

IN THE HIGH COURT OF BOMBAY AT GOA

MISC.CIVIL APPLICATION NO. 820 OF 2015
&
STAMP NUMBER (APPLN.) NO. 2953 OF 2015
IN
SECOND APPEAL NO. 77 OF 2008

SMT.DEEPALI SATARDEKAR.

... Applicant

Versus

MS.KUSUMA MANGUESH TIRODKAR ALIAS
KUSUMA MANGUESH PEDNEKAR AND 5
ORS.,

... Respondents

Mr. Sudesh Usgaonkar and Ms. R. Pereira, Advocates for the applicant.

Mr. Vledson Lucio Braganza, Advocate for the respondents.

Coram:- F. M. REIS, J.

Date:- 4th March, 2016

ORAL ORDER

Heard Mr. Sudesh Usgaonkar, learned counsel appearing for the applicant and Mr. V. Braganza, learned counsel appearing for the respondents.

2. This is an application for condonation of delay and to recall the judgment passed by this Court dated 20.06.2014. Mr. Sudesh

Usgaonkar, learned counsel appearing for the applicant has pointed out that the appeal was filed in the year 2008 and came to be admitted by this Court without notice to the applicants/original respondents. The learned counsel further pointed out that thereafter the applicants/respondents being the husband and wife were duly served in the appeal. But however, no Advocate was appointed to represent them in such appeal. The learned counsel further pointed out that thereafter the respondents/original appellants did not furnish the requisite paper book charges and the record reveals that the matter came for hearing on order board for that purpose. The learned counsel further pointed out that the record further reveals that the applicant/respondents in the appeal were allegedly notified about such paper book but however, no such notice was served on the applicant. The learned counsel further pointed out that the matter was thereafter placed for final hearing on 13.06.2014 and on the same date, the arguments were heard and the judgment was reserved. The learned counsel further pointed out that the judgment came to be passed on 20.06.2014 and only when the respondents/appellants filed an application for execution of the decree, the applicant learnt about the passing of the judgment. The learned counsel further submitted that immediately thereafter the applicant filed

an application for condonation of delay as well as for recall of the said judgment. The learned counsel thereafter has taken me through the averments in the affidavit to point out that the original respondent no.1 had expired on account of an ailment somewhere on 24.03.2013. The learned counsel further pointed out that as far as the said deceased respondent is concerned, the appeal itself had abated. The learned counsel further pointed out that the respondent no.2 was a cancer patient since 2006 and was subject to treatment at Tata Memorial Hospital at Mumbai. The learned counsel further pointed out that the respondent no.2 is still suffering from such ailment and as such was not aware about the passing of the said judgment. The learned counsel further submitted that both the Courts below have decided in favour of the respondents and that in case the judgment passed by this Court is allowed to stand, grave injustice would occasion to the applicant as she would be deprived of her residential house where she is residing. The learned counsel as such submits that the applicant has made out a case of sufficient cause for condonation of delay as well as for recall of the judgment passed by this Court.

3. On the other hand, Mr. V. Braganza, learned counsel

appearing for the respondents/original appellants has stated that the applicant has been negligent in pursuing her defence and as such the question of exercising any discretion in favour of the applicant would not arise. The learned counsel further pointed out that the applicant did not appoint a lawyer inspite of being served and as such it is not permissible to the applicant to now contend that the applicant was not aware about the date of the hearing. The learned counsel further submitted that on account of such gross negligence on the part of the applicant, this Court was justified to proceed to dispose of the Second Appeal ex-parte and pass the judgment dated 20.06.2014. The learned counsel further pointed out that though the respondents/original appellants do not dispute about the sickness of the applicant nevertheless, according to him as there was gross negligence on the part of the applicant in not appointing an advocate to represent them in the appeal which by itself would justify to dispose of the appeal ex-parte. The learned counsel has brought to my notice that the son of the applicant was representing the original respondents before the learned Lower Appellate Court. The learned counsel as such points out that both the applications be rejected.

4. I have considered the submissions of the learned counsel and I have also gone through the records. The effect of the judgment passed by this Court would result in the demolition of the structure which is occupied by the applicant. Mr. Braganza, learned counsel appearing for the respondents/original appellants fairly does not dispute the ailment suffered by the applicant. Admittedly, the original respondent no.1 had expired much before the passing of the judgment and as the legal representatives of the deceased respondent no.1 were not brought on record, the appeal had automatically abated as far as the deceased respondent no.1 is concerned. Be that as it may, the only aspect in such circumstances to be examined is whether on the date when the matter was heard on 13.06.2014, there was any sufficient cause or reason for non appearance of the applicant herein. As pointed out herein above, the respondents do not dispute the sickness of the applicant. As such, the fact that the applicant was suffering from the ailment of cancer from the year 2006 up to this date is not disputed. In such circumstances, admittedly, on the date when the matter was heard, the applicant was not represented as she was suffering from ailment of cancer and no advocate was appointed to represent her. As such, considering such pitiful circumstance, the applicant was suffering at the

relevant period, I find that the contention of Mr. Braganza, learned counsel appearing for the respondents that there was gross negligence on the part of the applicant in not being represented on the relevant date cannot be accepted. The conduct of the applicant may have been inappropriate in the circumstances but it cannot be termed to be grossly negligent which would disentitle her from the discretionary relief of condonation of delay and set aside the ex-parte judgment passed by this Court.

5. On perusal of the affidavit filed by the applicant, I find that there are no malafides attributed to the applicant in not being represented on the relevant date or that she deliberately had not filed any appearance through an Advocate. When there are no malafides attributed, the question of refusal to exercise discretion in favour of such applicant would not arise. Considering the sickness of the applicant which is not disputed and taking note of the fact that the respondents had not brought any material on record to suggest that the applicant had knowledge about the judgment passed by this Court much prior to the date as referred to in the affidavit filed by the applicant, I find that there is no reason to disbelieve the case put forward by the applicant. It is

now well settled that the words 'sufficient cause' has to be liberally construed to meet the ends of justice. In the present case, as pointed out by Mr. Usgaonkar, learned counsel appearing for the applicant, in case the judgment is allowed to stand, the applicant would suffer irretrievable damage as she would be deprived of the residential premises. In such circumstances, the contention of the learned counsel appearing for the applicant that the applicant has shown lack of due diligence in not appointing a lawyer cannot be accepted. Considering the facts and circumstances of the case and considering the contention of Mr. Braganza, learned counsel appearing for the respondents that the son of the applicant had represented the applicant before the learned Lower Appellate Court, I find that the applicant is bound to pay cost to the respondents in the peculiar facts and circumstances of the case. The costs are quantified at Rs.10,000/- as condition precedent.

6. In view of the above, I pass the following :

ORDER

The application for condonation of delay in filing the above application stands allowed. The judgment dated 20.06.2014 passed by this Court in Second Appeal No. 77 of 2008 stands recalled subject to

:8:

the payment of costs of Rs.10,000/- by the applicant to the respondents as condition precedent.

Both the applications stand disposed of accordingly.

F. M. REIS, J.

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