



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 428 OF 2020 WITH
CIVIL APPLICATION NO. 4845 OF 2024
IN SA/428/2020

Kazi Syed Salahuddin Kazi
Syed Nazirul Hasan

....Appellant

VERSUS

Syed Shahbuddin Shuttari
Syed Bahauddin Shuttari
(Deceased through LRs)

.....Respondent

Mr. V. C. Sholshe, Advocate holding for Mr. S. S. Shinde, Advocate for the Appellants.

Mr. A. P. Bhandari, Advocate for Respondent Nos. 1/B(i) to 1/B(iii), 1C to 1F.

CORAM : R. M. JOSHI, J.

DATE : 12th AUGUST, 2025.

PER COURT :

1. This Appeal is preferred against the order passed below Exhibit 1 in Civil M.A. No. 308/2015 whereby the First Appellate Court has rejected the Application filed under Section 5 of the Limitation Act for condonation of delay of 3864 days in preferring the Appeal against the judgment dated 18.12.2004 and decree dated 31.12.2005 passed in Regular Civil Suit No. 86/1997.

2. The facts as they appear from the record can be narrated in brief as under :-

Original Plaintiffs filed suit being Regular Civil Suit No. 1166/1990 for recovery of possession of the suit property against the Appellant/original Defendant. The plaint was returned for its proper presentation before the Court of competent jurisdiction. Accordingly, the plaint was again presented and it was numbered as Regular Civil Suit No. 86/1997. The suit came to be decided in absence of the Defendants. As original Plaintiffs died their legal representatives filed execution proceedings.

3. It is the contention of the Appellant that on receipt of notice of proceedings of MARJI No. 258/2015 on 12.02.2015, the Appellant came to know about passing of the judgment and decree in Regular Civil Suit No. 86/1997. It is also claimed that the Applicant therein on account of illness could not file the Appeal and the delay is claimed to be of 35 days in preferring the Appeal. It is further found by the office of the Court that delay was of 3864 days and not 35 days as claimed.

4. In the said Application, Applicant examined himself so also evidence of the Advocate was led. District Judge – 6, Aurangabad, by impugned order dated 12.02.2020 rejected the Application. Hence, this Appeal.

5. Learned counsel for the Appellant submits that while rejection of the appeal the original decree is merged in the said order and hence not only the reason for condonation of delay would have to be considered but also merits of the case need to be taken into account. It is his submission on condonation of delay that the Appellant had not engaged Advocate to cause appearance before the Trial Court after registration of suit. It is sought to be argued that the Advocate on his own has caused his appearance in the said proceedings without any instructions from the present Appellant. It is his further submission that having regard to the nature of dispute and also in view of the fact that at earlier point of time there was order of return of plaint, and by suppression of the said fact suit is filed and decided, the delay deserves to be condoned. It is his further submission that the Trial Court has failed to take into consideration the contention of Plaintiff in the plaint before the order of return of plaint was passed. It is his further submission that at earlier point of

time, it was sought to be contended that the suit property is Wakf property and thereafter it is claimed that it is the individual property of the Plaintiffs/Respondents herein. He alleged that even if it is accepted that no written statement was filed, it was incumbent on the part of the Trial Court to call upon the Plaintiff to prove his title. On these amongst other submissions, it is sought to be contended that substantial questions of law as made out in the appeal memo as well as by submission of additional grounds and substantial questions of law filed on record, the Appeal be admitted by framing substantial questions of law.

6. Learned counsel for Respondents has drawn attention of the Court to the fact that at no point of time, it was claimed by the Appellant that the Advocate has caused appearance without instructions. He drew attention of the Court to the certified copies of the proceedings before the Trial Court which according to him, indicate that the Appellant had signed Vakalatnama which was filed before the said court and thus, it cannot be said that Appellant had no knowledge of the said proceeding. In reply to the allegation of the Appellant that there was presentation of plaint before the same Court, it is sought to be argued that the Trial Court at the earlier

point of time has held that it has no jurisdiction and hence called upon the Plaintiff to present the plaint before the Court of competent jurisdiction. Thus, thereafter the plaint was presented before the Court of competent jurisdiction and it came to be decided in absence of Defendant as after causing of appearance, Defendant failed to appear before the Court.

7. At the outset, this Court is required to consider as to whether there is any substantial question of law involved in the challenge to the order dated 12.02.2000 passed by the District Court rejecting the Application for condonation of delay, to entertain the appeal further and decide the same.

8. Delay is sought to be condoned solely on the ground that the Applicant/Appellant herein had no knowledge of Regular Civil Suit No. 86/1997. This contention of the Appellant gets falsified from evidence led before the District Court where Advocate Sancheti deposed on oath about he being authorised to appear in the proceedings and Vakalatnama being signed by the Defendant. There is no cross-examination of this witness from the present Appellant in order to bring it on record that the Advocate has filed the

Vakalatnama without instructions from the Defendant. Pertinently, there was no such allegation made even during the entire proceeding before the District Court for delay condonation, that Advocate caused appearance without instructions from Appellant.

9. For the first time in this Appeal, it is sought to be canvassed that the Advocate was never instructed to cause appearance. This Court is unable to persuade itself to accept the said contention for the first time in this Appeal for more than one reason mainly on the ground that no such allegations were made before the District Court that the Application for condonation of delay was filed. Pertinently, when Advocate Sancheti examined himself on oath, there is not even suggestion made to him that he was never engaged by the Defendant. Thus, the ground sought to be made out is palpably false and a created ground needless to say that unsupported by any material on record. This Court therefore has no hesitation to hold that the Appellant has not approached to this Court with clean hands and has attempted to misguide the Court.

10. Insofar as the order of rejection of Application for condonation of delay is concerned, the District Court has rightly

taken into consideration the Application made before it and the evidence on record. This Court finds no perversity in the said findings recorded by the First Appellate Court in order to frame any substantial question of law.

11. As other contentions of learned counsel for Appellant are concerned, it is necessary to take note of the fact that Regular Civil Suit No. 1166/1990 was contested and thereafter the direction was issued by the Court to present the plaint before the competent Court and following order came to be passed by the Trial Court :-

ORDER

- (1) The plaint be returned to the plaintiff for its presentation to the court having jurisdiction.
- (2) The plaintiff is liberty to apply under Rule 10A(2) of Order 7 of C.P.C.
- (3) Cost in cause.

Accordingly, plaint was presented before the competent Court and notices were duly issued to the Defendants therein. Pursuant to the notice, appearance was caused by the Defendants through Advocate. Thus, it cannot be said that the said proceedings were conducted without knowledge of the Appellant.

12. Presentation of plaint before the Trial Court which has passed the impugned order therefore, cannot be faulted with. It is not the case made out by the Appellant herein that the Court which has passed the said judgment has no jurisdiction to pass any such judgment.

13. As far as contention of the Appellant that the Trial Court has failed to frame issue with regard to the title of the Plaintiff is concerned, for want of written statement there was no dispute with regard to the title claimed by Plaintiff and as such there was no reason for the Trial Court to frame any such issue. Consequently, no substantial question of law is involved in this Appeal. Second Appeal under Section 100 of the Code of Civil Procedure cannot be entertained unless substantial question of law involves therein.

14. As a result of above discussion, Appeal is dismissed.

15. Pending Application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge