

**IN THE HIGH COURT OF BOMBAY AT GOA.****MISCELLANEOUS CIVIL APPLICATION NO.195 OF 2016.**

SHRI DATTA BABU SINAI ZINGDE  
(SINCE DECEASED) REP. BY HIS LRS. ....Applicants.

V/S  
SHRI RAMNATH SINAI ZINGDE,  
(SINCE DECEASED) AND 5 ORS., .....Respondents

Shri Ajit J. Kantak, Advocate for the applicant.  
Shri I. Agha, Advocate for the respondent nos.3 and 4.  
Shri J. Godinho, Advocate for the respondent no.5.

**Coram :- Nutan D. Sardesai,J.**  
**Reserved on:-29<sup>th</sup> July, 2016.**  
**Pronounced on:-6<sup>th</sup> October,2016.**

**ORDER**

The applicants seeks to condone the delay in preferring the appeal to assail the judgment and order dated 13.8.2014 by the application coming up for final disposal today.

2. Shri A. R. Kantak, learned Advocate for the applicants came to be heard who contended that the suit between the parties bearing Regular Civil Suit No.234/2000/C(new) was decreed on 25.4.2011 and the Regular Civil Appeal No.86/2011 was filed by the respondent no.4 and the Regular Civil Appeal no.44/2012 came to be filed by the respondent no.5. The learned District Judge decided the Regular Civil Appeal

No.44/2012 by his judgment and order dated 13.8.2014 quashing and setting aside the judgment and order of the Trial Court. The learned District Judge on the basis of the judgment and order made in Regular Civil Appeal No.44/2012 also set aside the judgment and order of the Trial Court dated 25.4.2011 in the Regular Civil Appeal No.86/2011. An Appeal from Order No.37/2014 was filed which was partly allowed by the judgment and order dated 30.10.2014 in which the tenancy was restricted only in respect of the Survey No.91/0 of Veling Village. The applicants therefore in view of the said judgment of this Court did not prefer any appeal but instead preferred a Review on 7.11.2014 seeking to review the judgment and order made in Regular Civil Appeal No.86/2011 alongwith an application for the condonation of delay. The learned District Judge condoned the delay in filing the Review but rejected the Review Application vide order dated 3.2.2016.

3. The applicants had appended a copy of the judgment and order dated 13.8.2014 in the Regular Civil Appeal no.86/2011 to the Review Application and in view of the dismissal of the Review had applied for a certified copy of the order made in the review as also of the judgment and decree in the Regular Civil Appeal No.86/2011. The certified copy was ready for delivery on 11.2.2016. Therefore apparently there was a delay in filing the

present appeal solely on account of the applicants filing a review and that too based on the judgment of this Court dated 30.10.2014 in the Appeal from Order No.37/2014. There was a delay of 375 days in preferring the appeal solely related to the pursuit of the review application which had to be condoned and therefore be condoned on such conditions as deemed fit and proper. The application was supported by the order in the Review Application dated 3.2.2016 passed by the learned District Judge-I.

4. The respondent nos.3 and 4 strongly opposed the application on the premise that it lacked the very ingredients of Section 5 of the Limitation Act, 1963 and which was otherwise not attracted to the case at hand. The explanation offered by the applicants was neither reasonable nor satisfactory for the condonation of delay. The challenge to the order dated 3.2.2016 made in the Civil Review Application no.13/2015 was not maintainable in the present Appeal from Order. The plea of not preferring an appeal against the judgment and decree dated 13.8.2014 passed in the Regular Civil Appeal no.86/2011 on the pretext of preferring a review could not come to the aid of the applicants in seeking the condonation of delay moreso since the applicants had preferred an appeal against the judgment and decree dated 13.8.2014 passed in the Regular Civil Appeal

No.44/2012. The proposed Appeal from Order preferred now was as an afterthought since the applicants had waited for a chance to see the outcome of the other proceedings. No explanation of whatsoever nature had come forth as to why the impugned judgment and decree dated 13.8.2014 in the Regular Civil Appeal No.86/2011 was not challenged, though now a specious plea was taken that a review was preferred which was also dismissed. Filing of the review could not be a ground for the condonation of delay and Section 14 of the Limitation Act, 1963 would also not be attracted to the present case. The applicants had approached the Court with unclean hands and by the suppression of material facts and on this ground alone the application was liable for dismissal. The impugned judgment and decree was passed on 13.8.2014 and the period to prefer an appeal expired on 11.11.2014. The applicants had not produced the copy of the judgment and decree to show when they had applied and received the same, but which had been annexed now as a certified copy applied for on 3.2.2016. There was no basis in the case set out by the applicants and therefore, the same had to be dismissed.

5. The respondent no.5 too opposed the application for the condonation of delay and pressed for its dismissal on the ground that the applicants had filed the Review application

before the District Court to review the order dated 13.8.2014 on the ground that the learned District Judge while making the impugned judgment and order inadvertently did not consider the fact that the claim of Nobert Fernandes in the Regular Civil Appeal no.44/2012 was only restricted to the property bearing Survey No.91/0 of Veling village and not the other properties and that the learned District Judge while ordering the stay of the entire suit inadvertently did not consider the impact of the order made in the application for the temporary injunction. The Review Application came to be rejected vide the order dated 3.2.2016 as there was no error apparent on the face of the record which was sought to be challenged by way of an Appeal From Order. The Review Petition being dismissed the same could not be challenged by way of an Appeal from Order. The only remedy available to the applicants was by way of an independent proceedings. No reasonable and satisfactory grounds had been set out for condoning the delay of 375 days. The statement made by the applicants that the Appeal From Order was not preferred but the Review Application was filed is a valid ground to condone the delay the application therefore, was not tenable and had to be dismissed as otherwise the respondent no.5 would be put to grave loss as the judgment and decree had become final against him.

6. Shri A. R. Kantak, learned Advocate for the applicant came to be heard who reiterated the contents of his application and submitted that the time spent in pursuing the Review Application had to be excluded and the delay had to be condoned as sufficient cause had been set out by the applicants. Shri I. Agha, learned Advocate for the respondent nos.3 and 4 submitted that there were two decrees in the Regular Civil Appeal No.44/2012 and the Regular Civil Appeal no.86/2011 but only the judgment in the Regular Civil Appeal No.44/2012 was challenged in the Appeal from Order while there was no challenge to the judgment and decree in the Regular Civil Appeal No.86/2011. The applicants were taking a chance by not preferring an appeal and therefore the present application could not be allowed since they were otherwise seeking to take away the right accrued in favour of the respondents. Sections 5 and 14 of the Limitation Act were also not attracted to the case at hand. There was a delay of 461 days and not 375 days as alleged by the applicants. The application was otherwise not bonafide. Moreover the applicant nos. 1(l) and 1(m) were not parties before the Trial Court and no application was made for their transposition as the applicants. No sufficient cause has been set out to condone the delay and even otherwise the review was not a ground to file the application and seek the condonation of delay. The review as filed by the applicants was

an afterthought. The delay which had occurred was unreasonable, unsatisfactory and unexplained and the conduct of the applicants was otherwise not bonafide and hence the application had to be dismissed with exemplary costs.

7. Shri J. Godinho, learned Advocate for the respondent no.5 like Shri Agha submitted that there was a delay of 461 days and not 375 days, as canvassed on behalf of the applicants. He mainly adopted the arguments of Shri Agha and submitted that the present application for the condonation of delay was not bonafide and filed after awaiting the outcome of the judgment in the Appeal from Order. The applicants had taken a chance and therefore could not canvass a case for the condonation of delay for want of sufficient and reasonable grounds. The conduct of the applicants too was relevant who had transposed the original respondent nos.16 and 17 as the applicants without the leave of the Court. On all these counts, no case whatsoever was made out for the condonation of delay and therefore the application had to be dismissed.

8. The admitted facts are that the Regular Civil Suit no. 234/2000 filed by the original respondent no.1 was decreed on 25.4.2011 and thereupon an Appeal bearing Regular Civil Appeal No.86/2011 was preferred by the respondent no.4 while the

respondent no.5 had preferred the Regular Civil Appeal no.44/2012. The learned District Judge had decided the Regular Civil Appeal no.44/2012 by his judgment and decree dated 13.8.2014 and quashed and set aside the judgment of the trial Court. The Regular Civil Appeal No.86/2011 filed by the respondent no. 4 was also decided by the learned District Judge on 13.8.2014 on the premise that he had passed the judgment and order in the Regular Civil Appeal No.44/2012 quashing and setting aside the order of the trial Court and on that premise had allowed the appeal, remanded the proceedings to the trial Court with a direction to frame the issue of tenancy of the defendant no.4 in respect of the Survey No.91/0 in village Veling and to stay the suit pending the decision of the issue before the Mamlatdar of Ponda.

9. It is equally a matter of record that an Appeal from Order No.37/2014 was filed by the legal heirs of the respondent no.1 and this Court by the oral judgment dated 30.10.2014 held that the Lower Appellate Court was justified to set aside the impugned judgment of the trial Court and quashed and set it aside only to the extent of the suit property bearing the Survey No.91/0 of village Veling. The learned Judge of this Court partly allowed the appeal subject to this modification. The applicants had not challenged the judgment in the Regular Civil Appeal

No.86/2011 and instead preferred a Review Application which too was after seeking the condonation of delay. Though the learned District Judge-I had condoned the delay, nonetheless he had dismissed the Review Application vide the order dated 3.2.2016 holding that there was no error apparent on the face of the records.

10. Shri A. R. Kantak, learned Advocate for the applicants relied in **Deena(dead) through L.Rs., Vs Bharat Singh(dead) through L.Rs. and others,[ AIR 2002 SC 2768]**, **Union of India and others Vs. West Coast Paper Mills Ltd and another,[ AIR 2004 Sc 3079]** and **N. Balakrishnan Vs M. Krishnamurthy, [(1998) 7 SCC 123]** to support his contention that it was a fit case to condone the delay in preferring the appeal.

11. **Deena(supra)** was an appeal by the defendants directed against the judgment of the High Court of Punjab and Haryana allowing the plaintiffs appeal on reversing the judgment of the First Appellate Court confirming the decision of the trial Court. The question at large before the Hon'ble Apex Court was whether on the facts the plaintiffs were entitled to the exclusion of the period from 21.3.1980 to 24.2.1982 under Section 14 of the Limitation Act, 1963 for computing the period of limitation in

filing the suit. The appellant/Deena had mortgaged his land with possession with the plaintiff no.2 and father of the plaintiff nos.15 to 19 and Khubi Ram Alias Shushi Ram, predecessor-in-interest of the plaintiff nos. 2 to 14. Deena filed an application for redemption of the land before the Collector Jhajjar on 23.6.1978 which was accepted on 29.2.1980 and the land was ordered to be redeemed on payment of the mortgage amount of ₹2,500/-.

12. **In Deena** (supra), the plaintiffs filed a suit in the Court of the Sub-Judge, Jhajjar seeking a declaration that they had become the owners of the property and that the order of the Collector dated 29.2.1980 was null and void. The suit was decreed by the trial Court which was challenged in the Appeal by the defendants. During the pendency of the Appeal before the District Judge, Rohtak, the plaintiffs withdrew the suit with permission to file a fresh suit which was filed on 24.2.1982 seeking a declaration that they were owners of the suit property, that the order passed by the Collector was void and inoperative and did not affect their right. The defendants took a plea in thier Written Statement that the suit was barred by limitation.

13. In **Deena** (supra), the trial Court framed Issues and one of them being on the bar of limitation and whether the plaintiffs

were entitled to the exclusion of time between 21.3.1980 to 24.2.1982. It was the case of the plaintiffs that they were prosecuting the previous suit in good faith and which was permitted to be withdrawn with leave to file the same on the same cause of action and therefore, the suit was not barred by limitation and they were entitled for the exclusion of the period from 21.3.1980 to 15.2.1982. The defendants case was that the plaintiffs could not have claimed to have prosecuted the present suit in good faith since in the written statement it was specifically stated that the suit was bad for non-joinder of necessary parties who had being impleaded in the proceedings before the Collector. The plaintiffs being aware of the objections had pursued the matter and the suit was decreed by the trial Court which decree was challenged in the Appeal by the defendants. Therefore, there could be no exclusion of the period under Section 14 of the Limitation Act.

14. In **Deena** (supra), the trial Court held in favour of the defendants that the plaintiffs had not pursued the proceedings of the previous suit with due diligence and good faith and in the Appeal the learned Additional District Judge relying in **Rabindra Nath Samuel Dawson Vs. Sivakami and others, [AIR 1972 SC 730]** held that the plaintiffs were not entitled to take the benefit of Section 14 of the Limitation Act. In the Second Appeal

filed by the plaintiff, the High Court set aside the judgment of the First Appellate Court confirming the decision of the trial Court and decreed the suit. In this backdrop it was contended before the Apex Court on behalf of the applicants that the High Court was clearly in error in upsetting the concurrent decision of the Courts below. Besides whether the plaintiffs were prosecuting the present suit in good faith was a question of fact and the First Appellate Court being the Final Court of fact, concurring with the findings recorded by the learned trial Court that the plaintiffs had not been prosecuting the previous suit with due diligence and good faith, the High Court could not disturb this concurrent finding of fact.

15. In **Deena** (supra), it was however contended on behalf of the respondents that the plaintiffs were entitled to the exclusion of the period between the date of the withdrawal of the suit and the filing of the fresh suit and the High Court had taken a proper view applying Section 14 of the Limitation Act, 1963. In that backdrop the Hon'ble Apex court held that the main factor which would influence the Court in extending Section 14 of the Limitation Act is whether the prior proceedings had been prosecuted with due diligence and good faith. The parties prosecuting the suit in good faith in the Court having no jurisdiction is entitled to the exclusion of that period. The

expression "good faith" used in Section 14 means the "exercise of due care and attention". In the facts at large it was found that the High Court in the impugned judgment had not discussed the material on the basis of which the Courts below recorded the finding of fact related to lack of good faith on the part of the plaintiffs and allowed the appeal.

16. In **Union of India** (supra), the Hon'ble Apex Court held that exclusion of the period spent in bonafide litigation is liable to be excluded. In the facts at large where the issue as to the legality and reasonability of the rates charged by the Railway Administration having been finally adjudicated by the Supreme Court, there was nothing wrong in the plaintiff having proceeded on an assumption that what had remained to be done was a simple direction to the Railway Administration to refund the amount of freight to which it had already been adjudged not entitled to recover. The plaintiff thereupon filed a Writ Petition for such direction but the High Court was not inclined to grant such relief in exercise of the writ jurisdiction and therefore, left the remedy by way of a civil suit. By no stretch of imagination it could be said that the plaintiffs was actuated by malafides or want of good faith in instituting the proceedings. Therefore, the period lost during the pendency of the Writ proceedings was liable to be excluded for computing the period of limitation under

Section 14(2) of the Limitation Act.

17. In **N. Balakrishnan** (supra), the Hon'ble Apex Court stated the guidelines in the matter of the exercise of discretion by the Court to condone the delay. It held that "sufficient cause", be construed liberally, acceptability of the explanation of delay is the sole criteria and the length of the delay was not relevant in the absence of anything showing malafide or deliberate delay as dilatory tactics. The Court normally condones the delay, however while doing so, the Court should also keep in mind the litigation expenses to be incurred by the opposite party and should compensate him accordingly.

Each of these judgments are distinguishable on facts and do not at all substantiate the case of the applicants for condoning the delay on the premise that they were pursuing their remedy by way of review and that the period so spent had to be excluded from the purview of consideration in pursuing the proposed appeal.

18. At the cost of repetition, the applicants were faced with the judgments in the Regular Civil Appeal No.44/2012 allowing the appeal of the respondent no.5 and that in the Regular Civil Appeal No.86/2011 allowing the appeal of the respondent no.4 virtually adopting the reasoning given in the Regular Civil Appeal

no.44/2012. The applicants had agitated their remedy in the Appeal from Order No.37/2014 before this Court challenging the judgment in the Regular Civil Appeal No.44/2012 which was decided on 30.10.2014 and had attained finality. The applicants still took recourse to the review proceedings and that too by seeking the condonation of delay which did not find favour with the learned District Judge and were dismissed. It is therefore apparent that the applicants were taking a chance by not challenging the judgment in the Regular Civil Appeal No.86/2011 which was substantially the same as in the Regular Civil Appeal No.44/2012.

19. Section 5 of the Limitation Act, 1963 provides that any appeal or any application may be admitted after the prescribed period if the appellant or applicant satisfies the Court that he has sufficient cause for not preferring the appeal or making the application within such time. Section 14 deals with the exclusion of time of proceeding bonafide in a Court without jurisdiction. A reading of both these Sections would show that the case of the applicants does not at all fall within the purview of Section 5 of the said Act much less Section 14 thereof. Moreover it was nowhere the case of the applicants that they were proceeding bonafide in a Court without jurisdiction to seek the exclusion of time. In any view of the matter, the applicants

by their conduct have shown that the time spent in preferring the appeal was free from bonafides and quite on the contrary delay on their part in preferring the appeal was neither reasonable nor substantial nor duly accounted for from the conduct being not bonafide. The applicants have failed to show sufficient cause to condone the delay and therefore, there is no merit in the application which is hereby dismissed.

20. The application stands disposed off accordingly.

**NUTAN D. SARDESSAI, J.**

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