

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

**CIVIL APPLICATION NO. 687 OF 2014
IN
FIRST APPEAL (ST.) NO. 4528 OF 2014**

Mr. Kamleshankar Lutawan Rajbhar .. Applicant.

V/s.

Mr. Makhodar Dipan Rajbhar & Anr. .. Respondents

Mr. Jitendra Shukla with Krishna Singh for the applicant.

Mr. S. L. Gaikwad for the respondent nos. 1 and 3.

CORAM : K. K. TATED, J.

DATED : 26/03/2015.

PC.:

. Heard learned Counsel for the parties.

2 This application is preferred by the Defendant No.2 for condonation of 495 days delay in filing first appeal challenging the judgment and decree dated 06/09/2012 passed by Bombay City Civil Court at Bombay in S.C. Suit No. 2796 of 2008 holding that the respondent plaintiff is entitled to claim 1/3rd share in suit premises in Room No. 22 Nagrik Seva Chawl No.11, Kasturba Gandhi Nagar, Dainik Shivner Marg, Worli, Mumbai – 400 018 and also entitled to 1/3rd share in new premises allotted in lieu of Room no. 22 i.e. suit premises.

3 The learned Counsel for the applicant submits that initially applicant appointed Advocate Mr. R.D. Sawant on behalf of him. He submits that the earlier Advocate i.e. Mr. R.D. Sawant joined the Judicial service and he was appointed as a Judge on 12.10.2010. He

submits that as soon as he learnt about this fact, he contacted in the office of Advocate Mr. R.D.Sawant and appointed another Advocate who was working in the office of earlier Advocate Mr. R.D. Sawant. He submits that the subsequent Advocate, whom he appointed to defence the matter on behalf of him failed to appear when the matter called out for final hearing. He submits that as no one appeared on behalf of the defendant no.2, the Trial Court passed ex-parte decree on 06.09.2012.

4 The learned Counsel for the applicant submits that the Defendant no.2 filed his written statement on 02.03.2009 to defend the suit filed by the plaintiff. He submits that they learnt about the ex-parte decree passed by the Trial Court when bailiff came to execute decree on 20.12.2013. Thereafter, the applicant made inquiry immediately and he learnt that as no one appeared on behalf of him, the Trial Court passed decree on 06.09.2012. Therefore, he immediately applied for certified copy on 03.01.2014, the same were ready and collected by him on 06.01.2014 and filed the present first appeal on 13.02.2014.

5 The learned Counsel for the applicant submits that the applicant has good chance of success in the present proceeding. He submits that the applicant's father was tenant of the old suit premises. The plaintiff filed suit in the Trial Court, on that date the old suit premises was demolished by the Developer and allotted transit camp. Since then the applicant was in possession of the suit premises. He submits that the Developer handed over the new premises that is in the developed building and he is in possession of the same. He submits that in 2011, applicant was not keeping well, hence he went to his native place and

therefore, he could not able to contact his Advocate. He submits that because of mistake on the part of the Advocate, applicant should not suffer. He submits that if delay is not condoned, irreparable loss and injury will be caused to the applicant. He submits that as on today, the applicant is in possession of the suit premises and to that effect, he has filed affidavit-in-reply in execution application no. 740 of 2013.

6 On the other hand, the learned Counsel Mr. S. L. Gainkwad appearing on behalf of respondents plaintiffs vehemently opposed the present civil application. He submits that applicant has made false statement in the present civil application. Hence, he has not entitled for any relief from this Court. He submits that the applicant already created third party right, title and interest in respect of newly constructed suit premises. He submits that when the bailiff tried to execute the decree, at that time, the plaintiff learnt that one Mr. Kiran Gawade is occupying the suit premises. Hence, the plaintiff preferred execution application no. 740 of 2013. He submits that when the earlier Advocate of Defendant no.2 Mr. R.D. Sawant was appointed as Judge, the defendant no.2 appointed another Advocate Ms. Rajeshri Malpote. He submits that the said Advocate appeared on behalf of defendant no.2 in the Trial Court, therefore, it is not proper to say that the Trial Court passed ex-parte decree against defendant no.2. He submits that as defendant no.2 is not in possession of the suit premises as on today, the applicant defendant no.2 has no right to file present civil application and/or First Appeal. He further submits that in any case, the defendant no.2 has not shown sufficient cause for condonation of delay. Hence, civil application to be dismissed with

costs.

7 I heard both the sides at length. In the present proceeding, the trial Court passed decree on 06.09.2012. The applicant learnt about the decree passed by the Trial Court when the bailiff tried to execute the same on 28.12.2013. The Advocate appointed by the defendant no.2 Mr. R.D. Sawant was appointed as Judge on 12.10.2010 and thereafter, the defendant no.2 appointed another Advocate. Though, the defendant appointed another Advocate, she failed to appear on behalf of him, when the matter called out. It is to be noted that because of mistake on the part of the Advocate, litigants should not suffer. Not only that, the defendant no.2 through his Counsel made a statement that as on today they are in possession of the suit premises. They have not created any third party right, title and interest in the same.

8 The Apex Court in the matter of ***N.Balkrishnan Vs. M. Krishnamurthy (1998) 7 SCC 123*** held that the object of fixing the time limit is not meant to destroy the rights. The law of limitation fixes a lifespan for such legal remedy for the general welfare. Paragraph Nos.11, 12 and 13 of the said judgment read thus :

11. Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each

remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest reipublicae ut sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" Under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain v. Kuntal Kumari, 1969 SC 575 and State of West Bengal v. The Administrator, Howrah Municipality, AIR 1972 SC 749.

13. It must be remembered that in every case of delay there can 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 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. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss."

9 Considering the above mentioned fact and law declared by the Apex Court, I am of the opinion that applicant has made out case for allowing the civil application, but at the same time, applicant has to

pay cost of Rs.20,000/- to the respondent or his Advocate within four weeks from today, failing which civil application shall stand dismissed without referring back to the court.

10 Hence, the following order.

a) Delay of 495 days in filing First Appeal challenging the judgment and decree dated 06/09/2012 passed by Bombay City Civil Court at Bombay in S.C. Suit No. 2796 of 2008, is condoned.

b) Applicant to pay cost of Rs.20,000/- either to the respondent or his Advocate or deposit in the Registry of this Court within four weeks from today, failing which civil application shall stand dismissed without referring back to the court.

c) Liberty granted to the applicant to move for ad-interim relief after payment of cost to the respondent.

d) Civil Application stands disposed of accordingly.

(K.K.TATED, J.)