

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO. 11590 OF 2013

Naresh Kundanlal Jain.

.. Petitioner

Versus

Madhukar Harichandra Parkar & Ors.

.. Respondents

...

Mr. Vaibhav R. Gaikwad for petitioner.

Mr. V. A. Sugdare for respondent No. 1 to 3.

CORAM : M. S. SONAK, J.

DATE : SEPTEMBER 14, 2015.

P.C.:

1] This petition is directed against order dated 25th October 2013 by which the appeal court has refused to condone delay on 329 days in instituting appeal against eviction decree dated 31st October 2009.

2] The reasons set out in the application seeking condonation of delay is that the petitioner had engaged the services of advocate Pravin Thakur soon after the receipt of the summons in the suit for eviction which was instituted in the year 2007. In the year 2007 i.e. on 23rd January 2007 the said advocate Mr Pravin Thakur appeared for and on behalf of the petitioner. Thereafter, the petitioner, from time to time approached advocate Thakur in his chamber but was always assured that the case was going on and that the petitioner would be informed as and when his presence is required in the matter. Ultimately, the suit was decreed on 31st January 2009 and the petitioner received the process of execution on 27th July 2010. Soon thereafter, the petitioner

applied for and obtained certified copies and has instituted the appeal.

3] Mr. Vaibhav Gaikwad the learned counsel for the petitioner, placing reliance on the decision of the Apex Court in the case of M. K. Prasad V/s. P. Arumugam (2001) 6 SCC 176 and N. Balakrishnan V/s. M. Krishnamurthy (1998) 7 SCC 123, submitted that the petitioner, having done everything within his means to defend the suit, cannot be blamed for the default on the part of his advocate. Mr. Gaikwad submitted that the suit premises, which is a shop, constitutes the sole source of his livelihood. Further, the petitioner has exhibited due diligence no sooner the execution process was served upon him. Therefore, upon consideration of all such aspects, the delay of 329 days should have been condoned, so as to advance substantial justice.

4] Mr. Sugdare the learned counsel for the respondent landlords submitted that in the present case the petitioner has not at all bothered to defend the suit. Neither was there any written statement filed nor was any evidence led in the matter. Mr. Sugdare submitted that the landlords in this case are 88, 75 and 73 of age. The suit itself was instituted in the year 2007. Despite the decree dated 31st October 2009, the landlords have not obtained possession of the suit premises. In these circumstances, there is no question of showing any indulgence to the petitioner and interfering with the discretion exercised by the

appeal court by applying the correct principles. Mr. Sugdare submitted that in the case of *N. Balakrishnan V/s. M. Krishnamurthy* (supra) there was a specific finding that the appellant, had not just blamed his advocate, but further, had applied to the Consumer Forum complaining of deficiency in service. The Consumer Forum had accepted the appellants case and even directed the advocate to pay compensation of Rs.50,000/- to the appellant. In the absence of any material to indicate that the advocate was indeed to blame, the cause shown cannot be regarded as sufficient.

5] Having heard the learned counsel for the parties and perused the record, in my judgment, there is no case made out to interfere with the impugned order. The delay in this case is of 329 days. Although that by itself, may not be a very weighty consideration to decline condonation, it is necessary to note that the petitioner was duly served with the summons in the suit way back in the year 2007. The petitioner, through his advocate did appear in the suit on 23rd January 2007. Thereafter, however, the petitioner neither bothered to file his written statement nor applied to lead any evidence in the matter. There is really no proper explanation as why, the petitioner could not have been more diligent in this regard. Thereafter, the petitioner took action only after he was served with the process in execution proceeding.

6] It is not sufficient for the petitioner to merely, blame upon his advocate in this manner. It is the duty of the petitioner to bring on record at least some material to substantiate such blame. Further, it is also the duty of the petitioner to be diligent in so far as the progress of the suit is concerned. In this case, the decree of eviction was made a good three years after the suit was instituted i.e. on 31st October 2009. During this entire period, it is too much to believe that the petitioner was not aware that he was required to file an written statement or to lead evidence in the matter. Although, the conduct of the petitioner, after the decree is made is the relevant factor, the conduct prior, particularly, in the context of cause shown is not an entirely irrelevant circumstance particularly in the process of assessing whether the cause shown is indeed genuine and bonafide.

7] As noted earlier, the suit for eviction was instituted in the year 2007. Although, a decree has been made on 31st October 2009, the same has not yet been executed. Thus, a period of 8 years has elapsed and the petitioner has continued in possession of the suit premises, notwithstanding the circumstances that the petitioner has neither filed any written statement in the suit nor led any evidence in the matter. At this stage, if the delay is condoned, the petitioner, on the said basis, will continue in possession of the suit premises, despite the fact that the

petitioner has not at all of being diligent in pursuing the litigation. Already, the respondents landlords have attained the age of 88, 75, and 73 years. In such circumstances, the appeal court has rightly exercised the discretion in declining to condone delay.

8] In the case of *N. Balakrishnan V/s. M. Krishnamurthy* (supra) as pointed out that Mr. Sugdare, there was material on record which indicated that the advocate was indeed responsible for the delay. The appellant in the said case did not rest content by blaming his advocate but further instituted proceeding before the Consumer Forum against the said advocate and obtained favorable orders. The decision in the case of *N. Balakrishnan V/s. M. Krishnamurthy* (supra) is therefore inapplicable to the facts of the present case, where, the petitioner has merely blamed his advocate and furnished no particulars whatsoever. Similarly, in the case of *M. K. Prasad* (supra) the material on record indicated that the advocate for the appellant-defendant withdrew his appearance from the case owing to the death of his son and there was no notice to the appellant-defendant about such withdrawal. Such circumstances are neither alleged nor exist in the present case.

9] In this case, the petitioner has examined himself. In his examination he admitted knowledge about the pendency of the suit. He

also admitted that he was aware that he had to file a reply to the allegations in the suit. He has also stated that on two to three occasions when he visited his advocate's office, he was told by his advocate that the reply is not ready. In these circumstances, it was at least the duty of the petitioner who have pursued the matter with his advocate for the purposes of filing a written statement. The petitioner, in the present case has failed to demonstrate any diligence. No case is therefore shown, which can be regarded as sufficient cause.

10] For all the aforesaid reasons this petition is dismissed. There shall be no order as to costs.

11] At this stage, learned counsel for the petitioner seeks stay on the execution of the eviction decree for a period of 8 weeks from today on the ground that the petitioner will like to take recourse against this order before the Hon'ble Apex Court. The request is reasonable. Therefore, subject to the petitioner filing in this court in a period of two weeks from today the usual undertaking, the eviction decree shall not be executed for a period of 8 weeks from today. The copy of the undertaking to be furnished to the learned counsel appearing for the respondent before the same is filed in the registry.

(M. S. SONAK, J.)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment/Order.**