

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1037 OF 2015
FROM
ORDER DATED 6th JANUARY 2015
IN
REVISION APPLICATION NO.214 OF 2014
IN
MARJI APPLICATION NO.228 OF 2012
IN
T.E.& R. SUIT NO.58/78 OF 2009

Rabia Ismail Parkar
Age about 50 years
occ. Unemployed
residing at 3, Gundavali, Near
Little Flower School, Andheri (East),
Mumbai-400 069.

.. Petitioner
(Org.Defendant)

V/s

Mrs. Sybil Eugene Pereira
age about 69 years, occ. Housewife
residing at 3, Gundavali, Near
Little Flower School, Andheri (East),
Mumbai-400 069.

.. Respondent
(Org. Plaintiff)

Mr. Dinesh C. Shah for the Petitioner.
Mrs. Agnes Martins for the Respondent.

CORAM : M.S. SONAK, J.
DATED : 21 SEPTEMBER 2015

P.C. :

. Rule.

2 Rule is made returnable forthwith with the consent of both the learned Counsel for the parties.

3 This petitioner challenged the ex-parte decree dated 9 July 2012, as also, the orders made by the Trial Court and Appellate Court in refusing to condone the delay of about 17 days in applying for setting aside the ex-parte decree.

4 The ex-parte decree was made as the Petitioner failed to remain present on 9 July 2012. On 27 August 2012, the Petitioner made application for setting aside the ex-parte decree and seeking condonation of delay of 17 days delay in making the same. By the order dated 30 October 2014, the Trial Court declined to condone the delay and the order of the Trial Court was upheld by the Appellate Court by its order dated 5 January 2015. Hence, the present petition.

5 In my judgment, the Courts have adopted hyper technical

approach in the matter of condonation of delay of 17 days. In the application seeking condonation of delay, it was stated that after the ex-parte decree was made, a letter was received from the Registrar by the Petitioner's Advocate calling upon him to sign the decree or lodge objection to the same. Thereafter, a certified copy was applied for. It is further stated that the Petitioner was suffering from kidney problem and hyper tension and further, being the only person to look after the Court matter, there was delay of 17 days in applying to set aside the ex-parte decree. Petitioner has stated that she is a spinster and has several health issues.

6 The two Courts have held that hyper tension and kidney problems are not the grounds in the matters of condoning the delay. The Trial Courts have also held that a medical certificate did not state that the ailments prevented the Petitioner from approaching the Court within the prescribed period of limitation. Such approach, does not appears to be proper. In the matters of condonation of delay, it is always possible that there are some lapses on the part of the party concerned. However, by itself is not sufficient to deny a party a hearing on merits, particularly, if case shown is not malafide. In the circumstances, the Petitioner is unmarried, suffers from

ailments and hyper tension, itself sufficient to condone the delay of hardly 17 days in the matter. No doubt, prejudice is bound to occasion the landlady, who herself stated to be a senior citizen and in dire need of the suit premises as well as finances. This is an aspect which should have been taken into consideration in the matter of imposing of costs.

7 In the present case, although sufficient case has been shown for condonation of delay, same shall have to be subject to payment of substantial costs, this is because, it is pointed out that for the past 16 years, even a contractual rents have not been paid in respect of use of the suit premises. Besides, the landlady is aged 82 years and herself is widow. The landlady is herself in dire financial state. If the ex-parte decree dated 9 July 2012 is set aside at this point of time, then a period of almost three years will have been lost in her quest for possession of the suit premises. For this, landlady, undoubtedly deserves to be compensated. Atleast it is clear that though the landlady is in no manner responsible for delay caused, she is the one, who will be prejudiced the most, if the delay is condoned and ex-parte decree is set aside.

8. Therefore, upon cumulative consideration of the aforesaid factors, the impugned order by which delay of 17 days was not condoned, is set aside. The delay of 17 days is condoned. Further, since the cause shown for condonation of delay as well as for setting aside ex-parte decree, substantially overlap, ex-parte decree dated 9 July, 2012 is also set aside. All this subject to Petitioner's depositing in the Trial Court cost of Rs.75,000/- within a period of eight weeks from today and further depositing during the said period itself arrears of contractual rents upto date. In case, the Petitioner does not deposit the amounts within a period of eight weeks from today, this petition shall be deemed to have been dismissed and ex-parte decree dated 9 July, 2012, shall stand revived. In case, the petitioner deposits the amount, the Respondent-landlady is at liberty to withdraw the said amount unconditionally. Further, the Trial Court is directed to dispose T.E. & R. Suit No.58/78 of 2009 as expeditiously as possible and in any case, within a period of eight months from the date of depositing the costs and rents as aforesaid.

9 Rule is made absolute in aforesaid terms.

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

(M.S. SONAK, J.)

C E R T I F I C A T E

Certified to be true and correct copy of the original signed order.