

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 564 OF 2016

Ananda s/o Dula Mali,
Age 67 years, Occ. Agril,
R/o Shivaji Nagar, Motha Maliwada,
Nandurbar, Tq. & Dist. Nandurbar.

..Petitioner

Versus

- 1 Shri Nana Dula Mali
Age 30 years, Occ. Business
R/o Dhanmora - Chikuwadi,
Apartment No.32, Room No.9,
Surat, Gujarat.
- 2 Hiralal Dula Mali,
Age 40 years, Occ. Business
- 3 Shantaram Dula Mali,
Age 38 years, Occ. Business,
- 4 Suresh Dula Mali,
Age 34 years, Occ. Business,
- 5 Smt. Ashabai Ravindra Mali,
Age 30 years, Occ. Household,
- 6 Kum. Jyoti Ravindra Mali,
Age 10 years, Occ. Education,
- 7 Kum. Karina Ravindra Mali,
Age 10 years, Occ. Education,
- 8 Rohit Ravindra Mali,
Age 8 years, Occ. Education,

(The respondent No.6 to 8 through
Their natural guardian mother
i.e. Respondent No.5)
No.2 to 8 R/o Maliwada,
Nandurbar, Tq. & Dist. Nandurbar.

..Respondents

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Advocate for Petitioner : Shri Shah J.R.
Advocate for Respondents : Shri Abhyankar A.S. h/f Shri Natu S.V.

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CORAM : RAVINDRA V. GHUGE, J.

Dated: March 30, 2016

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ORAL JUDGMENT :-

1. Heard learned Advocates for the respective parties.
2. Rule.
3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.
4. The petitioner is aggrieved by the order dated 22.9.2015 passed by the trial Court, by which, Civil Misc. Application No.36 of 2014 has been rejected.
5. Shri Shah, learned Advocate for the petitioner contends that RCS No.15 of 2004 was dismissed in default on 7.11.2012. An application for restoration of the suit, along with an application for condonation of delay of 594 days was filed before the trial Court. By the impugned order, the said application was rejected thereby resulting in the right of the petitioner in the suit being extinguished.
6. It is further submitted that the details as regards the ailments suffered by the petitioner and his advanced age were mentioned in the application. Owing to the paralysis suffered by the petitioner and the medical treatment that he was taking from the concerned Doctors, he could

not remain present in the suit. Even thereafter, his physical mobility was restricted and he could not promptly file the application for restoration.

7. He concedes that during this period, he had preferred a proceeding with regard to his injunction application. Yet, due to his restricted mobility, he lost sight of the suit, which was dismissed and could not take effective steps within time for seeking its restoration. He further submits that despite the ill-health of the petitioner, the fact that he filed the present proceeding would indicate that he desires to have his suit adjudicated upon and has not lost interest in the matter. He, therefore, submits that no loss or harm would be caused to the respondent since the suit would be decided on its merits. They could be compensated with costs, if this Court is of the opinion that costs need to be imposed.

8. Shri Abhyankar and Shri Natu, learned Advocates appearing on behalf of the respondents, have opposed this petition. Contention is that all the reasons cited by the petitioner have been dealt with by the trial Court. The petitioner was cross-examined on the reasons for condonation of delay. He has admitted that after he suffered a paralysis attack, he had initiated a proceeding on 10.1.2011. He had admitted that neither he nor his family members attempted to contact his Advocate. He also admitted that his Advocate was residing in a near by area in the same town of Nandurbar.

9. It is further submitted that if the petitioner could travel upto Dhule for medical treatment, it is unacceptable that he could not travel to the

Court and file an application for restoration when the Court was situated in the same town Nandurbar.

10. Reliance is placed upon the judgment of the Honourable Supreme Court in the case of Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and others [(2013) 12 SCC 649] and Basawaraj and another Vs. Special Land Acquisition Officer [(2013) 14 SCC 81].

11. I have considered the submissions of the learned Advocates for the respective sides.

12. The issue before this Court is with regard to the cause of action put forth by an aged and unwell person, suffering from paralysis. It therefore, has to be seen as to whether the conduct of such an aged and ailing person could be equated with the conduct of a healthy bodied person. It also has to be considered as to whether the delay of 594 days should be construed so strictly that the attempt to have the matter restored for a trial on its merits should be defeated.

13. The Apex Court in the case of Collector, Land Acquisition Anantnag and another Vs. Mst. Katiji and others [(1987) 2 SCC 107], has observed while dealing with the application for condonation of delay, as under :-

" 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. *Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*

3. *"Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.*

4. *When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*

5. *There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.*

6. *It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."*

14. In the instant case, the petitioner has established the fact that he had suffered paralysis and his physical movements were restricted. There is no dispute that he travelled to the Court to initiate a proceeding in a Civil Misc. Appeal. The trial Court has concluded that since he could take the efforts to initiate a legal proceeding after he suffered paralysis, he could have also approached the Court for initiating the proceedings for

restoration of the suit, which was dismissed in default. I do not find that the delay of 594 days could be termed as being inordinate or deliberate.

15. In the case of Collector, Land Acquisition's (supra), this Court has held that no litigant would benefit by delaying his own matter. A dispute, which is yet to be adjudicated on its merits, has been dismissed since the petitioner could not participate in the proceedings. It cannot be lost sight of that his suit was instituted in 2009 and has been dismissed in default in 2012. It was only in three years that the suit has been dismissed for want of prosecution and it is not a case that the suit was pending for years together and since the decision in the suit was being delayed due to the conduct of the petitioner that the same eventually had been dismissed. I do not find that the period of three years, for which the suit was pending, could be, therefore, termed as being inordinately delayed by the conduct of the petitioner.

16. In the Esha Bhattacharjee's case (supra), the Honourable Supreme Court has carved out the principles, which need to be considered while considering the issue of condonation of delay. Taking into account the said principles, I do not find that the case of the petitioner would fall in the ambit of a fraud or mis-representation being made by him. In fact, his case would be covered by the observations of the Apex Court in Clauses 21.2, 21.3, 21.6 and 21.7, whereby the Honourable Apex Court has concluded that substantial justice should be paramount and pivotal and not the technical considerations and that sufficient cause should be interpreted to mean that

it is basically elastic and aimed at doing justice.

17. In the light of the above, though this petition deserves to be allowed costs need to be imposed on the petitioner since the respondents have been made to suffer the rigors of litigation as the suit filed by the petitioner has been dismissed in default.

18. As such, this petition is partly allowed. The impugned order dated 22.9.2015 is quashed and set aside. The delay of 594 days is condoned by imposing costs of Rs.5,000/- on the petitioner which shall be deposited before the trial Court within three weeks from today and respondent Nos.1 to 5, who are adults, would be at liberty to withdraw the said amount without conditions, in equal proportions.

19. Since Civil Misc. Application No. 36 of 2014 is allowed, the trial Court shall proceed to register the application for restoration filed by the petitioner and decide the same on its own merits.

20. Rule is made partly absolute in the above terms.

(RAVINDRA V. GHUGE, J.)

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