

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9439 OF 2015

Sahebu Dharmu Shinde (decd.) through
LRs Tanaji Sahebrao Shinde ... Petitioners
Vs.
Jagannath Mithu Shinde and others ... Respondents

Mr. Prabhanjan Gujar for Petitioner.
Mr. Vishwanath S. Talkute for Respondents No.1 to 10.

CORAM : R. G. KETKAR, J.
DATE : DECEMBER 08, 2015

P.C. :

Heard Mr. Gujar, learned Counsel for petitioner and Mr. Talkute, learned Counsel for respondents No.1 to 10 at length.

2. Mr. Talkute contended that respondents No.6 to 10 have expired, and therefore, the learned District Judge directed petitioners / appellants to take the necessary steps. As the necessary steps were not taken by the petitioners, by order dated 16.07.2001 passed below exhibit-1 in Regular Civil Appeal No.69 of 1997, the learned District Judge dismissed the Appeal against respondents No.6 to 10. He submitted that however, in Delay Miscellaneous Application No.82 of 2013, petitioners have brought legal representatives of respondents No.6, 9 and 10 as also in the present Petition though no steps were taken in the Appeal. He, therefore raises preliminary objection that petitioner cannot implead respondents No.6 to 10 in this Petition and submits that respondents No.6, 9 and 10 may be ordered to be deleted.

2. Mr. Gujar was not in a position to deal with this contention. Prima facie, having regard to the fact that the appeal against respondents No.6

to 10 is dismissed on 16.07.2001 and no steps appeared to have been taken for recalling that order, I find substance in the objection raised by Mr. Talkute that petitioner cannot implead respondents No.6 to 10 in this Petition. In view thereof, petitioner shall delete respondents No.6 to 10 from the present Petition.

3. Mr. Gujar orally seeks leave to delete respondents No.11 to 14 from the Petition. On the motion made by Mr. Gujar, leave to delete respondents No.11 to 14 is granted. Both the amendments shall be carried out forthwith. Rule. Mr. Talkute waives service on behalf of respondents No.1 to 5. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as plaintiff, has challenged the judgment and order dated 04.08.2015 passed by the learned District Judge-2, Satara below exhibit-1 in Civil Miscellaneous Application No.82 of 2013. By that order, the learned District Judge refused to condone the delay in filing the application for restoration of Regular Civil Appeal No.69 of 1997, which was dismissed in default on 21.01.2004. The relevant and material facts, giving rise to filing of the present Petition, briefly stated, are as under:

5. Plaintiffs instituted Regular Civil Suit No.80 of 1989 for partition and separate possession. The Suit was dismissed on 11.10.1996. Plaintiffs thereafter instituted Regular Civil Appeal No.69 of 1997. It appears that pending the Appeal, respondents No.6 to 10 expired. By order dated 16.07.2001, the plaintiff was directed to take steps on or before 04.09.2001, failing which Appeal was to stand dismissed against

respondents No.6 to 10. As the plaintiffs did not take steps against them on or before 04.09.2001, the order dated 16.07.2001 became effective and the Appeal stood dismissed against respondents No.6 to 10. It further appears that on 06.01.2004, the learned District Judge directed the plaintiffs to deposit paper-book charges on or before 21.01.2004 failing which, Appeal would stand dismissed. Plaintiffs did not comply order dated 06.01.2004. Resultantly, the Appeal stood dismissed. Plaintiffs thereafter filed Delay Miscellaneous Application No.82 of 2013 on 15.04.2013 for condoning the delay of 9 years 2 months and 22 days. By the impugned order, the learned District Judge has rejected the application.

6. Mr. Gujar submitted that by order dated 06.01.2004, the learned District Judge directed the plaintiffs to deposit paper-book charges on or before 21.01.2004, failing which, Appeal would stand dismissed. He submitted that during the pendency of the Suit, no interim order was operating in favour of the plaintiffs. Even during the pendency of the Appeal between 1997 and 2004, no interim order was operating in favour of the plaintiffs and against the defendants. He submitted that the order directing deposit of paper-book charges is a procedural order and failure to comply that order should not visit plaintiffs with serious consequences of a penal nature, namely, dismissal of the appeal itself. He submitted that the learned District Judge instead of dismissing the Appeal, could have considered imposing costs so as to ensure that plaintiffs comply order of depositing paper-book charges. He submitted that in paragraph 2 of the application, it was specifically contended that the order dated 21.01.2004 is a procedural order and it amounts to irregularity and not illegality. By not complying procedural order, a substantial right should not be allowed to be defeated and the said defect is curable. The Suit is for partition and separate possession. In

paragraph 3 of the application, the reasons as to why their Advocate could not take the steps were set out in detail. He submitted that perusal of paragraph 3 shows the reasons that prevented their Advocate from complying order dated 06.01.2004. In other words, he submitted that plaintiffs did not blame their Advocate and rather their Advocate accepted that because of the negligence and / or mistake committed by him, he did not take steps for complying order dated 06.01.2004. In support of this submission, he relied upon the decision of the Apex Court in the case of ***Kalipada Das Vs. Bimal Krishna Sen Gupta***, AIR 1983 SC 876.

7. On the other hand, Mr. Talkute strenuously opposed the Petition. In the first place, he submitted that the delay in filing the application is enormous, namely 9 years, 2 months and 22 days. No sufficient cause is made out. Secondly, even though the Advocate representing plaintiffs has blamed himself, he did not file affidavit. He has taken me through the cross-examination of plaintiff No.1 - Tanaji Sahebrao Shinde. In the cross-examination, plaintiff No.1 admitted that after filing of the appeal, he met his Advocate after 8 to 10 years. Apart from this Appeal, he has not instituted any proceeding in any Court. He is educated upto 2nd standard. He cannot read or write English. He further submitted that mistake of Counsel may in certain circumstances be taken into account in condoning delay although there is no general proposition that mistake of counsel by itself is always a sufficient ground. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose such as laches on the part of the litigant or an attempt to save limitation in an underhand way. In support of this proposition, he relied upon the decision of the Apex Court in the case of ***Lala Mata Din Vs. A. Narayanan***, 1969 (2) SCC 770.

8. He further submitted that the impugned order is purely discretionary order. In view of the decision of the Apex Court in the case of ***Surya Dev Rai Vs. Ram Chander Rai, (2003) 6 SCC 675***, this Court while exercising the power under Article 227 of the Constitution of India, will not interfere with the order passed by the learned District Judge which is purely a discretionary order. The conduct of the plaintiffs also dis-entitles them from any equitable relief and consideration. The reasons for condoning the delay to say the least are false.

9. Mr. Talkute further relied upon Order 41, Rule 18-A C.P.C. to contend that the Court has powers to issue special directions requiring the appellant to take any steps in prosecution of the appeal before a fixed date and where after due notice intimating the steps to be taken, the appellant fails to take such steps within the time prescribed by the rules or allowed by the Court, the Court may direct the appeal to be dismissed for want of prosecution or may pass such other order as it thinks fit. He submitted that the decision in ***Kalipada Das (supra)*** is not applicable as it was arising out of decision rendered by Calcutta High Court where no provision like Order 41, Rule 18-A, which is Maharashtra amendment, was dealt with. In other words, the Apex Court had no occasion to consider provisions of Order 41, Rule 18-A C.P.C. He, therefore, submitted that decision in ***Kalipada Das (supra)*** is not applicable to the facts and circumstances of the present case.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, by order dated 06.01.2004, the learned District Judge directed the plaintiffs to deposit paper-book charges on or before 21.01.2004. Order 41, Rule 18-A reads thus,

“18-A. Dismissal for want of prosecution.- Where after the admission of an appeal the rules or the special directions of the Court require the appellant to take any steps in the prosecution of the appeal before a fixed date, and where after due notice intimating the steps to be taken, the appellant fails to take such steps within the time prescribed by the rules or allowed by the Court, the Court may direct the appeal to be dismissed for want of prosecution or may pass such other order as it thinks fit.”

11. Perusal of this Rule shows that the Court is empowered to issue special directions requiring the appellant to take any steps in the prosecution of the appeal before a fixed date, and where after due notice intimating the steps to be taken, the appellant fails to take such steps within the time prescribed by the rules or allowed by the Court, **the Court may direct the appeal to be dismissed for want of prosecution or may pass such other order as it thinks fit.** (*emphasis supplied*)

12. The question that arises for consideration is whether order dated 06.01.2004 is a procedural order or not. In the case of **Kalipada Das** (*supra*), the Apex Court was dealing with order directing the appellant therein to supply paper-book within the prescribed time and there was failure on the part of the appellant tenant to comply with the Court's order. The Apex Court observed in paragraph 5 as under:

“5. The only question is whether the appellant tenants who undoubtedly failed to comply with the Court's order to supply the paper-books within the prescribed time should be visited with such serious consequences of a penal nature as described by the High Court itself. Supplying paper-books is a procedural requirement devised to facilitate rendering justice. In other words, it is a procedural step in aid of justice, and not substantive justice itself. Undoubtedly, Court's orders have to be obeyed. The institution of judiciary may not be able to function if there is no sanction behind the Court's order. But penalty of failure to comply with Court's order providing a procedural stage in aid of justice must be Commensurate with the gravity of the lapse. If the penalty imposed is disproportionate to the gravity of the lapse or omission, the procedural stage instead of becoming a step in aid of justice would be a roadblock to justice and at this stage it would be advantageous to recall what this Court said in *Sangram*

Singh v. Election Tribunal, Kotah and Anr., **AIR 1955 SC 425**. It reads as under :

Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties, not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore, be guarded against (provided always that justice is done on both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”

13. In paragraph 6, the Apex Court observed that the omission or lapse arising out of non-compliance with the Court's order was not of such a serious gravity as to close the door of the Court to the appellants by dismissing the appeal. A procedural step which facilitates hearing of the appeal cannot impede access to justice.

14. In paragraph 7, it was observed that if the Court felt that the appellants were trying to delay the hearing of the appeal and that on account of this dilatory tactics the respondents-landlords who had obtained a decree would suffer, it was open to the High Court to direct the respondents to get the paper-books prepared and impose the cost of the same on the appellants. That was the easiest way to deal with the situation and thwart the efforts of the appellants to delay the hearing of the appeal.

15. In paragraph 8, it was observed that it is not for a moment

suggested that the Court cannot make an order directing the appellants to prepare the paper-books. A sanction could have been created by providing that if the paper-books are not supplied in time the interim stay of dispossession would be vacated. That would have imposed a serious obligation on the appellants to comply with the Court's order in time. If the respondents were very keen to get the appeal expeditiously disposed of, they could have been called upon to supply the paper-books and costs could have been imposed on the appellants.

16. As noted earlier, in the present case, there was no interim order operating in favour of the plaintiffs during the pendency of the Suit as also during the pendency of the Appeal. If at all, the learned District Judge felt that plaintiffs are delaying hearing of the Appeal, he could have imposed costs on the plaintiffs or in the alternative, could have directed the respondents to supply a paper-book and imposed the costs of the same on the plaintiffs. In my opinion, in view of the decision of the Apex Court, order dated 06.01.2004 is clearly a procedural order, the learned District Judge should not have ordered dismissal of the Appeal.

17. Mr. Talkute placed reliance on Order 41, Rule 18-A C.P.C. Undoubtedly, the Court has power to issue special directions requiring appellant to take steps in prosecution of the appeal. But it is not imperative that the Court must dismiss the Appeal for non-compliance of the said direction. The discretion is given to the District Court either to dismiss the Appeal for want of prosecution or to pass such order as it deems fit. Understood thus, the learned District Judge could have imposed costs on the plaintiffs or in the alternative, directed the respondents to supply paper-book and impose costs on the plaintiffs. This is more so when the order dated 06.01.2004 was a procedural order.

18. That brings me to the contention advanced by Mr. Talkute that the reasons for condoning the delay are false as also his reliance on the decision of the Apex Court on **Lala Mata Din** (*supra*), and in particular paragraph 6 thereof. In paragraph 3 of the application, the Advocate representing the plaintiffs has accepted that there was negligence and / or mistake on his part in non-compliance of order dated 06.01.2004. It is further asserted therein that the plaintiffs had not committed any mistake. Thus, the Advocate for the plaintiffs has taken entire burden on himself and accepted his mistake. In the case of **Salil Dutta vs TM and MC Private Ltd., (1993) 2 SCC 185**, the Apex Court has considered its earlier decision in **Rafiq Vs. Munshilal, (1981) 2 SCC 788** and observed thus,

“8. The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. It is true that in certain situations, the Court may, in the interest of justice, set aside a dismissal order or an ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is not such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. ...

... Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and ought not to have been accepted.”

19. As the plaintiffs' Advocate accepted his mistake and also accepted that plaintiffs had not committed any mistake as also having regard to the fact that P.W.1 is educated upto 2nd Standard, it has to be held that plaintiffs are innocent. Mr. Talkute also submitted that Advocate for the plaintiffs did not file affidavit as also relied upon the cross-examination of plaintiff No.1 - Tanaji Sahebrao Shinde. Basically, in my opinion, the order dated 06.01.2004 is a procedural order. That apart, admittedly, Suit is for partition and separate possession. In a Suit for partition and

separate possession, both, plaintiffs and defendants are plaintiffs. In view thereof as also in view of the decision in the case of **Salil Dutta** (*supra*), I do not find that the decision in the case of **Lala Mata Din** (*supra*) advances the case of the respondents.

20. That brings me to the decision of **Surya Dev Rai** (*supra*) relied by Mr. Talkute. In that case, the Apex Court considered its earlier decision. In particular, in paragraph 32, the Apex Court considered its decision in the case of **State Vs. Navjot Sandhu, (2003) 6 SCC 641**, wherein it was held thus,

(i) the jurisdiction under Article 227 cannot be limited or fettered by any Act of the State Legislature;

(ii) the supervisory jurisdiction is wide and can be used to meet the ends of justice, also to interfere even with an interlocutory order;

(iii) the power must be exercised sparingly, only to keep subordinate courts and tribunals within the bounds of their authority to see that they obey the law. The power is not available to be exercised to correct mere errors (whether on the facts or law) and also cannot be exercised “as the cloak of an appeal in disguise.

21. Ultimately, sub-paragraphs (4), (5) and (7) of paragraph 38 of the said decision, the Apex Court has observed thus,

38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:

(1) to (3) ...

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and **failure of justice or grave injustice has occasioned thereby**, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) **a grave injustice or gross failure of justice has occasioned thereby.**

(6) ...

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases **where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion.** Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. **The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.**

(8) and (9) ...

(emphasis supplied) ”

22. Perusal of paragraph (7) extracted hereinabove shows that the power to issue a writ of certiorari and the supervisory jurisdiction has to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion.

23. In the present case, by rejecting the application for condonation of delay, the learned District Judge has dismissed the Appeal. As noted earlier, the Appeal would stand dismissed for non complying procedural order. In my opinion, the learned District Judge ought to have condoned the delay. In the case of *State of Nagaland Vs. Lipok A.O.*, (2005) 3

SCC 752 wherein it is held by the Apex Court that what counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. The expression “sufficient cause” should be considered with pragmatism in a justice oriented approach rather than the technical detection of sufficient cause for explaining every day's delay.

24. Considering the totality of circumstances as also having regard to the fact that the order dated 06.01.2004 was a procedural order, in my opinion, the learned District Judge was not justified in dismissing the application. Hence, the impugned order is set aside. It is made clear that if respondents No.6 to 10 have expired pending the Appeal and no steps are taken, the Appeal will proceed in their absence unless plaintiffs take out appropriate steps subject to keeping all the contentions of the respondents open in that regard. Rule is made absolute in the aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab