

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5338 OF 2014

Shri. Satishkumar Satyanarayan
Agarwal

...Petitioner

Versus

Shri. Nandu Maruti Pol and Anr

...Respondents

....

Mr.G.S. Godbole, Senior Advocate a/w. Mr. Dupad S. Patil,
Advocate for the Petitioner.

Mr. Madhav J. Jamdar, Advocate for Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 12th APRIL, 2016

P.C.

1. Heard Mr. G.S. Godbole, learned Senior Counsel for the petitioner and Mr. Madhav Jamdar, learned Counsel for respondents, at length.

2. Rule. Mr. Jamdar waives service on behalf of the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of

India, the petitioner has challenged the judgment and order dated 4.4.2014 passed by learned Civil Judge, Senior Division, Pune in Misc. Application No.295/2013. By that order, the learned trial Judge dismissed the application made by the petitioner, hereinafter referred to as the 'plaintiff' for restoration of the Misc. Application No.128/2012 which was dismissed in default on 12.12.2012. The plaintiff has instituted suit against the respondents, hereinafter referred as the 'defendants', on 23.11.1995 for specific performance of the agreement for sale dated 20.2.1989 and in the alternative for damages of Rs.21,14,600/- and for refund of the earnest money of Rs.22,300/-.

4. On 21.7.2007, the issues were framed and the matter was adjourned to 5.9.2007 for recording plaintiff's evidence. As the plaintiff remained absent, on 13.2.2008 notice was issued to the plaintiff. Report Exhibit-24 refers that the plaintiff was not traceable. On 27.3.2008, as the plaintiff and his advocate remained absent, the suit was dismissed in default. On 16.7.2008 the plaintiff filed Misc. Application No.573/2008 for restoration of suit. Again on various dates, the plaintiff remained

absent and the application was dismissed on 24.3.2011 for not taking proper steps. On 31.10.2011, the plaintiff took out Misc. Application No.128/2012 for condonation of delay in filing the application for restoration of the Misc. Application No.573/2008. On various dates, the plaintiff remained absent and did not pay the process fee. As no steps were taken as also the plaintiff and his advocate remained continuously absent, that application was dismissed in default on 12.12.2012. On 27.2.2013, the plaintiff has filed present application being Misc. Application No.295/2013 for restoration of Misc. Application No.128/2012, which was as noted earlier, dismissed in default on 12.12.2012. It is against this order, the plaintiff has instituted the present petition.

5. Mr. Godbole submitted that from perusal of Rojanama it would be evident that from 4.8.2006 till 5.4.2007 the suit was un-dated. It is only on 26.6.2007, the plaintiff and his advocate were present and the defendants and his advocate were absent. As the defendants had already filed written statement, 'no written statement' order was set aside and the matter was adjourned to 21.7.2007 for framing issues. He submitted that

the report Exhibit-24 shows that the plaintiff was not traceable and on 27.3.2008, the suit was dismissed after perusing the report on notice Exhibit-23 and that the plaintiff was not traceable. It was further recorded that the plaintiff was not interested to proceed with the suit and the suit was dismissed in default.

6. Mr. Godbole submitted that the plaintiff took out Misc. Application No.573/2008 on 16.7.2008. By order dated 24.3.2011, the learned trial Judge dismissed that application by observing as under :

“Applicant remained absent. He failed to provide copy of the order/document submitted with list Exh-3 to the opponent. No proper steps taken. Application is dismissed.”

7. Mr. Godbole submitted that the defendants were duly served with Misc. Application No.573/2008 and in fact they filed application Exhibit-8 seeking time for filing their reply. Learned trial Judge was, therefore, not justified in dismissing the application on 24.3.2011. The plaintiff filed Misc. Application No.128/2012 on 31.10.2011 for condoning the delay in filing application for restoration of Misc. Application No.573/2008. On

various dates, the matter was adjourned for payment of process fees. As no steps were taken, on 12.12.2012, that application was dismissed. He submitted that it was for the plaintiff's Advocate and his Clerk to ensure payment of process fees. Because of negligence on the part of the Advocate, the plaintiff should not suffer. In any case, the plaintiff is ready and willing to compensate the defendants by paying costs as may be determined by the Court. He further submitted that in fact on 20.6.2011, the defendants have sold the suit property to Shri Pravin Bansilal Raisonni and said fact was not disclosed. He therefore submitted that the impugned order deserves to be set aside thereby restoring the Misc. Application No.128/2012 to the file of the trial Court.

8. On the other hand, Mr. Jamdar has taken me through Rojanama of the suit as also Misc. Applications filed by the plaintiff and submitted that in the main suit after framing of the issues on 21.7.2007, the suit was adjourned to 5.9.2007 for plaintiff's evidence. The plaintiff remained absent on 5.9.2007, 26.9.2007, 3.11.2007, 15.12.2007, 2.1.2008 and 5.2.2008. On 13.2.2008 notice was issued to the plaintiff. In fact it was not

necessary for the Court to issue notice to the plaintiff as he was represented by an Advocate. Despite that, notice was issued to the plaintiff on 13.2.2008. As the plaintiff and his advocate did not appear, on 27.3.2008 the suit was dismissed. The plaintiff came with the case that he came to know about dismissal on 2.4.2008 and filed application for certified copy. The plaintiff filed Misc. Application No.573/2008 on 16.7.2008 for restoration. Again the plaintiff and his Advocate remained absent on 29.7.2008, 3.12.2010 and 15.12.2010. On 31.1.2011 the plaintiff's Advocate was present. The defendants filed application Exhibit-8 for adjournment, on which the learned trial Judge passed order 'other side to say' and adjourned the matter to 25.2.2011. On 25.2.2011, the Advocate for the plaintiff remained absent and the matter was adjourned to 24.3.2011. On 24.3.2011, as the plaintiff remained absent and failed to provide copy of the order/documents with list Exhibit-3 to the defendants, application was dismissed as no proper steps were taken.

9. Mr. Jamdar submitted that on 31.10.2011, the plaintiff filed Misc. Application No.128/2012 for condonation of delay in filing the application for restoration of the Misc. Application

No.573/2008. The plaintiff and his advocate remained absent on 26.3.2012, 20.4.2012, 20.6.2012, 3.10.2012 and 7.11.2012. In the meantime, even the process fee was not paid and no steps were taken by the plaintiff. As the plaintiff and his Advocate remained continuously absent and did not take steps, the application was dismissed in default on 12.12.2012. Mr. Jamdar therefore submitted that the plaintiff was grossly negligent in prosecuting both the suit as also the applications for restoration. He relied upon the decision of the Apex Court in the case of ***Isha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academi and others, 2013 AIR (SCW) 6158*** and in particular paragraph-15 thereof in which after considering various authorities, the Apex Court culled out the principles while considering the application for condonation of delay. He submitted that said principles will apply for the purpose of finding out whether the plaintiff has made out sufficient cause for restoration of the Misc. Application. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

10. I have considered the rival submissions advanced by

learned Counsel for the parties. I have also perused the material on record.

11. As noted earlier, on 21.7.2007, the issues were framed and the matter was adjourned to 5.9.2007 for plaintiff's evidence. The plaintiff remained absent on various dates. On 13.2.2008 notice was issued to the plaintiff. Report Exhibit-24 records that the plaintiff was not traceable. On 27.3.2008, the learned trial Judge after noting the report, dismissed the suit on the ground that the plaintiff was not interested to proceed with the suit. On 16.7.2008 the plaintiff filed Misc. Application for restoration. Except 31.1.2011, the plaintiff and his Advocate remained absent on 29.7.2008, 3.12.2010, 15.12.2010 and 25.2.2011. As the plaintiff remained absent, on 24.3.2011 the learned trial Judge dismissed the application by observing that the plaintiff failed to provide copy of order/document submitted with list Exhibit-3 to the opponent. No proper steps were taken. It is however not clear as to what steps were required to be taken by the plaintiff. It is not in dispute that the defendant was served with the application and in fact the defendant filed application Exhibit-8 seeking adjournment.

12. The plaintiff, therefore, took out Misc. Application No.128/2012 on 31.10.2011 for condonation of delay in filing the application for restoration. It is material to note that by registered sale deed dated 20.6.2011, the defendants sold the property to Pravin Bansilal Raison. Again the plaintiff and his Advocate did not remain present on various dates, as indicated above. Even the process fee was not paid. Learned trial Judge, therefore, dismissed the application on 12.12.2012 noting that no steps were taken by the plaintiff for payment of process fee.

13. Mr. Godbole submitted that the Advocate for the plaintiff and his Clerk should have paid the process fee and for their negligence the plaintiff should not suffer. I find merit in this submission. Perusal of order dated 12.12.2012 reveals that the matter was adjourned from time to time for payment of process fee and only because of failure to pay the process fee, the application was dismissed in default. The plaintiff therefore took out present application on 27.2.2013 and by the impugned order, the learned trial Judge has rejected the application. Learned trial Judge while rejecting the application, noted that the plaintiff did not adduce any evidence of his Advocate or clerk.

Mr.Godbole submitted that the plaintiff is ready and willing to examine Advocate who represented the plaintiff in the trial Court.

14. In the case of **Esha Bhattacharjee** (*supra*) , Apex Court has laid down the principles which are to the following effect :

“15. From the aforesaid authorities the principles that can broadly be culled out are:

(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:

(a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters.”

15. Mr. Jamdar relied upon clauses (iv), (v), (vii), (viii), (ix) and (d) and submitted that as there was gross negligence on the part of the plaintiff in conducting the suit and Misc. Application,

this Court should not invoke the powers under Article 227 of the Constitution of India.

16. As noted earlier, the plaintiff has instituted the Suit for specific performance of the contract. Valuable rights of the parties are involved in the suit. If the impugned order is not set aside, the suit instituted by the plaintiff for specific performance will stand dismissed on technical ground. The delay in prosecuting the suit will not enure to the benefit of the plaintiff. That apart, the defendants have sold the suit property by registered sale deed dated 20.6.2011 to Shri Pravin B. Raison. Perusal of Misc. Civil Application No.128/2012 shows that immediately after dismissal of the suit on 27.3.2008, the plaintiff applied for certified copy on 2.4.2008. The certified copy was ready on 23.6.2008 and after obtaining certified copy the plaintiff instituted Misc. Civil Application No.573/2008 on 16.7.2008. Perusal of Roznama shows that the plaintiff and his Advocate remained absent and did not attend Misc. Application No.573/2008. In view thereof, it is necessary to impose costs on the plaintiff.

17. As far as the proceedings of Misc. Application

No.128/2012 are concerned, the same was dismissed because of non-payment of process fee. Because of failure on the part of the plaintiff's Advocate and his clerk, the plaintiff should not suffer. At the same time, having regard to the fact that the suit is instituted in the year 1995 for specific performance of the agreements for sale dated 20.2.1989, in my opinion, the impugned order deserves to be set aside subject to imposing costs of Rs.50,000/- to be paid to the defendants within two weeks from today. In the case of ***Esha Bhattadcharjee (supra)***, the Apex Court also considered its earlier decision in the case of ***State of Nagaland vs. Lipok AO and others, (2005) 3 SCC 752***, wherein the Apex Court held 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. Hence, the following order

- (i) Impugned order dated 4.4.2014 is set aside and Misc.

Application No.128/2012 is restored to the file of the trial Court. The plaintiff shall examine his Advocate in support of his application and the defendants will cross-examine said witness.

- (ii) All contentions on merits are expressly kept open.
- (iii) The plaintiff shall pay costs of Rs.50,000/- to the defendants within two weeks from today or will deposit the same in the trial Court under due intimation in writing to the defendants' Advocate. If the amount of costs is not paid or deposited within the stipulated period, impugned order will stand revived without further reference to the Court.
- (iv) Rule is made absolute in aforesaid terms. Order accordingly.

(R. G. KETKAR, J.)