

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.2657 OF 2014
IN
WRIT PETITION NO.5494 OF 2002
WITH
CIVIL APPLICATION NO.2658 OF 2014
IN
WRIT PETITION NO.5494 OF 2002

Mr. Ajitkumar D. Jain & Ors. .. Applicants

IN THE MATTER BETWEEN

Mr. Dharamchand Chiranjilal Jain
(since deceased)

Mr. Ajitkumar D. Jain & Ors. .. Petitioners

vs.

Shri Mahalaxmi Temple Trust & Ors. .. Respondents

Mr. Bhavin Gada with Mr. Sachin Karia i/b M/s. Harakhchand & Co.
for Applicants/Petitioners.

Mr. S.C. Naidu a/w Mr. Rahul Tanwani i/b M/s. C.R. Naidu & Co. for
Respondents.

CORAM : M. S. SONAK, J.

DATE : 17 AUGUST 2015

P.C. :-

1 Heard learned Counsel for the parties.

2 Civil Application No.2657 of 2014 seeks condonation of delay of over 6 years in applying for recall of order dated 5 October 2007, in terms of which, the Applicants' Writ Petition No.5494 of 2002 stood dismissed for non-prosecution. Civil Application No.2658 of 2014 seeks restoration.

3 Writ Petition No.5494 of 2002 challenges judgment and order dated 5 December 2001 made by the Appeal Court setting aside the judgment and decree dated 4 March 1999 in R.A.D. Suit No.1112 of 1983 instituted by the Applicants. The Writ Petition was admitted on 30 September 2002 and it is stated that necessary bhatta charges for service upon the Respondents were deposited on 26 February 2003.

4 Upon the demise of the sole Petitioner, Application was taken out to bring on record the legal representatives. The same was allowed and in pursuance of the same, on 13 October 2005 necessary amendment was also carried out to the cause title. However, no Vakil Patra from the legal representatives was on record.

5 The Registrar (Judicial) granted time for clearance of this office objection and filing of Vakil Patra. Conditional order was made that in case, objection is not cleared within four weeks, the Petition will stand dismissed with. Based thereupon, this Court, by an order dated 5 October 2007, recorded that the objections had not been cleared and therefore, the Petition stands dismissed.

6 It is the case of the Applicants that they were not at all aware of the order dated 5 October 2007. In fact, the Applicants contend

that they were under the bonafide impression that the Petition is pending. After a period of almost 7 years, the Respondent which is a temple Trust, instituted L.E. Suit No.106/125 of 2014 seeking the eviction of the Applicants from the suit premises. The summons was served upon the Applicants on 29 September 2014. It is at the stage, that the Applicants made enquiry and came to know about the dismissal of the Writ Petition on 5 October 2007. The Application seeking condonation of delay and restoration has been filed on 29 October 2014. The Applicants contend that from the date of knowledge the Application has been preferred within the prescribed period of limitation. In any case, the Applicants contend that there is sufficient cause for condonation of delay.

7 Mr. Naidu, learned Counsel for the Respondents submits that the Applicants are in possession of the suit premises which admeasure around 3000 square feet, from which, the Applicants carry out the business of Restaurant from last several years. Mr. Naidu points out that the Applicants have not made payments whatsoever towards the use of the suit premises. Further, Mr. Naidu points out that blame has been shifted upon the Advocate and the Applicants had not at all demonstrated any diligence on their part. Mr. Naidu submits that Applicants are bent upon clinging to the suit premises notwithstanding the denial of any declaration by the Appeal Court that they are the tenants of the suit premises.

Mr. Naidu points out that in case this Petition is restored, the Civil Suit instituted by the temple Trust will be affected. For all these reasons, Mr. Naidu submits that there is no case made out for either condonation of delay or restoration.

8 Having heard the learned Counsel for the parties, interest of justice will be met if delay is condoned and the Petition is restored. This shall however be subject to payment of substantial costs by the Applicants. The records would indicate that the Applicants have no doubt been negligent in the matter. It is not sufficient to merely shift the blame on the Advocate. The Applicants were also required to diligently pursue the matter. This, the Applicants have not done. In any case, the Respondents temple Trust deserves to be compensated, for there is absolutely no fault on the part of the Respondents temple Trust in this matter.

9 The only circumstance, which can be held in favour of the Applicants is that they have acted with sufficient promptitude no sooner, they were served with the summons in L.E. Suit No.106/125 of 2014. There is also substance in the contention of the learned Advocate for the Applicants that the Applicants had nothing to gain by not clearing the office objection in the matter of filing of Vakil Patra. The record indicates that necessary amendment to bring on record the legal representatives of the deceased Petitioner had

already been carried out on 13 October 2005. True, opportunity was granted for filing Vakalatnama so that the matter could have proceeded. The explanation offered is that the Advocate who had been engaged in the matter was thought to have done the needful. The explanation does not smack of any malafides. In several matters where condonation of delay is applied for, there is some lapse or negligence on the part of the party concerned. However that by itself, is not a valid ground for denying such party hearing on merits. Further, the length of the delay is not the main test. The quality of explanation offered is the main test. No doubt, in the matter of this nature prejudice is bound to occasion the Respondent temple Trust. Prejudice however is compensable in terms of costs. Suitable orders can also be in the context of L.E. Suit No.106/125 of 2014 instituted by the Respondent Temple Trust.

10 In the matter of determination of costs it is to be noted that the suit premises, even according to the Applicants, admeasure around 2,400 square feet. There is no record of any payments having been made by the Applicants to the Respondent Temple Trust at least during the pendency of the Petition. Mr. Naidu states that no payments had been made since the year 1982. From the suit premises, the Applicants carry out the business of Restaurant. The premises are located in the temple complex. The temple complex is

visited by devotees. The learned Counsel for the Applicant points out that several restrictions have been imposed by the authorities and therefore, the access to the Restaurant is affected. That may be, the Applicants, despite the so called hindrances, desire to continue with their business from the suit premises. Further, as noted earlier, it is not sufficient to shift the blame on the Advocate. The Applicants were also required to be more diligent in the matter. On account of lack of the diligence on the part of the Applicants, the Petition, which would have been ready for final hearing much earlier, could not be taken up for final hearing. In any case, the Applicants are running a Restaurant from the Mahalaxmi Temple Complex premises for last several years and there is no record of any payments having been made to the Respondent Temple Trust with regard to such user. Considering all these circumstances cumulatively, it is only appropriate that the Applicants pay costs of Rs.2.5 lacs to the Respondent Temple Trust within a period of four weeks from today. The costs may be paid directly in favour of the Respondent Temple Trust or be deposited in this Court within a period of four weeks. The Respondent Temple Trust is at liberty to withdraw the amount of costs unconditionally.

11 In case, the costs are not paid or deposited within a period of four weeks from today, these Civil Applications shall be deemed to

have been dismissed. However, if the costs are paid, then the delay shall stand condoned and the Writ Petition No.5494 of 2002 shall stand restored. Upon the receipt of costs, it shall be open for the Respondent Temple Trust to apply for expeditious hearing of the matter.

12 Further, should the costs be paid and this Writ Petition No.5494 of 2002 restored, it is made clear that there shall be no stay on proceedings in L.E. Suit No.106/125 of 2014. However, if any, decree is made therein, the same shall not be put into execution by the Respondent Temple Trust without the prior permission of this Court. Further, the Small Causes Court is directed to take up and dispose of the Application for mesne-profit/ deposit of interim compensation made by the Respondent Temple Trust for consideration expeditiously and dispose of the same within a period of six months from today. Thereafter parties shall have liberty to apply.

13 The two Civil Applications are allowed in the aforesaid terms.

(M. S. SONAK, J.)