

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7084 OF 2016

Ghanshyam Mohanlal Parmar ... Petitioner
Vs.
Mahesh Fojalal Seth ... Respondent

Mr. Jaydev Trivedi for Petitioner.

CORAM : R. G. KETKAR, J.
DATE : NOVEMBER 17, 2016

P.C. :

Not on Board. At the request of Mr. Trivedi, learned Counsel for petitioner, taken up for admission.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'plaintiff', has challenged the judgment and order dated 30.01.2015 passed by the learned Judge, City Civil Court, Borival, Dindoshi Division in Notice of Motion No.2087 of 2014 in Summary Suit No.2448 of 2012. By that order, the learned trial Judge condoned the delay of 31 days in filing the application for leave to defend.

3. In support of this Petition, Mr. Trivedi strenuously contended that respondent, hereinafter referred to as 'defendant', filed Notice of Motion No.2087 of 2014. In that Motion, he did not pray for condoning the delay in filing application for leave to defend. He has taken me through the Notice of Motion as also affidavit in support of that Motion. In affidavit in support of the Notice of Motion, all that defendant stated is that after one year, plaintiff served summons for judgment on 09.06.2014 and the date of hearing was 21.06.2014. He informed this fact to his Counsel prior to that date and his Counsel was unable to file

reply to the summons for judgment in time, and therefore, there was delay of 31 days in filing leave to defend to the Summary Suit. He submitted that even in affidavit in support of the Notice of Motion, no prayer is made for condoning the delay. He, therefore, submitted that in such state of affairs, the learned trial Judge was not justified in condoning the delay. In support of this submission, he relied upon the judgment of the Apex Court in the case of *Trojan & Co. Vs. Nagappa*, AIR 1953 SC 235 to contend that the decision of a case cannot be based on grounds outside the pleadings of the parties. He also relied upon the decision of the Apex Court in the case of *Brijesh Kumar Vs. State of Haryana*, AIR 2014 SC 1612 to contend that sufficient cause is a condition precedent for exercising discretion by Court for condonation of delay.

4. I have considered the submissions advanced by Mr. Trivedi. I have also perused the material on record. It is not in dispute that there is a delay of 31 days in filing the application for leave to defend. In the Notice of Motion, defendant has averred thus,

“Take Notice that this Court will be moved before the Hon'ble Judge Shri R. M. Khan on 21.07.14 in the forenoon by the abovenamed defendant for and order that **he move application for delay condonation in this suit and also file his leave to defend the summons for judgment issued by the Plaintiff and.**”

5. Perusal of the portion extracted hereinabove clearly shows that defendant has specifically averred that he will move application for condonation of delay in the Suit and also file his leave to defend the summons. In support of this Motion, defendant filed affidavit. In paragraph 2, defendant has averred thus,

2. I state that after one year the plaintiff served summons for Judgments on 09.06.2014 but the date for hearing before this Hon'ble court on 21.06.2014 and I inform this fat to my counsel prior to this date hence my counsel unable to file reply to the

summons for judgments in time. And therefore the delay of 31 day is occurred in filing the leave to defend to this present summary suit. The defendant Mahesh Fojalal Seth has a substantial defence in this present suit.”

6. In paragraph 3, defendant prayed for making Notice of Motion absolute. In my opinion, perusal of the Notice of Motion and more particularly the portion extracted hereinabove read with paragraphs 2 and 3, leave no room for doubt that defendant has prayed for condoning the delay. It is not in dispute that delay is of 31 days. In the case of ***State of Nagaland Vs. Lipok A.O.***, AIR 2005 SC 2191, it is held by the Apex Court that what counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. The expression “sufficient cause” should be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay.

7. Mr. Trivedi relied upon the decision of the Apex Court in ***Trojan & Co.*** (*supra*). In that case, the Apex Court has held that decision of a case cannot be based on grounds outside the pleadings of the parties. The said decision is not applicable for the reasons already indicated hereinabove. In the case of ***Brijesh Kumar*** (*supra*), the Apex Court has held that sufficient cause is a condition precedent for exercising discretion by Court for condonation of delay. While allowing the Notice of Motion, the learned trial Judge has held that sufficient cause is made out for condoning the delay. In view thereof as also in view of the decision of the Apex Court in the case of ***State of Nagaland*** (*supra*), I do not find that the decision in ***Brijesh Kumar*** (*supra*) is applicable to the facts of the present case. While condoning the delay, the learned trial Judge was of the opinion that the delay deserves to be

condoned so as to afford opportunity to the defendant seeking leave to defend the Suit. Accordingly, the delay was condoned subject to costs of Rs.1000/- payable to the plaintiff. The impugned order is purely a discretionary order. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Minal Parab