

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO. 422 OF 2014
WITH
CIVIL APPLICATION NO. 483 OF 2014 IN A.O. NO. 422 OF 2014**

Smt. Ujwala Bodhraj Jadhav & Anr. ... Appellants
Vs.
Nagnath Ramling Shinde (Dhor) ... Respondent

Mr. Dilip Bodake, Advocate for the appellants/applicants.

**CORAM: MRS.MRIDULA BHATKAR, J.
DATE : 20th October, 2015**

P.C.:

This Appeal from Order is directed against the order dated 31st December, 2014 below Exhibit 1 in Civil Miscellaneous Application No. 137 of 2013 thereby rejecting the Application for condonation of delay of 8 years, 6 months and 14 days for filing an application under Order 41 Rule 19 of the Code of Civil Procedure for readmission of Appeal bearing No. RCA No. 434 of 2001 which was dismissed for default by IV Additional District Judge, Solapur by an order dated 26th August, 2004.

2. The respondent has filed the Regular Civil Suit No. 290 of 1997 for injunction and possession against the present appellant in respect of suit premises. The suit was decreed with costs and the defendants/present appellants were directed to handover the vacant possession of the suit property to the plaintiff/respondent. Thereafter the Appeal challenging the

same judgment and decree was filed before the District Judge, Solapur. The said Appeal was called out for hearing , however, adjournments were sought by the appellants nearly for 11 times. Thereafter the learned counsel for the appellant filed No instruction pursis at Exhibit 31 that he had informed the appellants that he would be submitting no instruction pursis in the Court. The learned Judge dismissed the said Appeal by giving reasons for dismissal by the order dated 26th August, 2004. Thereafter, Miscellaneous Application No. 137 of 2013 was moved before the District Judge for condonation of delay to entertain the Application of readmission of Appeal under Order 41 Rule 19 of the Code of Civil Procedure. The learned Judge dismissed the said application. Hence, this Appeal.

3. The learned counsel for the appellants has submitted that no notice was issued by the concerned advocate to the appellant giving intimation that he would be filing no instruction pursis in the District Court. Secondly, when such pursis was filed before the Court, it was a duty of the Court to issue notice to the appellants informing that his counsel has filed the pursis for no instruction and it is necessary for the Court to make the party aware of such situation that the advocate of the party hereafter will not be appearing and they will go undefended. In support of his submissions, he relied on the following decisions -

(i) **Malkiat Singh & Anr. vs. Joginder Singh & Ors., reported in (1998) 2 SCC 206.**

(ii) **Tahil Ram Issardas Sadarangani & Ors. vs. Ramchandra Issardas Sadarangani & Anr., reported in 1993 Supp (3) SCC 256.**

(iii) **Laxmi Prasad Dubey vs. Gulam Ali & Ors., reported in AIR 2008 Chhattisgarh 24.**

4. Perused Miscellaneous Application No. 137 of 2013, order dated 26th August, 2004 and the impugned order rejecting the Application for condonation of delay passed by the learned District Judge. In the order dated 26th August, 2004, while dismissing the Appeal, the Court has considered that 11 adjournments were sought by the appellants on the hearing date and secondly the advocate for the appellant has filed no instruction pursis. The ratio laid down in the above cases relied by the learned counsel can be culled out that if no instruction pursis is given by the advocate, it is a duty of the advocate to communicate the said fact to the party and thereafter the Court shall communicate it to the party by issuing notice.

5. In the case of **Malkiat Singh** (*supra*), though ex-parte decree was passed, within four days the appellants learnt about the ex-parte decree

and then the Application for restoration was filed and it was considered that the appellants were neither careless nor negligent.

6. In the case of **Tahil Ram Issardas Sadarangani** (*supra*), the Court has observed that no notice was given to the appellants by the advocate and the Supreme Court has criticized the decreasing trend of service element and increasing trend of commercialization of legal profession and held that it was the duty of the counsel to give notice to the party.

7. In the case of **Laxmi Prasad Dubey**, the Court has held that the party should not be made to suffer for lapse on the part of counsel.

5. The facts in the present case are different. At the time of passing the order of dismissal dated 26th August, 2004, the advocate has informed that he has communicated the party that he would be filing no instruction pursis. However, the Application for condonation of delay was submitted after 8 years and 6 months wherein there was no say to the learned advocate whether he really issued notice in respect of no instruction or not. In the order dated 26th August, 2004, the learned District Judge has noted that 11 times adjournments were sought by the appellants to go ahead with the matter. Thus, that ground was also taken into account while dismissing the Appeal. It is true that it is the duty of

the advocate to issue notice and acknowledgment of such notice on the party is to be believed in the Court. However, in the present case, assuming that no notice was issued either by the advocate or by the Court informing the party that now he will go undefended, as their lawyer has withdrawn from the matter, the party did not care for the matter for long 8 years. This Application was filed not for readmission under Order 41 Rule 19 of the Code of Civil Procedure but it was filed under Section 5 of the Limitation Act, i.e., for condonation of delay. The delay was not for a short period but for a long period of 8 years and 6 months. For condonation of delay, it was necessary for the party to give a sufficient cause. After going through Application no. 137 of 2013, it is found that the appellants have mentioned in paragraph 2 that the advocate did not communicate them about withdrawing of his appearance and in paragraph 3 it is mentioned that the appellants were in trouble in their business and family disputes, therefore, they lost track of the appeal in the District Court. Solapur. This cannot be sufficient cause to condone the delay of 8 years and 6 months. If at all it is a negligence of the advocate, then the view is always taken by the Court that the party should not suffer and delay to be condoned. However, where it is evident that the party himself or herself is negligent or not interested to pursue the matter, then such delay cannot be condoned. It is the duty of the party to keep the track of the matter. Some delay can be considered if at

all the party loses track of the matter but in the present case for 8½ years, the appellants did not bother to enquire about the appeal proceedings filed by them. Moreover, no sufficient cause is given by the appellants. Under such circumstances, Appeal is dismissed.

6. In view of dismissal of Appeal, Civil Application does not survive and the same is accordingly disposed of.

(MRS.MRIDULA BHATKAR, J.)