

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.4109 OF 2014
IN
FIRST APPEAL (ST.) 20699 OF 2014
WITH
CIVIL APPLICATION NO.4321 OF 2014

Shri. Vidyadhar Pandurang Koli & Ors. Applicants
(Ori. defendants)

Vs.

Baburao Harishchandra Koli Respondents
since deceased thru' his legal heirs
& LRs Smt. Prabhavati Baburao & Koli.

Mr. Dilip Bodake, Advocate for the Applicants.

Ms. R.C. Nichani alongwith Ms. Sunanda R. Kumbhat and
Parikshit Pujari, Advocate for respondent no.3

Coram : Smt. R.P. SondurBaldota, J.

Date : 4th February, 2015

P.C.

1 This application is for condonation of delay of 57 days in filing the First Appeal to challenge the judgment and decree of possession dtd. 28th April, 2014. The present application was filed on 1st August, 2014. The respondents are

the decree holders. The explanation for delay in filing the appeal is stated at paragraph 5 of the application. It is averred therein that the applicant had filed an application for certified copy of the judgment and decree on the very day, but the same was not ready until 2nd May, 2014. The applicants collected the certified copy on 7th May, 2014. This court went for summer vacation during the period 10th May, 2014 to 8th June, 2014. During the period of vacation, the applicants could not meet their advocate for the purpose of filing the appeal. It is also the claim of the applicants that they carried an impression that the period for filing the appeal is of 90 days. The applicants approached their advocate in the last week of June, 2014, who advised them to file appeal. The applicants at that time were not in a position to incur the expenditure for the appeal. They raised funds through their relatives and friends and again approached the advocate on 14th July, 2014. Then the advocate demanded for some more documents and the applicants could collect the documents and take them to the advocate only on 25th July, 2014. Thereafter the appeal came to be filed along with the application for condonation of delay on 1st August, 2014.

2 Mr. Bodake, the learned advocate for the applicants submits that the applicants could not have filed the First Appeal

during the period 10th May, 2014 to 8th June, 2014 because the office of the court was closed for vacation. The appeal could be filed only after 8th June, 2014. Therefore the applicants are required to explain the delay only for the period 8th June, 2014 to 1st August, 2014.

3 Though the applicants claim that they did not have sufficient funds for the purpose of filing the proceedings and that they had to raise money from their friends and relatives, there are no particulars whatsoever of the claim stated in the application. Neither the names of the friends nor the relatives nor the amounts that had to be raised from them is mentioned in the application. Even after raising amount, there is delay from 14th July, 2014 to 1st August, 2014, for which the applicants claim that the advocate had demanded certain documents and time was spent in collecting the documents for handing over to the advocate. The details of the documents are however missing.

4 The respondents oppose the application contending that the application not only does not disclose any cause for the delay but suppresses material facts from the court. They also complain that the applicants have 20th December, 2014 obtained exparte order of stay of execution proceedings and have since

been dragging the application. They allege that after filing the application for condonation on 1st August, 2014, the applicants had left the same unattended until 20th December, 2014, when the court was moved urgently seeking ad-interim stay of execution proceedings.

5 Ms. Nichani, the learned advocate for the respondents submits that ordinarily, considering the fact that the appeal preferred is the first appeal and the delay being of only 57 days, the respondents would not have objected to the same. However, according to her the conduct of the applicants, disentitled them to any sympathy or concession from the court. Ms. Nichani points out that immediately after the exparte decree, the respondents had filed caveat in this court and notice of the caveat was served to all the applicants. The notice was served upon applicants no.1 and 5 as far back as in the month of May, 2014 by registered post A/D. The packets of the registered post A/D sent to applicants no.2,3 and 4 had returned with remark "intimation posted and not collected by the addressee". In the affidavit-in-rejoinder, the applicants do not dispute that the notice of caveat had been received by applicants no.1 and 5 in the month of May, 2014. The affidavit-in-rejoinder, which is filed by applicant no.4 states that applicants no.1 and 5 did not inform applicant no.4 about the receipt of notice of caveat.

Applicant no.4 claims to be the constituted attorney of applicants no. 1, 2, 3 and 5. Mr. Bodake argues that since applicant no.4 is the constituted attorney of the other applicants, the respondent ought to have served the notice of caveat upon applicant no.4. According to him, the notice served upon the other applicants, can be of no consequence. Since applicant no.4 was not aware of the caveat, notice of the application made on 20th December, 2014 for stay of execution was not given to the respondents. Mr. Bodake also sought to argue that after the suit was decreed, relations between applicant no.4 and applicants no. 1 and 5 are no more cordial which is why applicants no.1 and 5 did not inform applicant no.4 about receipt of notice of caveat. The applicants cannot be permitted to advance such argument. Firstly it cannot be contended that the notices sent individually to the applicants should be ignored and that notice sent to applicant no.4 as constituted attorney of the other applicants alone should be considered. Thus as per the record, the applicants had been served with the notice of the caveat and as such were duty bound to inform the court on 20th December, 2014 about the caveat. If the court were to be informed about the caveat, it would not have passed any ad-interim order without notice to the caveator. Thus the ad-interim order obtained on 20th December, 2014 was by practising fraud upon the court.

6 Ms. Nichani further points out that the applicants were in fact aware of the execution proceedings initiated by the respondents as far back as 29th November, 2014. She refers to the report of the Bailiff made on that day of the attempt to execute warrant of possession. The report shows that the Bailiff had visited the suit premises on 29th November, 2014 for the purpose of taking possession of the suit premises. Applicant no.4, who was present at site and who had been shown the warrant of possession by the Bailiff had refused to handover possession. On the basis of report of the Bailiff, the executing court had passed order dtd. 6th December, 2014 of granting police assistance to the respondents. She argues that it is only after the order of police assistance was granted that the applicants moved the court for ad-interim reliefs.

7 Mr. Bodake relies upon following decisions :

- I) Sonerao s/o Sadashivrao Patil & Anr. Vs. Godawaribai w/o Laxmansing Gahirewar & Ors., reported in 1999(2) ALL MR, page 507.
- II) Municipal Corporation, Gwalior vs. Ramcharan, reported AIR 2003 Supreme Court, 2164.
- III) D.M.P Div. Andaman and Nicobar Islands vs. Munnu Barrick, reported in AIR 2005 Supreme Court, page 1158.

and submits that the court should be taking liberal view while deciding applications for condonation of delay. There can be no dispute about the proposition that ordinarily courts should adopt liberal approach while considering applications for condonation of delay. However, fraud vitiates everything. The conduct of the applicants has clearly been fraudulent.

8 Further the averments in the application for condonation of delay do not explain the delay. According to the applicants, they had applied for certified copy on the same day as the order i.e. on 28th April, 2014. The certified copy was ready on 2nd May, 2014. But it was collected on 7th May, 2014. The five days delay between the two days is not even acknowledged much-less explained. Even if concession is given for the vacation period from 10th May, 2014 to 8th June, 2014, there is delay beyond 8th June, 2014 for which there is no case made out whatsoever. The contention of the applicants of being short of funds for filing an appeal, needs to be disbelieved for want of necessary particulars. The particulars are missing in the application and also from affidavit of rejoinder. In the circumstances, the application is dismissed.

9 Mr. Bodake requests for continuation of the ad-interim orders passed in the application on 20th December, 2014.

The order of injunction has not been continued after 23rd January, 2014 as on that day, Ms. Nichani, had made a statement that the respondents will not take steps in execution until today. The respondents are not willing to continue the statement for any further period. Considering the facts and circumstances, the request made for continuation of the ad-interim orders is rejected.

10 In view of dismissal of the Civil Application, the Civil Application No.4321 of 2014 does not survive, the same is accordingly disposed off.

(Smt. R.P. SondurBaldota, J.)