

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 8061 OF 2016

Smt. Eugene Vaz ...Petitioner
Versus
Smt. Shalini Vishwanath Vaigankar
And Ors. ...Respondents

....
Mr. J.M. D'Silva, Advocate for the Petitioner.
Mr. A.R. Singh, Advocate for the Respondents.
....

CORAM : R. G. KETKAR, J.

DATE : 02nd August, 2016

P.C.

1. Heard Mr. D'Silva, learned Counsel for the petitioner and Mr. Singh, learned Counsel for the respondents, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.1(b)' has challenged the judgment and order dated 14.1.2016 passed by the Appellate Bench of Small Causes Court at Mumbai (Bandra Branch) in Marji Application No.152 of 2015. By that order, the Appellate Court rejected the application made by defendant No.1(b) for condoning the delay of six years ten months and six days in taking out the application for restoration

of Appeal No.142/2008 which was dismissed in default on 15.7.2008.

3. The respondents had instituted R.A.E. & R. Suit No.2948/1988 against Mrs.Shantan Karshal Pereira for recovery of possession of room No.1 in Savitri Chawl No.2, situate at Jawahar Nagar, Khar (East), Mumbai – 400 051 (for short, 'suit premises'). During pendency of the suit, original defendant died and her daughters, namely, defendant No.1(a) Mrs.Cleira Fernandes and defendant No.1(b) Smt.Eugene Vaz (present petitioner) were brought on record. Original defendant had filed written statement opposing the suit. In paragraph-2 of the written statement, she contended that the contents of paragraph-1 of the plaint are substantially correct. The suit was decreed on 31.1.2008. Aggrieved by that decision, appeal was preferred before the Appellate Bench of the Small Causes Court on 13.3.2008. On 15.7.2008 the appeal was dismissed in default. The petitioner took out two applications on 22.6.2015, one for restoration of the appeal and one for condoning the delay of six years ten months and six days in filing the application for restoration. By the impugned order, Appellate Court rejected

the application for condonation of delay. It is against this order, defendant No.1(b) has instituted the present petition.

4. In support of this petition, Mr. D'Silva has strenuously contended that the Appellate Court should have adopted liberal approach while considering the application for condoning the delay. He submitted that defendant No.1(b) is a handicapped lady and there is no male member in her family to look after her legal affairs. He has taken me through Marji Application. In paragraph-2, it is contended that defendant No.1(b) is a handicapped lady since birth and suffering from physical impairment, disability in relation to her left side leg and being the polio patient, said disability is not likely to improve. In paragraph-3, it is contended that after filing of appeal on 13.3.2008, all of sudden on 15.3.2008 she fell down in bathroom. Due to which, there was fracture and dislocation of her hip-joint of the left side. She was under the care and treatment of Dr. Nilesh M. Veera from 15.3.2008 to 30.9.2008. Dr. Nilesh M. Veera has also issued medical certificate dated 30.9.2008. Said dislocation and disability is increased to 79% disability. She also produced disability certificate dated

29.5.2014 issued by the Government of Maharashtra as also certificate of disability dated 12.9.2007 issued by All India Institute of Physical Medicine and Rehabilitation, Mumbai. In paragraph-14, it is contended that the respondent has executed the decree and took possession of the suit premises on 7.1.2015 and all her articles, things, belongings, papers, proceedings, clothes, paraphernalia are lying and being in the suit premises. Mr.D'Silva submitted that the Appellate Court should have considered the disability of defendant No.1(b) and on humanitarian ground condoned the delay. He also submitted that there is difference between the description of the suit premises and the room in possession of defendant No.1(b). The plaintiffs have executed the decree mischievously. He submitted that room No.1 (suit premises) was converted into room No.2 and defendant No.1(b) is in possession of room No.2. The decree is, therefore, inexecutable.

5. On the other hand Mr.Singh supported the impugned order. He submitted that admittedly even on the defendant No.1(b)'s showing the decree was executed and possession of the suit premises was taken on 7.1.2015. Application for restoration

of the appeal as also application for condonation of delay were filed on 22.6.2015. There is no explanation for the period between 7.1.2015 to 21.6.2015 for not filing applications for restoration and for condonation of delay immediately after 7.1.2015.

6. As far as description of the suit premises is concerned, he has taken me through the plaint and the written statement as also the order dated 31.10.2014 passed by the learned trial Judge below Exhibit-33. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the appeal was dismissed in default on 15.7.2008. It is also not in dispute and is a matter of record that the applications for restoration of appeal and for condonation of delay were filed on 22.6.2015. With the assistance of learned Counsel for the parties, I have carefully perused the application filed by defendant No.1(b) for condoning the delay in filing application for restoration of

appeal. Defendant No.1(b) contended that after filing of the appeal on 13.3.2008, she fell down in the bathroom on 15.3.2008 and sustained fracture and dislocation of her hip-joint of left side. She was under care and treatment of Dr. Nilesh M. Veera from 15.3.2008 to 30.9.2008. Perusal of the application does not show any reason given by defendant No.1(b) for not filing applications after 1.10.2008. In other words, there is no explanation for her filing application from 1.10.2008 till 22.6.2015. In paragraph-14, defendant No.1(b) contended that the respondents executed the decree and took possession of the suit premises on 7.1.2015. Even there is no explanation as to why no applications were filed immediately after 7.1.2015 and defendant No.1(b) waited till 22.6.2015 for filing applications. It is admitted position that there is delay of six years ten months and six days in filing the applications.

8. As far as the contention advanced by defendant No.1(b) that the suit premises is not properly described is concerned, I do not find any merit in the submission for more than one reason. In the first place, in paragraph-1 of the plaint, the plaintiffs specifically contended that the original defendant was

tenant in respect of room No.1 of Savitri Chawl No.2, situate at Jawahar Nagar, Khar (East), Mumbai – 400 051. In the written statement filed by original defendant, she admitted that the contents of paragraph-1 are substantially correct. In other words, no dispute was raised about the description of the suit premises. That apart, during pendency of the execution proceedings, defendant No.1(b) took out application Exhibit-33 for discharge of decree on the ground that the trial Court decreed the suit and ordered handing over possession of room No.1. Possession of room No.1 was handed over to the plaintiff by the deceased father of defendant No.1(b) prior to 1972. That room was let out to one Mr. Subhash Warick. Room No.1 was renumbered as room No.6 in the year 1990 by the plaintiffs. The defendants are in possession of room No.2 and are not in possession of room No.1.

9. By order dated 31.10.2014, the learned trial Judge rejected the application. In paragraph-7 of that order, the learned trial Judge has referred to the assertions made by the plaintiffs in paragraph-1 of the plaint and written statement filed by original defendant. In paragraph-11, the learned trial

Judge also considered the submissions of defendant No.1(b) that her father had surrendered possession of suit premises to the plaintiffs prior to 1972 and rejected said explanation. Mr.D'Silva submitted that the order dated 31.10.2014 was also not challenged by defendant No.1(b).

10. In view thereof, I do not find that the Appellate Court committed any error in rejecting the applications. Though it is true that while considering the application for condonation of delay, liberal approach has to be adopted, nonetheless the person praying for condonation of delay has to make out a sufficient cause. In the facts and circumstances of the present case, the cause shown by the defendant No.1(b) cannot be said to be a sufficient cause. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)