

3. In support of this Petition, Mr.Vaze strenuously contended that the learned trial Judge committed serious error in allowing the applications at Exhibits 10 & 12. He submitted that in the impugned order, the learned trial Judge observed in paragraph 5 that respondent No.1-plaintiff produced on record a photocopy of the application dated 16/04/2014 as well as affidavit in support of that application on the same date. It was observed that if photocopy is perused carefully, it shows that the Court fee stamp of Rs.10/- bears date 16/01/2014. The affidavit in support was affirmed on 16/04/2014. The learned trial Judge observed that at certain times, it is noticed that the Court proceedings have been handled by the concerned Court officials in a highly negligent manner which cannot be overlooked. He submitted that this finding is recorded without giving any opportunity to the petitioner to cross examine the plaintiff. The said observation is also against the Court officials who were also not given reasonable opportunity. He submitted that affidavit cannot be construed as evidence as per Section 3 of the Indian Evidence Act, 1872.

4. He further submitted that the delay cannot be condoned mechanically. The delay can be condoned if it is established that there is mistake in calculation which constitutes a sufficient cause in terms of the explanation to Section 5 of the Limitation Act, 1963 (for short 'Act'). Here, there is no question of applicant being misled in

ascertaining or computing prescribed period.

5. He submitted that Section 2(j) of the Act defines the expression “period of limitation” to mean the period of limitation prescribed for any suit, appeal or application by the Schedule, and “prescribed period” to mean the period of limitation computed in accordance with the provisions of the Act. He submitted that in terms of Article 120 of the Act, period of 90 days is provided for filing the application and thereafter 2 months for setting aside the abatement. In other words, period of limitation for setting aside abatement and for bringing heir and legal representative of deceased on record is 150 days. Here, in the present case, there is delay of 3 months and 10 days. He submitted that delay cannot be condoned mechanically and while considering the application for condonation of delay, the Court has to consider over all merits of the case. In support of his submission, he relied upon the following decisions.

- i) *Urban Improvement Trust Vs. Poonam Chand*, **AIR 1997 Rajasthan 134** to contend that Courts are required to have a glance on merits of the proceedings.
- ii) *Union of India Vs. Lachhman Dass Sain Ditta Mall*, **AIR 2002 Himachal Pradesh 50** in particular paragraph 26 thereof, to contend that while considering the applications for condonation of delay and deciding them, the approach of the Court is to decide the matter on merits and to do substantial justice between the parties. Merits cannot be ignored or overlooked altogether.

iii) *Zafar Ali Vs. Shamim Akhatar*, **2009(6)Mh.L.J. 204** to contend that while considering prayer for condonation of delay, it does not mean that merit of the main appeal /case cannot be looked into. In other words, while considering the application for condonation of delay, the Court has to consider merit of the appeal or case.

iv) *Hindustan Petroleum Corporation Limited Vs. Dilbahar Singh*, **(2014) 9 Supreme Court Cases 78** to contend that powers of revisional Court are confined to find out whether or not a finding of the fact recorded by the subordinate Court or Tribunal is according to law. The said aspect is required to be seen on the touchstone whether such finding of fact is based on some legal evidence or it suffers from any illegality like misreading of the evidence or overlooking and ignoring the material evidence altogether or suffers from perversity.

6. I have considered the submissions advanced by Mr.Vaze. I have also perused the material on record. As noted earlier, original defendant No.1 expired on 31/03/2014. The plaintiff filed application on 08/10/2014 for bringing on record his widow – Yesubai Keshav Naik. In that application, the plaintiff contended that on 16/04/2014, he had filed application. However, that application was misplaced by the concerned Court staff. The suit was thereafter transferred to the Court of Civil Judge, Junior Division, Vasai. It was further asserted that the application made on 16/04/2014 was not traced despite making efforts in that regard. It

is in that context, plaintiff pleaded for condonation of delay of 3 months and 10 days in filing the application.

7. As noted earlier, the learned trial Judge has obtained in paragraph 5 that at certain times, it is noticed that the Court proceedings are handled by the concerned Court officials in a highly negligent manner which cannot be over looked. The learned trial Judge also noted that roznama is silent as regards the date 16/04/2014. After 10/03/2014, the suit is shown to be posted on 09/06/2014. Thereafter, till 08/10/2014, 5 dates were given viz. 23/06/2014, 03/07/2014, 16/07/2014, 05/09/2014 and 22/09/2014. The learned trial Judge also considered the case of the plaintiff that despite strenuous efforts, the missing application could not be traced and therefore, the present application was taken out for condoning the delay of 3 months and 10 days. The learned trial Judge thereafter observed that in view of the contentions raised by the plaintiff and over all circumstances pleaded by the plaintiff, he should not be deprived to bring on record the heir and legal representative of defendant No.1 and opportunity to contest the suit on merits.

8. Mr.Vaze submitted that the learned trial Judge did not give any opportunity to cross examine the plaintiff as regards assertions made in affidavit in support of his application. This aspect is considered by the learned trial Judge in paragraph 6 and it was

observed that oral application was made to cross examine the plaintiff and no specific provision was shown. It was further noted that at that stage, there was no need to cross examine the plaintiff on the his affidavit in support of application. I do not find that the learned trial Judge committed any error in that regard. The question is whether the plaintiff had filed application on 16/04/2014 for bringing heir and legal representative of defendant No.1 on record. Defendant No.1 expired on 31/03/2014. If it is accepted that on 16/04/2014, application was made, then, it has to be held that application was filed well within limitation and there was no question of applying for condonation of delay. Since that application was misplaced, plaintiff took out application at Exhibit 10 for condoning the delay and for bringing heir and legal representative on record.

9. Mr.Vaze relied upon the decisions referred in paragraph 3 above. In the case of **Urban Improvement Trust** (*supra*), the learned Single Judge of Rajasthan High Court has observed that before rejecting the applications under Section 5 and dismissing appeals as barred by lapse of time, the Courts of law are required to have a glance as a condition precedent on the merits of the appeals and unless, the appeals are found to be hopelessly devoid of merits ordinarily efforts should be made to decide the appeals on merits. In the case of **Union of India** (*supra*), in paragraph 26, it was observed

that the Apex Court has held in several cases that while considering the applications for condonation of delay and deciding them, the approach of the Court is to decide the matter on merits and to do substantial justice between the parties. Merits cannot be ignored or overlooked altogether. In the case of **Zafar Ali** (*supra*), the learned Single Judge of this Court held that while considering the application for condonation of delay, it cannot be said that merit of the appeal or case cannot be looked into.

10. Mr.Vaze, relying upon these decisions, submitted that defendant No.1 has no right, title and interest in the suit property and this aspect ought to have been considered by the trial Court. In any case, if this aspect is not considered, this Court while exercising powers under Section 115 of the C.P.C. ought to consider legality, regularity and propriety of the impugned order. He relied upon the decision of **Hindustan Petroleum Corporation Limited** (*supra*) in support of this submission. I do not find that the decisions relied upon by the petitioner advance the case of the petitioner in any manner whatsoever. Fundamentally, the learned trial Judge accepted the case of the plaintiff that he had filed application on 16/04/2014 for condonation of delay and the same was misplaced. Even assuming that the application was not filed on 16/04/2014, having regard to the decision of the Apex Court in the case of *State of Nagaland Vs. Lipok AO*, (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, I am of the opinion that the learned trial Judge was justified in condoning the delay. The submission of Mr.Vaze that the learned trial Judge failed to appreciate that defendant No.1 has no right, title, interest in the subject matter of the Suit cannot be gone into while considering application for bringing legal representative of defendant No.1 on record. In the light of above discussion, Petition fails and the same is dismissed. Order accordingly.

(R. G. KETKAR, J.)