

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 860 OF 2014
WITH
CIVIL APPLICATION NO. 861 OF 2014
IN
REJECTED CASE NO. 2610 OF 2013
IN
WRIT PETITION (ST) NO. 25186 OF 2009

Chitrasen S. Kalambe
deceased through His legal heirs
Smt. Shalini C. Kalambe and anr. .. Applicants

vs.
Dhondiram V. Kavale and ors. .. Respondents

Mr. S.R. Nargolkar h/f. Ms Meenakshi Sakhare for the Applicants

CORAM : M. S. SONAK, J.

DATE : 10 JUNE 2015.

P.C. :-

1] Writ Petition (Stamp) No. 25186 of 2009 was dismissed for non-prosecution on 15 September 2010. Restoration alongwith condonation of about four years delay has been applied for on 11 March 2014.

2] The only reason set out in the applicant seeking condonation of delay is contained in paragraph 3 of the application, which reads thus:

3. The Applicants state and submit that Trial court asked the status of the Writ Petition thereafter they contacted theirs

advocate and ask the status of the Writ Petition. the Applicants state & submit that when they have enquired the status of the Writ Petition, the Advocate who didn't entertain them nor whispered the word about the rejection/dismissal of Writ Petition. The Applicants thereafter enquired about the matter & found that the Writ petition was rejected on 15/09/10. The Applicants state & submit that Advocate on record never contacted with them/inform them that Writ Petition was rejected/dismissed. The Applicants state & submit that thereafter they contacted the local Advocate & local advocate advised him to file application for restoration/setting aside order passed by the Ld. Registrar in the high court. Thereafter they contacted the High court advocate & filed the present application.

3] There are absolutely no details set out in the application. There is no explanation as to why the petitioners did not contact their advocate during the period of four years, during which they claimed to be under the impression that the petition was pending in this Court. The averments in the application are absolutely casual and made as if by way of formality.

4] Learned counsel for the applicants placed reliance upon the Hon'ble Apex Court in case of ***Ram Kumar Gupta and ors. vs. Har Prasad and anr.***¹, which lays down the proposition that a party should not be made to suffer on account of any default on the part of his advocate in attending the matter. The fact situation involved in

¹ Civil Appeal Nos. 7648-7649 of 2009 (arising out of SLP (C) Nos. 938-939 of 2009) decided on 18.11.2009

the said decision before the Hon'ble Apex Court, is by no means comparable with the fact situation involved in the present case. In the said case, there was material to establish that the appellants had been prosecuting the litigation diligently and had even engaged an advocate who appeared for them before the High Court. The advocate was however, designated as an Additional Advocate General for the State and therefore, on the particular occasion when the matter was called out, the said advocate was unable to appear for the appellants.

5] In the present case, the applicants obtained an *ex-parte* decree or eviction against the respondents. The said decree was set aside by the appeal Court. The order, by which such *ex-parte* decree was set aside, has not been questioned by the petitioners. Instead, the petitioners, in the petition question the order dated 20 February 2009 which orders restitution under Section 144 of the CPC and directs restoration of possession to the respondents, which possession the respondents had lost in the execution of *ex-parte* decree, which has since been set aside. The challenge in the petition, therefore, was to the consequential order and not to the main order, by which *ex-parte* decree in favour of the petitioners came to be set aside.

6] The petitioners, despite having no valid decree of eviction in their favour and despite the fact that there was no interim relief *qua* the order dated 20 February 2009 directing restitution in favour of the respondents have managed to continue in the suit premises. In these circumstances, the petitioners have gained undue advantage on account of their own lack of diligence in pursuing the present petition. Merely, alleging some negligence on the part of advocate, is not a sure panacea to secure condonation of delay or restoration. The delay in the present case is gross and the explanation furnished neither inspires confidence nor appears to be *bona fide*. The petitioners have obtained undue advantage, presumably on the basis of the impression that this petition is pending, when in fact the same was dismissed for non-prosecution wayback on 15 September 2010.

7] In the aforesaid circumstances, no case is made out for condonation of delay and restoration of the petition. Accordingly, Civil Application No. 860 of 2014 is dismissed.

8] The learned Small Causes Court, Pune which is taking up Regular Civil Suit No. 883 of 1990 is directed to dispose of the same as expeditiously as possible and in any case within a period of one

year from today. The petitioners/applicants to produce an authenticated copy of this order before the learned Small Causes Court, Pune on 29 June 2015 at 3.00 p.m.

9] It is clarified that this Court has not interfered with the order dated 20 February 2009 directing restoration in favour of the respondents and therefore, the learned Small Causes Court, Pune to ensure that the said order is duly implemented.

10] In view of dismissal of Application for condonation of delay and restoration of the petition, i.e. Civil Application No. 860 of 2014, Civil Application No. 861 of 2014 for condonation of delay and to bring on record the legal heirs of applicants does not survive and same is disposed of accordingly.

(M. S. SONAK, J.)

dinesh