

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.9282 OF 2015

Mahendra Kantilal Panchal

.. Petitioner

-Versus-

Smt. Indradevi Jairam Pandey & Ors.

..Respondents

Mr. Ramesh Mishra for petitioner

Mr. R.S.Saluja for respondents.

CORAM : R.G.KETKAR, J.

DATE : 21st September 2016.

P.C.

1] Heard Mr. Mishra for petitioner and Mr. Saluja for respondents.

2] Rule. At the request and by consent of parties also having regard to the controversy involved in this petition, rule is made returnable forthwith and the petition is taken up for final hearing.

3] By this petition under Article 227 of the Constitution of India, the petitioner (hereinafter referred to as defendant) is challenging the judgement and order dated 13th August 2015 passed by the appellate bench of the Small Causes Court at Mumbai in Marji Application No.66 of

2015. By that order the appellate court has dismissed the application for condoning the delay of 148 days in filing the appeal.

4] The respondents, (hereinafter referred to as the plaintiffs) have filed a suit against the defendants for recovery of possession of the suit premises. By the judgement and decree dated 19th November 2009, the suit was decreed ex parte. The defendant, therefore, filed application under Order IX Rule 13 of CPC for setting aside the ex parte decree. That application came to be rejected on 25th July 2014. The defendants filed an appeal on 11th February 2015 after a delay of about 148 days. He, therefore, took out an application for condonation of delay which is rejected by the impugned order. It is against this order the defendant has preferred the present petition.

5] In support of the petition, Mr. Mishra for petitioner has taken me through (i) the trial court's order dated 19th November 2007 (ii) application filed under Order IX Rule 13 of CPC (iii) the order dismissing the application as also (iv) Marji Application for condonation of delay. He submitted that the petitioner has studied upto 7th standard in Gujarati language and he is not conversant with the English language. He works as a labour. He submitted that the defendant was not served with the copy of the plaint. He submitted that after passing of exparte decree the

defendant filed an application for setting aside the exparte decree. That application was dismissed on 25th July,2014. In paragraphs 14 and 15 of the order, the learned Trial Judge had dealt with service of suit summons as also service of notice before execution of decree. In paragraph 14 the learned Trial Judge has dealt with the notice before execution. However, the learned Trial Judge did not deal with the case of the defendant he was not served with the summons of the suit. He further submitted that the defendant filed an appeal on 11.02.2015 and as there was a delay of 148 days, took out marji application. He further invited my attention to paragraph 11 to 16 of the application and submitted that for the reason stated therein the application the delay deserves to be condoned.

6] On the other hand Mr. Saluja, supported the impugned orders. He has invited my attention to the endorsement made by the bailiff on 3rd May, 2008 to the effect that the defendant refused to accept the service. While decreeing the suit in para 4, the learned Trial Judge observed that the defendant was duly served with suit summons but he failed to appear. He submitted that as the defendant refused to accept the service he is deemed to have been served. He further submitted that the reasons given for condonation of delay do not constitute sufficient cause. The defendant did not produce death certificate of his mother either before the Courts below or before this Court.

7] As the defendant has not made out sufficient cause for condonation of delay, no case is made out for interference with the impugned orders. The petition deserves to be dismissed. In support of his submission he has relied upon two decisions ;

I) Varhyan Narendra Singh Chhatwal & Ors -Vrs- Kala Narendra Singh Chhatwal & Ors. 2014(6) Bom.C.R.603 in particular paragraph 14 & 15.

II) Brijesh Kumar and others -Vrs- State of Haryana and others AIR 2014 Supreme Court 1612 in particular paragraph 11 & 12.

8] I have considered the rival submission advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Mr. Saluja has invited my attention to bailiff's report dated 3rd May, 2008, wherein it is recorded that the bailiff tendered a copy of summons alongwith copy of plaint to defendant at the address mentioned on 13th May, 2008 at about 8.05 a.m. But the defendant refused to accept the service without giving any proper reason. Plaintiff representative Mr. Jayaram Pande instructed him to serve the summons on the defendant. A perusal of the Trial Court's decree dated 19th November, 2009 and in particular para 4 shows that the learned Trial Judge has observed that the defendant was duly served with the suit

summons but failed to appear. Presently, I am considering the question as to whether the appellate Court was justified in refusing to condone the delay of 148 days in filing the appeal. It will be open to plaintiff to agitate this contention at the time of hearing of appeal. In view thereof I deem it appropriate not to deal with these submissions, lest, the appellate court will be influenced by any observations, finding rendered by me.

9] Perusal of the application for setting aside a decree and in particular para 5 thereof shows that the defendant contended that he has studied upto 7th Standard in Gujarati medium and he is not conversant with English language. He is working as a labour in a fabrication shop. Perusal of the marji application for condonation of delay and in particular paragraphs 11 to 16 shows that mother of defendant was very serious and therefore he was required to attend to her and in the process there is a delay of 148 days in filing appeal.

10] Mr. Saluja relied upon the decision of Varhyan Narendra Singh Chhatwal & Ors -Vrs- Kala Narendra Singh Chhatwal & Ors.(supra). In that case the court was considering the question of condonation of delay of 354 days in filing appeal. In paragraph 13 of the report it was held that barring Surendrapal Singh who was suffering from illness, other appellants had no reason not to take any prompt steps in filing appeal

especially during the period from 15/2/2010 to 25/8/2010 and since it was not shown that they were acting with due diligence, the first appellate court was right in not condoning the delay. In the case of Brijesh Kumar and others -Vrs- State of Haryana and others (supra) the delay was of more than 10 years in filing application under Section 54 of the Land Acquisition Act. In the present case, admittedly the delay is about 148 days. The decisions relied by Mr. Saluja are not applicable to the facts of the present case.

11] It is settled principle of law that while considering the application for condonation of delay the court has to adopt liberal approach. apart from 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 express "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, as held by the Apex Court in the case of State of Nagaland Vs. Lipok AO, 2005(3) S.C.C. 752.

12] Applying the test laid down by the Apex Court in the case of State of Nagaland (supra) as also having regard to the shortness of the delay viz., 148 days, in my opinion, the appellate court should have condoned

the delay and proceeded to hear the appeal on merits. By refusing to condone the delay substantive rights of the defendant are affected and the plaintiff will be in a position to execute the decree of eviction. Understood thus, in my opinion, the delay in filing the appeal deserves to be condoned. Hence, the following order:-

(i) The impugned order dated 13th August 2015 is set aside and the MARJI Application stands allowed. The delay of 148 days in filing appeal is condoned. The appeal shall be registered by the appellate court, if it is otherwise ready.

(ii) Parties agree that they will appear before the appellate court on 3rd October 2016 and for that purpose no fresh notice be issued to them. The appellate court is requested to decide the appeal on its own merits and in accordance with law as expeditiously as possible and preferably within four months from the date of appearance of parties before it.

(iii) Rule is made absolute accordingly with no order as to costs;

(R.G.KETKAR, J)