

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

**CIVIL APPLICATION NO. 3153 OF 2014
IN
REJECTED CASE NO. 974 OF 2012
IN
FIRST APPEAL (ST.) NO. 21581 OF 2010**

Mohammed Munir Saudagar ... Applicant
V/s.
Arthur Jerom D'Zouza & Ors. ... Respondents

Mr. J.B. Mishra for the applicant.
Mr. Iver Peter D'Cruz for the respondent no.1.
None for respondent nos. 2 to 8.

CORAM : K. K. TATED, J.
DATED : 08/04/2015.

PC.:

• Heard learned Counsel for the parties.

2 This application is for restoration of Civil Application no. 157 of
2011 with First Appeal (St.) no. 21581 of 2010.

3 The learned Counsel for the applicant submits that this Court (Coram : A.S. Oka, J) by order dated 27.01.2011 granted rule in Civil Application no. 157 of 2011 and directed the applicant to serve the respondents by private notice by registered post A.D. and/or by courier and or by hand delivery and file Affidavit of Service, one week before the returnable date, failing which application shall stand dismissed for non prosecution.

4 The learned Counsel for the applicant submits that the order passed by this Court on 27.01.2011 was not complied by his Advocate. Hence, the matter stand dismissed in view of conditional order. He submits that as soon as this fact learnt to the applicant in the year 2011, he immediately engaged another Advocate and instructed him to prefer the application for restoration of First Appeal alongwith Civil Application. He submits that earlier Advocate preferred the application in the month of November, 2011 and same was noterised on 16.11.2011. The applicant was under impression that his Advocate must have filed that application before this Court. The applicant placed on record the photocopy of application, which was declared on 16.11.2011. He submits that applicant learnt later on that his earlier Advocate has not filed Civil Application for restoration of present proceeding. He submits that in between, the daughter-in-law of applicant filed criminal complaint under Section 498A, 494, 323, 504 r/w 34 of I.P.C. against the applicant and six other family members. In that proceeding, the applicant was granted anticipatory bail by the Sessions Court. Because of that proceeding, the applicant went in depression. In support of the illness of the applicant, the applicant placed on record the certificate issued by Dr. J. J. Patel, Surgeon dated 30.03.2014. In the said certificate, it is stated that the applicant was suffering from depression since 01.03.2011 and he was advised to take rest for more than 2 to 3 years.

5 The learned Counsel for the applicant submits that because of mistake on the part of earlier Advocate and litigation filed by the daughter-in-law of the Applicant under Section 498-A of I.P.C., there is

a delay in preferring the present Civil Application. He submits that applicant has good chance of success in the present proceeding. He submits that if delay is not condoned and proceeding is not restored, the applicant will suffer irreparable loss and injury. He submits that in the interest of justice, this Hon'ble Court be pleased to allow the Civil Application and restore First Appeal as well as Civil Application.

6 On the other hand, the learned Counsel for the respondent no.1 vehemently opposed the present Civil Application. He submits that applicant has not shown sufficient cause for condonation of more than three years delay and for restoration of First Appeal as well as Civil Application. He submits that the applicant has not placed on record sufficient proof to show that he was under depression for more than three years. He submits that as applicant failed to disclose sufficient cause for condonation of delay, there is no substance in the present Civil Application and same to be dismissed with cost.

7 Though the other respondents are duly served, no one appeared on behalf of them, when the matter called out.

8 I heard both the sides at length. It is to be noted that in the present proceeding because of the mistake on the part of the earlier Advocate, Civil Application as well as First Appeal stand dismissed. The photocopy of earlier Civil Application, which was duly affirmed before Notary on 16.11.2011 shows that applicant has taken immediate steps to restore the matter. Hence, because of mistake on the part of the Advocate, the litigant should not suffer.

9 It is to be noted that 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 up 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.”

10 Considering the submissions made by learned counsel for the applicant, reasons disclosed in paragraph 8, 9 and 10 of civil application and reasons disclosed in additional affidavit dated 04.04.2015, I am satisfied that applicant has made out the case for allowing the civil application. At the same time, the applicant to pay cost of Rs.5,000/- to the respondent no.1 within two weeks from today.

11 Hence, the following order.

a) Delay in preferring the present Civil Application is condoned.

b) Civil Application no. 157 of 2011 and First Appeal (St.) no. 21581 of 2010, are restored on file.

c) Applicant to serve the respondents in Civil Application no. 157 of 2011 by private notice either by registered post A.D. and/or by hand delivery within six weeks from today and file Affidavit of Service to that effect, failing which present civil application shall stand dismissed without referring back to

the court .

d) Applicant to pay cost of Rs.5000/- to the respondent no.1 within two weeks from today, failing which civil application shall stand dismissed without referring back to the court .

e) Office is directed to place the Civil Application no. 157 of 2011 on board for hearing after ten weeks.

f) Civil Application is disposed of accordingly.

(K.K.TATED, J.)