

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1490 OF 2015

Shri. Ramanugrah Sarjuprasad Shastri .. Petitioner
vs.
Shri. Vishwanath Bal Krishna Avalaskar (deceased)
and anr. .. Respondents

Mr. A.Y. Sakhare, Sr. Advocate i/b S.P. Srivastava for the Petitioner.
Mr. Yadunath Chouwdhary a/w. Ms Reena Salunkhe for the
Respondents.

CORAM : M. S. SONAK, J.
DATE : 17 JULY 2015.

P.C. :-

1] This petition is directed against the orders dated 30 January 2013 and 21 November 2014 made by the Small Causes Court (Trial Court) and the Division Bench of the Small Causes Court (Revisional Court) which have the effect of restoring the suit instituted by the respondents seeking eviction of the petitioner.

2] The suit instituted by the respondents was dismissed for non-prosecution on 1 October 2011. The respondents applied for restoration on 11 October 2012, i.e., after delay of about eleven months. By order dated 30 January 2013, the Trial Court condoned the delay and restored the suit subject to payment of costs of Rs.10,000/-. The Revisional Court, by its judgment and order dated 21 November 2014, by reference to the decision of the Full Bench of

this Court in case of ***Bhartiben Shah & anr. vs. Gracy Thomas & ors.***¹, has declined to exercise revisional jurisdiction by holding that an order allowing application for restoration of suit under Order 9, Rule 4 of Code of Civil Procedure, 1908 (CPC) is not a revisable order.

3] Mr.Sakhare, learned senior counsel for the petitioner, has submitted that in the present case the application for restoration was made beyond the prescribed period of limitation. Consequent upon the expiry of period of limitation, the valuable right had accrued to the petitioner. Upon condonation of delay and setting aside of the *ex-parte* order, therefore, a substantive right, as opposed to mere procedural advantage, was deprived to the petitioner. In such circumstances, the revision was clearly maintainable before the Revisional Court. In this regard, reliance was placed upon the decision in case of ***Bennett Coleman & Co. Ltd. & Anr. vs. Jamshed Kwasjee Vakeel & ors.***², decided by the Division Bench of this Court. Mr. Sakhare further submitted that in the impugned order dated 30 January 2013 made by the Trial Court, there is no discussion whatsoever on the aspect of sufficient cause in the context

1 2013(2) Bom.C.R.1

2 2006(6) Bom.C.R.3

of delay of about eleven months in applying for restoration. For these reasons, Mr. Sakhare urged interference with the impugned orders.

4] Mr. Chowdhary, learned counsel appearing for the respondents on the other hand, submitted that there is no jurisdictional error in making of the impugned orders. Mr. Chowdhary further submitted that even if revision was held to be maintainable, this is not a fit case to remand the matter for reconsideration, as the material on record establishes that sufficient cause was made out for condonation of delay as well as restoration. Mr. Chowdhary submitted that this is a case where positive discretion has been exercised by the learned Trial Court and this Court in exercise of its extra ordinary jurisdiction should not upset the exercise of such discretion.

5] Having heard learned counsel for the parties and perused the record, I find no reason to interfere with the order dated 30 January 2013 made by the Trial Court in condoning the delay and restoring the suit. The Trial Court has rightly observed that in a matter of this nature, the issue of condonation of delay as also

restoration is interconnected. Accordingly, it is not correct to say that there is no discussion on the issue of condonation of delay. The respondents in their application seeking condonation of delay as also restoration pointed out that they are 89 and 63 years old respectively. That they reside in Pune and case had to be instituted in Mumbai on account of location of the property. For this purpose, they had engaged services of advocate. The advocate, on account of reasons of ill-health of his wife, was not regular in attending the case. Further, the advocate had informed the respondents that a case of this nature would take atleast four to five years for disposal and that once matter reaches the stage of evidence, necessary intimation would be sent to the respondents. Relying upon such assurances and advise, the respondents, for *bona fide* reasons did not attend the proceedings. However, soon after the respondents learnt of dismissal of the suit for non-prosecution, they have changed their advocate and filed proceeding for condonation of delay and restoration. Upon reasonable consideration of all these factors, the Trial Court has exercised discretion in positive manner, condoned the delay and ordered the restoration of suit. In order to compensate the petitioner for the prejudice, costs of Rs.10,000/- have also been awarded in his favour. There is nothing unreasonable or arbitrary in the exercise of

discretion by the Trial Court.

6] The Apex Court in case of *N. Balakrishnan vs. M. Krishnamurthy*³, had also held that the primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. The time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The condonation of delay is a matter of discretion of the Court. Length of delay is no matter, acceptability of the explanation is the only criterion. In every case of delay, there may be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is a reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the Court should lean against acceptance of the explanation. There is no presumption that delay in approaching the Court is always

3 (1998)7 SCC 123

deliberate. The expression '*sufficient cause*' should receive a liberal construction so as to advance substantial justice.

7] In the facts and circumstances of the present case, there is nothing mala fide in the explanation offered by the respondents. The respondents are the landlords who have applied for eviction of the petitioner. In such circumstances, it can hardly be said that the delay is a part of any dilatory strategy on the part of the respondents. That apart, the Apex Court in case of *N.Balakrishnan (supra)*, has further held that once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. Different considerations may, however, apply if the first Court refuses to condone the delay. Then the superior Court would be free to consider the cause shown for the delay afresh and comes to its own finding even untrammelled by the conclusion of the lower Court. This is an additional reason not to interfere with the order dated 30 January 2013 by which the Trial Court has exercised discretion in a positive manner and the exercise is certainly not on any untenable grounds, arbitrary or perverse.

8] There is however, merit in the contention of Mr. Sakhare that the revision was maintainable against the order dated 30 January 2013. The Full Bench of this Court in case of ***Bhartiben Shah (supra)***, has no doubt at paragraph 87 (sub clause xi) cited an order allowing an application for restoration of the suit under Order 9, Rule 4 of CPC to be an instance of a non-revisable order. However, same was in the context of restoration being applied for within the prescribed period of limitation. The instances set out in paragraphs 86 and 87 in the decision of ***Bhartiben Shah (supra)***, are broadly in the context of interpretation of the term 'judgment' as it appears in Clause 15 of the Letters Patent. In the context of Clause 15 of the Letter Patent, the Division Bench of this Court in case of ***Bennett Coleman & Co. Ltd. (supra)***, has held that where restoration is granted upon an application made beyond the prescribed period of limitation, substantive and valuable right of the defendant is affected and a Letters Patent Appeal would be maintainable. Applying the same analogy, the order dated 30 January 2013 made by the Trial Court was indeed revisable. However, no useful purpose would be served by a remand to the Revisional Court, because in the peculiar facts and circumstances of this case, there was neither any jurisdictional error nor any other

illegality in making of the order dated 30 January 2013 by the Trial Court. Merely because some legal point is made out, jurisdiction under Article 227 of the Constitution of India, which is itself discretionary, need not be exercised. No useful purpose would be served by remand, as in the facts and circumstances of the present case, record justifies the exercise under taken by the Trial Court in condoning the delay and restoring suit. Incidentally, in case of *Bennett Coleman & Co. Ltd. (supra)*, upon which reliance was placed by Mr. Sakhare, the Division Bench of this Court after holding that the Letters Patent Appeal would be maintainable, declined to admit the same upon record of satisfaction that the order which was sought to be appealed against was legal and proper and that sufficient cause had been shown for condonation of delay as well as restoration. This is the case where same approach shall have to be adopted.

9] For the aforesaid reasons, this petition is dismissed. There shall, however, be no order as to costs.

(M. S. SONAK, J.)