

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6777 OF 2014

Arun D. Upalkar and ors. .. Petitioners

vs.

Vishwanath S. Muchalambe .. Respondent

Mr. A.A. Joshi for the Petitioners.

Mr. Sandeep Phatak for the Respondent.

CORAM : M. S. SONAK, J.

DATE : 14 JULY 2015.

P.C. :-

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] This petition is directed against the judgment and order dated 3 October 2013, by which the District Judge-1, Pandharpur (Appeal Court) has refused to condone the delay of about 9 months in instituting an appeal against eviction decree dated 7 April 2011.

3] During pendency of the present petition, the eviction decree dated 7 April 2011 has already been executed and the petitioners have thus, lost the possession of the suit premises.

4] Mr. A.A. Joshi, learned counsel for the petitioners, submitted that decree dated 7 April 2011 was made *ex-parte*. It is

only upon knowledge of the execution proceedings that the petitioners came to know about eviction decree and soon thereafter preferred the appeal against the same. In these circumstances, learned counsel submitted that sufficient cause was shown and the Appeal Court failed to exercise jurisdiction in making the impugned order.

5] On the other hand, Mr. Sandeep Phatak, learned counsel for the respondent submitted that this was the case where the petitioners have been thoroughly negligent and therefore, there is no jurisdictional error in making of the impugned order. Mr. Phatak placed reliance upon the decisions of the Supreme Court in case of *Ramlal, Motilal and Chhotelal vs. Rewa Coalfields Ltd.*¹, *Oriental Aroma Chemical Industries Limited vs. Gujarat Industrial Development Corporation and anr.*² to submit that in absence of any sufficient cause, there is no question of condoning the delay in instituting the appeal. Mr. Phatak also relied upon the decision of this Court in case of *Varhyan Narendra Singh Chhatwal & ors vs. Kala Narendra Singh Chhatwal & ors.*³ to submit that condonation of delay without any sufficient cause being shown, is not proper.

1 AIR 1962 SC 361

2 (2010) 5 SCC 459

3 2014(6) Bom.C.R. 603

6] Having heard the learned counsel for the parties and perused the records, in my judgment, the impugned order made by the Appeal Court is required to be set aside. The records indeed reveal that the eviction decree, though not entirely *ex-parte* as such, when made, was made in the absence the petitioners. It does appear that the petitioners took part in the proceeding before the Trial Court upto a particular stage, but not thereafter. It is the case of the petitioners that on 12 February 2012, the petitioners got knowledge that the Bailiff had come to execute the decree at the suit premises on or about 31 January 2012. Soon thereafter, i.e., 13 February 2012 itself, the petitioners instituted the appeal alongwith application seeking condonation of delay. There is no basis to hold that the petitioners were earlier aware of the making of eviction decree. The petitioners have gained nothing by delay in institution of the appeal. The reasons set out cannot be styled as *mala fide*.

7] As has been held by the Apex Court in case of *N. Balakrishnan vs. M. Krishnamurthy*⁴ and *Collector (L.A.) vs. Katiji*⁵ that in every case seeking condonation of delay, it is possible that there is some lapse on the part of the litigant. However, such

4 (1998)7 SCC 123

5 (1987) 2 SCC 107

lapse itself is not sufficient to shut out the litigant from hearing on merits. Unless the cause shown smacks of *mala fide* or has been put forth as dilatory strategy, the Courts are required to show utmost consideration to the cause of the suitor. Viewed from this perspective, the impugned order is unsustainable.

8] Further, in making the impugned order, the Appeal Court has virtually adverted to events and circumstances prior to making of the decree dated 7 April 2011. This is clearly impermissible and vitiates the impugned order.

9] The Apex Court in case of ***Ramlal (supra)***, has held that the right which has accrued in the favour of the decree-holder by lapse of time should not be lightheartedly disturbed. However, the same decision also holds that the expression '*sufficient cause*' , should receive a liberal construction so as to advance a substantial justice when no negligence nor inaction nor want of bona fide is imputable, normally, the delay should be condoned.

10] The position in case of ***Oriental Aroma Chemical Industries Limited (supra)***, is in the context of making a false

statement in the application seeking condonation of delay. This decision also states that the State cannot, in every case, expect some differential treatment in the matters of application seeking condonation of delay. This decision, is not applicable in the facts and circumstances of the present case.

11] The decision of this Court in case of *Varhyan Narendra Singh Chhatwal (supra)*, also turned on its own facts. However, even in the said case, the delay was condoned by imposing costs.

12] In view of the aforesaid, the impugned order dated 3 October 2013 is set aside. The delay in filing of appeal is condoned. The appeal is restored to the file of the Appeal Court. The Appeal Court should accordingly hear and decide the appeal on its merits. All this shall be subject to the petitioners paying costs of Rs. 10,000/- in favour of the respondent. Such costs to be deposited within a period of four weeks from today before the Appeal Court. Such costs once deposited, the respondent shall be at liberty to withdraw the same unconditionally.

13] Both parties to appear before the Appeal Court on 19 August 2015 at 11.00 a.m. alongwith an authenticated copy of this order.

14] Rule is made absolute to the aforesaid extent. There shall be no separate order as to costs other than what is referred earlier.

15] All concerned to act upon an authenticated copy of this order.

(M. S. SONAK, J.)

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