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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5717 OF 2015

Kalpavruksh Associates and others .. Petitioners

Vs.

Meena Dilip Panchal and others .. Respondents

Mr.Akshay Bobde and Ms.Harsha Y.Shah i/b Mr.Yatin R. Shah,
Advocates for the Petitioners.

CORAM : R.G.KETKAR, J.
DATED : 21st NOVEMBER, 2015

P.C. :

1. Heard Mr.Akshay Bobde, learned Counsel for the petitioners at length.

2. By this Petition under Article 227 of the Constitution of India, original defendants No.1 to 4 have challenged the judgment and order dated 05/02/2015 passed by the learned Judge, City Civil Court, Greater Mumbai in Notice of Motion No. 1620 of 2014 in S.C. Suit No. 3684 of 2008. By that order, the learned trial Judge partly allowed the Motion filed by the respondents, hereinafter referred to as original plaintiffs for setting aside order dated 15/06/2013 by which the Suit was dismissed in default after condoning the delay in taking out the Motion.

3. In support of this Petition, Mr.Bobde submitted that on

15/06/2013, the learned trial Judge passed the following order.

“ Advocate Kothari for deft. present. Since nobody appears for plaintiff, Suit stands dismissed for want of prosecution.”

4. Mr.Bobde submitted that this order is referable to Order 9 Rule 8 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). However, the trial Court proceeded on the footing that order is referable to Order 9 Rule 10 of C.P.C. which is patently erroneous. He further submitted that Suit was dismissed for default on 15/06/2013. Notice of Motion was taken out on 25/04/2014. The delay is 9 months. He has taken me through the impugned order and submitted that though no sufficient cause is made out in explaining the delay between 15/07/2013 (after excluding 30 days from 15/06/2013) and 25/04/2014, the learned trial Judge condoned the delay. He submitted that while considering the application for condonation of delay, the applicant has to explain the entire period of delay. In the present case, no such attempt is made by the original plaintiffs. He relied upon the decision of this Court in the case of *Nandkishor s/o Damodhar Wadgaonkar Vs. Gajanan s/o. Uttamrao Pede*, **2013(6) ALL MR 53** and in particular paragraph 8 thereof.

5. He further submitted that in paragraph 5 of the impugned order, the learned trial Judge noted that initially the Suit was instituted on the Original Side of the High Court. The said Suit

was transferred to the City Civil Court, Mumbai. He observed that whenever a matter is transferred from one establishment to other establishment, the contract between the parties and their advocates may suspend, unless renewed. He submitted that this finding is patently erroneous and contract between the Advocates and parties does not come to an end merely on account of transfer of Suit from the Original Side of the High Court to the City Civil Court, Mumbai. In support of this proposition, he relied upon the decision of this Court in the case of *Govinda Bhagoji Kamable Vs. Sadu Bapu Kamable*, **2005(1) Mh.L.J. 651**.

6. He further submitted that the learned trial Judge has observed that there was partial negligence on the part of the plaintiffs. On the contrary, there was total negligence in prosecuting the Suit even in the High Court and after transfer in the City Civil Court. He, therefore, submitted that no case is made out for condoning the delay as also for restoration of the Suit.

7. As noted earlier, on 15/06/2013, the learned trial Judge after noting the appearance on behalf of the defendants observed that nobody appeared for the plaintiffs and Suit was dismissed for want of prosecution. I find merit in the submission of Mr. Bobde that this order is squarely referable to Order 9 Rule 8 of C.P.C. Order 9 Rule 9 lays down that where a Suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh

Suit in respect of the same cause of action, but he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the Suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit.

8. It is in that context, one has to consider the impugned order passed by the learned trial Judge. In paragraph 4 of the impugned order, the learned trial Judge has observed that remedy of filing fresh Suit on the basis of the same cause of action which is subject matter of the Suit is not available to the plaintiffs. No remedy is available for the plaintiffs to file an Appeal. In short, the learned trial Judge was of the opinion that the remedy of the Appeal is not effective as the Suit was not dismissed on merits but was dismissed in default. The remedy available to the plaintiffs is to make application under Order 9 Rule 9 of C.P.C. The learned trial Judge thereafter considered that as the order was passed on 15/06/2013, he has to make application under Order 9 Rule 9 within a period of 30 days. In other words, Motion ought to have been submitted on or before 15/07/2013 and the same was presented on 25/04/2014. Thus, the plaintiffs have to explain the delay between 15/07/2013 and 25/04/2014.

9. The learned trial Judge thereafter considered the question of condoning the delay in paragraph 5. He observed that

the Advocate for the plaintiffs fairly admitted that error was committed by them and for that purpose, plaintiffs should not be penalized.

10. In the case of **Rafiq Vs. Munshilal**, (1981) 2 SCC 788, the Apex Court observed in paragraph 3 thus :

"3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watch-dog of the advocate that the latter appears in the matter when it is listed. It is no part of his job...

... The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or mis-demeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted."

11. This decision was subsequently considered in the case of **Salil Dutta vs T.M. and M.C. Private Ltd**, (1993) 2 SCC

185. In paragraph 8, it was observed thus :

"8. The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. **It is true that in certain situations, the Court**

may, in the interest of justice, set aside a dismissal order or an ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is not such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult.

..... Putting the entire blame upon the advocate and trying to make it. out as if they were totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and ought not to have been accepted.

12. It is material to note that in the present case, plaintiffs have not blamed their Advocate. On the other hand, Advocate for the plaintiffs has admitted that there was error on their part in conducting the Suit. It is in this state of affairs, one has to consider whether the delay of about 9 months is so fatal. As noted earlier, in paragraph 4, the learned trial Judge has observed that remedy in such situation is to make an application under Order 9 Rule 9 of C.P.C. Mr. Bobde relied upon paragraph 8 of the decision in the case of **Nandkishor** (*supra*) to contend that the plaintiffs ought to have explained the delay for the entire period. In that case, the Court was considering the delay of 5 years and 9 months in filing application under Order 9 Rule 9 of C.P.C. 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.

13. The decision in the case of **State of Nagaland** (*supra*) was subsequently considered in the case of *Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy*, **2013 (12) SCC 649**. After considering the law on the subject, the Apex Court culled out the principles as under :

- i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the Courts are not supposed to legalize injustice but are obliged to remove injustice.
- ii) The terms “sufficient cause” should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact- situation.
- iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.
- iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.
- v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.
- vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the Courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.
- vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.
- viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the Courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the Courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are: -

a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the Courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters.

14. In view of the decisions of the Apex Court as also from the fact that Advocate for the plaintiffs fairly admitted that there were errors, omissions, and mistakes on their part, in my opinion, the learned trial Judge was justified in allowing the Motion and

directing the plaintiffs to deposit amount of Rs.10,000/-. Mr.Bobde submitted that the contract between the Advocate and client did not come to an end on account of transfer of the Suit from the High Court to the City Civil Court. He relied upon the decision of this Court in the case of **Govinda Bhagoji Kamable** (*supra*). Even if it is accepted that the contract subsisted, for the reasons stated earlier, the decision in the case of **Govinda Bhagoji Kamable** (*supra*) does not advance the case of the defendants No.1 to 4.

15. In view thereof, I do not find that the plaintiffs have made out any case for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioners, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)