

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.494 OF 2015

Jitendra Kantilal Shah and Anr .. Applicants*Versus***Mihir International and anr .. Respondents**

Mr.Subhash Jha with Ms.Rushita Jain and Ms.Sanjana Pardeshi,
Advocates i/b Law Global for the applicants.

Mr.Abhishek P. Deshmukh, Advocate for respondent no.2.

Mr.A.R.Kapadnis, APP for the Respondent State.

CORAM : PN. DESHMUKH, J**DATED : 4th OCTOBER, 2016**

P.C. :

1 Heard learned counsel for the applicants and learned
counsel for the respondents.

2 This application is filed for condonation of delay
caused in preferring application for leave to file Appeal. Delay
caused to prefer said application is of two years and 318 days
which is prayed to be condoned on reasonable terms and
conditions.

3 Learned counsel for the applicant has invited my
attention to roznama of the trial Court, and had contended that
preceding 2 ½ years upto 27th June 2012 on which date, complaint
has been dismissed, on 21 dates complaint was on board and

practically on each and every date, either complainant was present personally or was represented through his counsel, and inspite of that, on 27th June 2012, by an unreasoned order, complaint came to be dismissed for want of prosecution.

4 Learned counsel for the applicant in the background of above facts, further contended that though the impugned order came to be passed on 27th June 2012, applicant learnt about such dismissal order recently, and thereafter applied for certified copy of same on 26th June 2015 which was made available on 2nd July 2015. One of the grounds put forth on behalf of applicant is that though applicant was diligently following up his complaint by contacting his Advocate, on few occasions, as Advocate was otherwise busy, could not apprise applicant of further progress in the complaint, and in fact, could not even apprise complainant about dismissal of complaint on 27th June 2016 itself. It is the case of applicant that he therefore engaged services of some other Advocate who in the last week of June 2015, informed applicant of dismissal of his complaint, and thereafter, took necessary steps.

5 Learned counsel for the applicant in support of his application has relied upon the case of **N. Balkrishna Vs. M.Krishnamurthy reported in 1998 AIR SC 3222**, and in the case of **Collector, Land Acquisition, Anantnag and Anr Vs. Mst.Katiji & ors, reported in 1987 (2)SCC 107**, and has contended that in view of law laid down by Apex Court in the above two citations, application be allowed by imposing suitable costs.

6 Learned counsel for the respondent, on the other hand, has opposed the application, and has submitted that no case is made out for condonation of delay in view of applicant's failure to explain the delay caused in filing present application. It is contended that order of dismissal came to be rightly passed by the learned Court considering that on three consecutive dates on 29th March 2015, 24th April 2015 and on 27th June 2016, applicant remained absent without any reason. Learned counsel for respondent has also invited my attention to the documents on record, being cross-examination of complainant dated 29th September 2011, and by referring to this document, has pointed out that on that day, complainant had sought time to place on record documents to show if there was any transaction between complainant and respondent, prior to issuing the disputed cheque, however, thereafter, did not attend the Court probably because he must have not found any such documents, and thus, chose to not to attend the Court as he had no material to prosecute his complaint, which is thus contended to be rightly dismissed.

7 Learned counsel for the respondent while praying for rejection of application relied upon the case of **Basawaraj Vs. Special Land Acquisition Officer reported in 2014, AIR SC 746** and order passed by Hon'ble High Court of Delhi in the case of M/s.Godrej Hi Care Ltd in First Appeal No.253 of 2007.

8 Having considering submissions advanced, as aforesaid, together with the subject matter involved in the present application, it is found that applicant filed complaint against

respondent nos.1 and 2 for dishonor of cheque valued for Rs.50,00,000/- u/s.138 of the Negotiable Instruments Act, 1888.

9 On perusal of copies of roznamas annexed on record from 18th February 2010 to 27th June 2012 i.e. almost for a period of 2 ½ years, it is revealed that during that period, complaint was fixed for hearing on 21 dates, while on four dates, Court was vacant. Thus, Complaint was on board practically for 17 dates out of which applicant's Advocate is found present on 16 dates while applicant was present on 10 dates. It is noted that except on 9th March 2012, neither applicant's Advocate nor applicant was present.

10 Roznama dated 27th June 2012 on which day complaint came to be dismissed, reveals that on that day, though complainant was not present, he was represented through his Advocate, while Respondent-accused too was absent. Application filed by applicant for adjournment was rejected while application of respondent for grant of personal exemption was allowed, and on the same day, stating that complainant has failed to take proper steps for securing presence of accused, complaint came to be dismissed for want of prosecution acquitting the accused. It is material to note that the impugned order thus apparently does not appear to be sustainable, at all, as from the roznama referred above, applicant is duly found represented and in fact, though the learned Court has allowed exemption of accused, erroneously held that complainant failed to take necessary steps to secure presence of accused, and dismissed the complaint.

11 In the background of facts as aforesaid, and subject matter of the case out of which present application arises, law relied for applicant in the case of Collector, Land Acquisition, Anantnag (supra), can be duly made applicable wherein paragraph no.2 and 3 of its judgment, the Hon'ble Apex Court has observed thus

“2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties. “Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period”.

3. “Every day's delay must be explained” does not mean that pedantic approach should be made. Why not every hour's delay, every second's delay The doctrine must be applied in a rational, common sense and pragmatic manner.

12 Similarly, in the case of N. Balkrishnan (supra), the Hon'ble Apex Court by referring to the case of **Shakuntala Devi Vs. Kuntal Kumari reported in SC 575** and **State of West Bengal Vs. Administrator, Howrah Municipality reported in AIR 1972 SC 749** has observed thus :

“A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This court has held that the words 'sufficient cause' under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice”.

13 Respondents, on the other hand, while opposing the application had relied upon case of **Basawaraj V/s. Special Land Acquisition (supra)**, wherein paragraph no.9 of the judgment, the Hon'ble Apex Court considered the meaning of words 'sufficient', 'adequate' or 'enough', and in the context had noted that the party should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has “not acted diligently” or “remained inactive”, and in fact, had observed that the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously.

14 In view of law laid down, as aforesaid, when roznama involved in the present application are considered, it reveals that applicant was in fact diligent in prosecuting his claim, but the complaint came to be dismissed for the reasons as aforesaid.

15 Learned counsel for the respondent though has also relied upon the order of Delhi High Court in the case of Godrej

(supra), same cannot be made use of his facts of respondent, having distinguishing facts, as in that case, Court has considered conduct of appellant as well as of his counsel who was appointed after removing the earlier counsel, however, was also found to be totally negligent, and due to his utter negligence, various applications came to be dismissed, leaving no room for doubting that appellant as such, had no interest to prosecute the suit.

16 Having considering the facts, as aforesaid, and as there appears no intentional delay on the part of applicant, application for condonation of delay of 2 years and 318 days caused to file leave to file Appeal is liable to be allowed by imposing suitable costs as per order below.

O R D E R

Application is allowed thereby condoning delay caused in filing application for leave to file appeal on applicant's paying costs of Rs.25,000/- only.

Applicant to deposit amount of costs as aforesaid within one week from today to Maharashtra State Legal Services Authority.

Office to register application for leave to file Appeal.

(PN.DESHMUKH, J)