

DR. YASHWANTRAO BHASKARRAO DESHMUKH

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v.

RAGHUNATH KISAN SAINDANE

(Civil Appeal No. 6315 of 2021)

OCTOBER 08, 2021

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[INDIRA BANERJEE AND J. K. MAHESHWARI, JJ.]

*Delay/latches: Condonation of delay of 650 days in filing appeal against the ex parte decree – Suit for specific performance of contract by respondent partly decreed ex parte and recovery of Rs.61,000 ordered while dismissing relief for specific performance – Respondent filed appeal before High Court – Appellant was duly served and appeared in the said matter through his counsel – However, due to enhancement of pecuniary jurisdiction of District Court, appeal stood transferred to District Court from High Court and fresh notice issued to appellant through paper publication – Appellant did not appear and District Court proceeding ex parte allowed appeal and granted specific performance in favour of respondent – Appellant filed appeal before High Court – There was delay of 650 days in filing appeal – His plea of non service of notice due to change of address, not accepted by High Court – High Court dismissed appeal as time barred holding that sufficient cause for delay was not established – On appeal, held: In this case, appellant had produced the documents including voters list/aadhar card showing his change of address from Amalner to Nashik – On the other hand, the respondent had produced the voters' list of Amalner itself contending that the name of appellant was still existing – In such a situation, without any enquiry and without arriving at a finding disbelieving the explanation of the appellant, High Court was not justified in rejecting application for condonation of delay – Order of High Court set aside – High Court to take up second appeal and dispose it of expeditiously.*

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#### Disposing of appeal, the Court

**HELD:** 1 In this case, the appellant had also produced the documents including voters list/aadhar card showing his change of address from Amalner to Nashik. On the other hand, the respondent had produced the voters' list of Amalner itself

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- A contending that the name of appellant is still existing. However, in such a situation without any enquiry and without arriving at a finding disbelieving the explanation of the appellant, the High Court was not justified in rejecting the application for condonation of delay. [Para 14][1130-B-C]
- B 2. As per the judgment of *Perumon Bhagvathy Devaswom*, the Court, while dealing with the issue of condonation of delay in respect of matters pending at the appellate stage, advocates usually inform the litigants who are to be in contact. Sometimes, they assure their clients that they will give information to them as and when matter would be ripe for hearing. Thus, the High Court erred in dismissing the second appeal solely on the ground of limitation. A second appeal lies to the High Court if the High Court is satisfied that a substantial question of law is involved. The High Court shall take up the second appeal for admission as expeditiously as possible. [Paras 15, 16][1130-C-F]
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- D *Perumon Bhagvathyu Devaswom Perinadu Village v. Bhargavi Amma (dead) by LRS and Others (2008) 8 SCC 321:[2008] 11 SCR 1 – relied on.*  
*Mohan v. R. Madhu 2019 (16) SCALE 602; Rohin Thapa v. Rohit Dora (2019) 7 SCC 359 – referred to.*
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**Case Law Reference**

[2008] 11 SCR 1	relied on	Para 8
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2019 (16) SCALE 602	referred to	Para 9
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(2019) 7 SCC 359	referred to	Para 9
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- F CIVIL APPELLATE JURISDICTION: Civil Appeal No.6315 of 2021.

- G From the Judgment and Order dated 07.08.2018 of the High Court of Judicature at Bombay Bench at Aurangabad in Civil Application No.12143 of 2017 in Second Appeal (ST) No.31286 of 2017.

Vivek Solshe, Varun Solshe, Vijay Khamkar, Anjani Kumar Jha, Advs. for the Appellant.

Nishant Ramakantrao Katneshwarkar, Adv. for the Respondent.

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The Judgment of the Court was delivered by

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**J. K. MAHESHWARI, J.**

1. Leave granted.

2. This appeal arises out of the judgment passed on 7.8.2018 by the High Court of judicature of Bombay, Bench at Aurangabad on Civil Application No. 12143 of 2017 in Second Appeal (ST) No. 31286 of 2017 dismissing the application seeking condonation of delay and the appeal as barred by limitation.

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3. The facts leading to file this appeal are that a suit for specific performance of the contract was filed by the respondent against the appellant based on an agreement to sell dated 18.2.1998 with respect to an agricultural land bearing Gat No. 21/1, admeasuring 1.54 hectares, situated at Maouje Hingone Sim Tehsil Amalner. The said suit was partly decreed ex-parte by judgment dated 9.12.2002 in Special Civil Suit No. 2 of 2001 by Civil Judge (Sr. Division), Amalner directing recovery of a sum of Rs. 61,000/- along with interest @ 6% p.a. from the appellant (defendant therein), while relief for specific performance of contract was denied.

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4. Respondent preferred first appeal before the High Court. The appellant was duly served and appeared in the said matter through the counsel. However, due to enhancement of pecuniary jurisdiction of the District Court, the said appeal stood transferred from the High Court to the District Court. Thereafter, a fresh notice was issued to the appellant, which was served through paper publication. The appellant did not appear, and taken pretext of non-service of the notice due to change of his address. The Ad-hoc District Judge-I, Amalner proceeding ex-parte, allowed the Regular Civil Appeal No. 31 of 2012 vide judgment dated 8.09.2015 and granted decree of specific performance in favour of respondent (plaintiff therein).

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5. Aggrieved by the judgment of the Ad-hoc District Judge-I, appellant filed second appeal before the High Court of judicature of Bombay, Bench at Aurangabad on 18.9.2017, inter alia, contending that the judgment passed by the Ist Appellate Court came to his knowledge only on 14.9.2017. There was a delay of 650 days in filing the appeal. However, explaining the delay due to lack of knowledge of the decision in the appeal, prayer for condonation was made.

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- A        6. By the impugned judgment dated 07.08.2018, passed by the High Court in Second Appeal (ST) No. 31286 of 2017, the application seeking condonation was rejected, observing that the plea of non service of notice due to change of address was not acceptable. It was also observed that the appellant had himself been negligent and had not contacted his counsel engaged in the lower appellate court. The High Court, however, observed that the respondent, who had been litigating since last 17 years, ought not be deprived of the valuable right as accrued to him. With these observations, the application seeking condonation was rejected, dismissing the second appeal, as time barred.
- C        7. Learned counsel for the appellant has strenuously urged that the suit was filed for specific performance of contract. As per the defence taken, it is visible from the agreement itself that it was not an agreement to sell but a money transaction, to which a sum of Rs. 90,000/- has been refunded and only sum of Rs. 51,000/- was remaining. In addition, Rs. 10,000/- paid later and endorsed therein. The trial court decreed the suit partly, for refund of earnest amount. The decree of specific performance is a discretionary relief, as specified under Section 16 of the Specific Relief Act. However, without giving an opportunity of hearing to contest the claim, the lower appellate court allowed the appeal of the respondent and passed an ex-parte judgment and decree of specific performance. Counsel argued that the dismissal of the second appeal on the ground of limitation is wholly unreasonable.
- F        8. In support of the contentions, reliance has been placed on a judgment of this Court in the case of *Perumon Bhagvathyu Devaswom Perinadu Village vs. Bhargavi Amma (dead) by LRS and Others* (2008)8SCC 321 to contend that when appeal is pending in the appellate court where periodical dates are not being given, the parties cannot be faulted with because the counsel informs the parties that they will get in touch as and when the case is listed for hearing. Considering the facts of the case in which the notice of the appeal sent by publication is not allegedly served and the documents of change of address have been filed by the appellant as well as the respondent, which are on record, in such a situation, lenient view ought be taken.
- H        9. Reliance is further placed on the judgment of this Court in *N. Mohan vs. R. Madhu* 2019(16)SCALE 602. In the said case, considering the facts and circumstances of the case and in the interest of justice, an opportunity was granted subject to deposit of the amount.

10. Reliance is further placed on the decision of this Court in **Rohin Thapa vs. Rohit Dora** (2019) 7 SCC 359, wherein this Court subject to direction of deposit of the amount of the agreement and further deposit of the amount of the stamp and registration fee, directed to condone the delay and also set-aside the sale deed, executed by the Court. Therefore, an opportunity in a suit of specific performance to the appellant may be granted condoning the delay subject to imposition of the conditions, as deemed fit.

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11. Per contra, learned counsel representing the respondent contends that a suit for specific performance of contract was filed long back and respondent is contesting the matter for the last 20 years. In the said suit in trial court, the appellant remained ex-parte. However, the suit was partly decreed. On filing a first appeal before the High Court, notice was served and the appellant was represented through an advocate. Later, due to enhancement of pecuniary jurisdiction, the said appeal stood transferred to the court of Ad-hoc District Judge-I, Amalner, where from notice of the appeal was served through publication. The appellant did not choose to appear before the Ist Appellate Court, however the suit seeking specific performance was decreed. The appellant remained ex-parte and on filing the execution, the sale deed has also been executed. The appeal filed before the High Court by the appellant was barred by limitation of 650 days, which has not been explained showing bona fides. In such a case, interference by this Court is not warranted.

12. Having heard learned counsel for the parties and on perusal of the facts of the case, suit seeking specific performance was based on an agreement to sell dated 18.2.1998. As per the said agreement to sell, appellant had agreed to sell 5 bighas of land for a consideration at the rate of Rs. 51000/- per bigha. As per the entries on the agreement to sell, certain amount was paid. Later on, certain refund is also recorded and acknowledged thereon. The Trial Court, considering the same, refused to grant a decree of specific performance but directed for refund of Rs. 61,000/- with interest. The said decree was reversed by the lower Appellate Court, directing specific performance. In both the courts, the appellant remained ex-parte.

13. The appellant filed an appeal before the High Court, which has been dismissed as barred by limitation. The High Court, while dismissing the application seeking condonation of delay in filing second

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- A appeal observed that sufficient cause for delay has not been established. The litigant, who is contesting the matter, cannot be negligent and it would be unfair to deprive the respondent, litigating for the last 17 years, of the valuable right that has accrued to him.

14. In this case, the appellant has also produced the documents including voters list/aadhar card showing his change of address from Amalner to Nashik. On the other hand, the respondent has produced the voters' list of Amalner itself contending that the name of appellant is still existing. However, in such a situation without any enquiry and without arriving at a finding disbelieving the explanation of the appellant, the High Court was not justified in rejecting the application for condonation of delay.

15. As per the judgment of ***Perumon Bhagvathy Devaswom*** (supra), the Court, while dealing with the issue of condonation of delay in respect of matters pending at the appellate stage, has clearly observed that advocates usually inform the litigants who are to be in contact. Sometimes, they assure their clients that will give information to them as and when matter would be ripe for hearing. Considering the aforesaid aspect and taking a lenient view, we are of the considered opinion that the High Court erred in dismissing the second appeal solely on the ground of limitation. Therefore, the impugned judgment and order of the High Court is set-aside.

16. A second appeal lies to the High Court if the High Court is satisfied that a substantial question of law is involved. We request the High Court to take up the second appeal for admission as expeditiously as possible, preferably within one month, and if the second appeal is admitted, to decide and finally dispose of the same within a period of six months from the date of communication of this judgment and order.

17. It is made clear here that any of the observations made hereinabove would not be treated as an expression on the merits of second appeal and would not cause any impediment to the parties.

- G 18. Appeal is, thus, disposed of in the aforesaid terms. No order as to costs.

Devika Gujral

Appeal disposed of.