

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.12601/2015

Allahabad Bank

... Petitioner

V/s.

Western India Chamber of Commerce

... Respondent

Mr. Jayesh R. Patel for the petitioner

Mr. Rupesh Tukaram Padwal for the Respondent.

CORAM: K.K. TATED, J.

DATED : APRIL 6, 2016

PC. :

1. Heard the learned counsel for the parties. By consent of the parties matter is taken up for final hearing at the stage of admission itself.
2. For the sake of brevity, the parties will be referred to as per their nomenclature in the suit i.e. petitioner - defendant and respondent – plaintiff.
3. By this petition filed under Article 227 of the Constitution of India, the defendant challenges the order dated 11.08.2015 passed by the Appellate Bench of the Small Causes Court in MARJI application No.743/2014 rejecting the application made by the defendant for condonation of 284 days delay in preferring the appeal challenging the order passed by the trial court in mesne profits application No.7/2008.

4. In the present proceedings, the plaintiff instituted TE & R Suit No.229/248/2003 in the Court of Small Causes for an order and decree against the defendant to handover vacant and peaceful possession of the suit premises i.e. office premises admeasuring 2500 sq.ft. on first floor in the building known as Chamber Bhavan situated at 232-234 Kalbadevi Road, Mumbai – 400 002. The suit was decreed by the trial court on 05/08/2006 directing the defendant to handover vacant and peaceful possession of the suit premises to the plaintiff. Thereafter the defendant preferred appeal No.567/2006 before the Appellate Bench of the Small Causes Court. The defendant also made an application for stay of execution of the decree. Thereafter, the defendant handed over possession of the suit premises to the plaintiff on 18th October 2008.

5. The plaintiff made mesne profits application on 29th July 2008 being Misc. application No.7/2008 before the Court of Small Causes for ascertaining the mesne profits in respect of the suit premises from 01.02.2003 till handing over possession. That application was contested by the defendant by filing written statement. After hearing both sides, the trial court, by order dated 07.01.2014 allowed mesne profits application of the plaintiff holding that the plaintiff decree holder is entitled to recover mesne profits @ Rs.115/- per sq.mtr. including outgoings on built-up area of 2500 sq.ft. along with interest @ 6% p.a. from 01.02.2003 to 18.10.2008 on payment of court fees. Thereafter the defendant received summons in MARJI application No.307/2014 on 17.07.2014 by which the plaintiff made prayer for modification of order dated 07/01/2014. At that time, the bank learnt

that the mesne profits application was decided by the trial court against them. Hence, the defendant wrote a letter to their Advocate-on-record and made enquiry and thereafter they preferred appeal (ST) No.25/2014 and MARJI application No.743/2014 for condonation of delay of 284 days in filing the appeal which was rejected by the Appellate Bench of the Small Causes Court by order dated 11.08.2014. Hence, the Writ Petition.

6. The learned counsel for the defendant submits that the Appellate Bench of the Small Causes Court erred in coming to the conclusion that the defendant failed to show sufficient cause for condonation of delay. He submits that the Appellate Bench of the Small Causes Court erred in not appreciating the fact that the delay has been specifically and properly explained by the defendant.

7. The learned counsel for the defendant submits that immediately after they got knowledge about the order passed by the trial court on 07.01.2014 in mesne profits application when they received summons from the plaintiff in Misc. application No.307/2014 on 17.07.2014, they contacted their Advocate who appeared in the trial court. The bank wrote letter dated 04.08.2014 to their Advocate on record and requested him to visit the branch for discussion. Thereafter the Advocate on record held a joint meeting with Manager (Legal) and Branch Manager on 14.08.2014. Said Advocate wrote letter dated 16.08.2014 regarding the meeting with Manager (Legal). In the said letter, the advocate admitted that he had instructed his junior Advocate Gul Madam to attend the matter on 07.01.2014. Though the judgment

was delivered by the trial court on mesne profits application, his junior failed to inform the same to him. He submits that their advocate was under an impression that their junior might have applied for certified copies of the order and judgment. Moreover, the said junior informed the office that she had applied for certified copies and as such the defendant's advocate was waiting to get certified copies of the judgment. It is also stated in the said letter that said junior failed to inform the order passed by the trial court about the mesne profits against the bank. It is also recorded in the said letter that the said junior left the advocate's chamber and therefore, it was not possible to give more explanation.

8. The learned counsel for the defendant submits that the matter was discussed with their higher authority and they decided to prefer an appeal against the order passed by the trial court for mesne profits. He submits that thereafter the bank got papers on 02.09.2014 from their earlier advocates M/s. Pradip Shukla. On the basis of papers supplied, they applied for certified copies of judgment and order on 5.09.2014. Same was received on 15.09.2014. He submits that the concerned officer, after verifying all the papers learnt that some papers were missing from their earlier advocate's brief. Hence, they applied for certified copies for missing documents on 15.09.2014. After receipt of certified copies of those papers on 08.10.2014, the defendant directed their advocate to file an appeal along with application for condonation of delay. He submits that the defendant filed appeal before appellate court along with application for condonation of delay on 18.11.2014. He submits that same was opposed by the plaintiff.

9. The learned counsel for the defendant submits that at the time of passing the impugned order dated 11.08.2014, the Appellate Bench of the Small Causes Court failed to consider the fact that the defendant's earlier advocate filed affidavit stating that because of his office mistake, the order passed by the trial court on mesne profits application was not communicated to the defendant immediately. He further submits that the appellate court failed to consider the fact that the MARJI application No.307/2014 made by the plaintiff for modification in order dated 07.01.2014 was pending for hearing and final disposal on merits.

10. The learned counsel for the defendant submits that in the interest of justice, this Hon'ble Court be pleased to set aside the impugned order dated 11.08.2015 passed by the Appellate Bench of the Small Causes Court and allow the application made by the defendant for condonation of delay of 284 days. He submits that if impugned order is not set aside and the application made by the defendant is not allowed, irreparable loss and injury will be caused to the defendant. He submits that the defendant has good chance of success in the matter.

11. On the other hand, the learned counsel for the plaintiff vehemently opposed the Writ Petition. He submits that the defendant has not made out any case for condonation of 284 days delay. Hence, the Appellate Bench of the Small Causes Court rightly rejected the MARJI application No.743/2014. He submits that bare reading of

MARJI application No.743/2014 shows that the defendant failed to disclose sufficient cause for condonation of delay. The defendants are placing the entire blame on their advocate only. In support of this contention, the defendant has not placed on record any documentary proof. He submits that when the mesne profits application was decided by the trial court on merits, the defendant represented and appeared through their advocate. Hence, a statement made by the defendant that they learnt about passing of the order in mesne profits application, when they received summons in MARJI application No.307/2014 which was made by the plaintiff for modification of order dated 07.01.2014 is not correct. He submits that as the defendant failed to show sufficient cause for condonation of delay, nothing survives in the Writ Petition. Same is liable to be dismissed with costs.

12. Heard the learned counsel for the parties. The issue involved in the petition is, "Whether the defendant shown sufficient cause for condonation of 284 days delay in filing the appeal challenging the judgment and decree passed by the trial court on 07.01.2014 in mesne profits application No.7/2008".

13. Though the defendant appeared before the trial court in mesne profits application through their Advocate and defended the said application, because of mistake on the part of their advocate's junior the order passed by the trial court was not communicated to the defendant. In any case, if the advocate is appointed by the parties, they have to depend on him. In the present proceedings, the defendant had appointed an advocate who attended the matter. But his junior, by

mistake failed to intimate the order either to the advocate or the defendant. For the first time, the defendant learnt about the order passed by the trial court in mesne profits application when they received summons in application for modification of the mesne profits order. When they contacted their advocate, their advocate immediately accepted his mistake. Not only that, he has filed an affidavit to that effect in the present proceedings. This itself shows that because of mistake on the part of their Advocate, there was delay on the part of the defendant to file the appeal.

14. The Appellate Bench of the Small Causes Court, in order dated 11.08.2015 erred in coming to the conclusion that the defendant has not placed on record satisfactory and convincing reason for condonation of 284 days delay. In fact the defendant placed on record an affidavit of their advocate because of whose mistake there was delay in preferring the appeal, which is more than sufficient to consider the application for condonation of delay.

15. It is to be noted that the Apex Court in the matter of ***N.Balkrishnan Vs. M. Krishnamurthy (1998) 7 SCC 123*** held that the object of fixing the time limit is not meant to destroy the rights. The law of limitation fixes a lifespan for such legal remedy for the general welfare. Paragraph Nos.11, 12 and 13 of the said judgment read thus :

11. Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for

the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. 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 vide Shakuntala Devi Jain v. Kuntal Kumari, 1969 SC 575 and State of West Bengal v. The Administrator, Howrah Municipality, AIR 1972 SC 749.

13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss."

16. Even in the matter of **State of Haryana Vs. Chandra Mani & Ors. JT 1996 (3) SC 371** the Apex Court held that because of mistake on the part of the advocate, a litigant should not suffer. Paragraph 5 of the judgment reads thus:

5. In *Concord of India Insurance co. Ltd. V. Nirmala Devi & Ors (1979) 3 SCR 694* which is a case of negligence of the counsel which misled a litigant into delayed pursuit of his remedy, the default in delay was condoned. In *Lala Mata Din Vs. A. Narayanan (1970 2 SCR 90)*, this Court had held that there is no general proposition that mistake of counsel by itself is always sufficient cause for condonation of delay. it is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose. In that case it was held that the mistake committed by the counsel was bona fide and it was not tainted by any mala fide motive.

17. Considering the above mentioned facts and the reasons disclosed by the defendant in their application for condonation of delay and the law declared by the Apex Court, I am satisfied that the defendant has made out a case for allowing this Writ Petition. At the same time, considering the facts and circumstances of the case, the defendant bank is directed to pay cost of Rs.10,000/- to the respondent plaintiff.

18. Hence, following order is passed:

a. Impugned order dated 11.08.2014 passed by the Appellate Bench of the Small Causes Court in MARJI application No.743/2014 in appeal (ST) No.5124/2014 is set aside.

b. MARJI application No.743/2014 made by the defendant for condonation of 284 days delay in preferring the appeal is allowed.

- c. The Appellate Bench of the Small Causes Court is directed to register the appeal (ST) No.5124/2014 and decide the same on merits.
- d. The defendant bank is directed to pay cost of Rs.10,000/- to the respondent plaintiff.
- e. Cost to be deposited in Registry of the Court of Small Causes within 6 weeks from today, failing which the Writ Petition shall stand dismissed, without further reference to the court.
- f. If cost is deposited within stipulated time as stated hereinabove, the respondent plaintiff is entitled to withdraw the same without furnishing any security.
- g. Writ Petition stands disposed of accordingly.

(K.K. TATED, J.)