismissing the application is that the concerned physician was not examined by the Appellant to establish his medical ailment. He would further submit that the Appellate Court has sought explanation for the period from 29th April, 2011 to 6th June, 2011 which is the date of the medical certificate and has considered that there is no explanation given for this period. He submits that the substantial question which arises is whether the Appellate Court has rightly exercised the discretion vested in it under Section 5 of the Limitation Act, 1963.

6. *Per contra*, learned counsel for the Respondent would submit that the Appellant was aware of the passing of the judgment of the Trial Court on 16th November, 2010 and was therefore expected to

challenge the same within the prescribed period. He submits that the Plaintiff is put to financial loss as apart from the execution of the sale deed the, judgment directed the Defendant No. 1 to refund sum of Rs. 1 lakh and by virtue of the appellate proceedings, the decree has not have been put into execution. He submits that the Appellate Court has rightly refused to exercise the discretion as no sufficient explanation was tendered for the delay.

7. Considered the submissions and perused the record.

8. Admit on the following substantial question of law.

“Whether the First Appellate Court has committed an error in law by not exercising the discretion in favour of the Appellant considering that the delay of 81 days has been sufficiently explained by the Appellant?”

9. As the private paper book is already on record, learned counsel for the parties are ad-idem that the Appeal can be disposed of finally on the aforesaid substantial question of law.

10. Learned counsel for the parties submits that the submissions made for admission to be taken into consideration while finally disposing of the Second Appeal.

11. In support of the Application for condonation of delay, the

Appellant has examined himself.

12. Perusal of the impugned judgment would indicate that the Application for the certified copy was made on 1st December, 2010 and was stated to be ready on 29th April, 2011. The Appellant had deposed that because he was advised bedrest, he could not travel to collect the certified copy which was ready on 29th April, 2011 and in support of his case of suffering from hyper tension, the medical certificate of Dr. R. B. Babladi from Solapur was tendered in evidence. The same was marked as Exhibit 13. Although the certificate was denied by the Opponents which they were well within their rights to do so, the Appellate Court ought to have considered that the document was a medical certificate issued by a qualified doctor from Solapur. The document was marked as an Exhibit and despite the author not being examined, the certificate corroborated the case of the Appellant as regards his ailment. The Appellate Court also failed to consider that it is not necessary to explain each and every days of delay and has thereby committed error in law by holding that the period from 29th April, 2011 till 6th June, 2011 has remained unexplained.

13. The Appellate Court ought to have considered that the provisions of Section 5 of Limitation Act, 1963 are elastic enough to

apply the law in a meaningful manner to sub-serve the ends of justice. The delay in the present case could not said to be an unexplained inordinate delay which could not have been condoned. Considering that the subject matter was the specific performance of an agreement of sale in respect of immovable property, it is desirable that the appeal be adjudicated on merits and should not be thrown out at the threshold on the ground of limitation.

14. Having regard to the discussion above, considering the explanation which has been tendered in the Application for condonation of delay read with evidence which has come on record, the Appellate Court has committed an error in law in not exercising the discretion vested in it for condoning the delay which discretion has to be exercised judicially. The Appellate Court failed to consider the well settled judicial pronouncement that the delay has to be condoned liberally and in the facts of the present case, the explanation was sufficient to condone the delay. The substantial question of law is answered accordingly.

15. Appeal succeeds. The impugned judgment dated 8th December, 2014 is quashed and set aside. Resultantly, the Misc. Application No. 242 of 2012 is allowed.

16. As the Appeal is of the year 2012, the Appellate Court is requested to decide the Appeal expeditiously and in any event within a period of six months from the date of production of the order of this Court before the Appellate Court.

17. There was interim stay to the execution proceeding operating in favour of the Appellant since the year 2017. The same is extended till the first date of hearing before the Appellate Court.

18. In view of disposal of the Second Appeal, Civil Application does not survive for consideration. Civil Application stands disposed of.

[Sharmila U. Deshmukh, J.]

Harish

7 of 7