

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**SECOND APPEAL NO.167 OF 2016**

The Superintending Archaeologist,  
Archaeological Survey of India,  
Government of India,  
Aurangabad Circle, ..Appellant  
Aurangabad (orig. Defendant)

Vs.

Jayraj s/o. Kamlakar Pande,  
Age : 55 years, Occ. Advocate,  
r/o. Begumpura, Aurangabad, ..Respondent  
Dist. Aurangabad (orig. Plaintiff)

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Mr.S.B.Deshpande, Asst. Solicitor General of  
India, for Appellant

Mr.A.D.Kasliwal, Advocate for respondent

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**CORAM : SANGITRAO S. PATIL, J.  
RESERVED ON : JULY 25, 2017  
PRONOUNCED ON : AUGUST 02, 2017**

**JUDGMENT :**

The appellant has challenged the judgment  
and order dated 01.08.2014 passed in MARJI No.334  
of 2011 by the learned District Judge-5,  
Aurangabad, whereby the application for

condonation of delay of four 4 years and 10 months in filing the appeal before the first appellate Court, came to be dismissed.

2. The respondent (original plaintiff) instituted Regular Civil Suit No.408 of 2001 against the present appellant seeking the relief of perpetual injunction to protect his possession over the suit property survey no.164 situate behind Bibi-ka-Makbara, Pahadsingpura, Aurangabad. The appellant resisted the suit by filing written statement. The trial Court recorded evidence of the witnesses produced by the parties. After evaluating the evidence on record, the learned trial Judge decreed the suit on 30.08.2006 and granted the relief of perpetual injunction in favour of the respondent restraining the present appellant or anybody claiming through it from disturbing possession of the respondent over the above-mentioned suit property.

3. The appellant filed an appeal against the judgment and order passed by the trial Court with above-numbered Misc. Civil Application for condonation of delay of 4 years 10 months in filing the appeal. The said application was contested by the respondent. The learned Judge of the first appellate Court dismissed that application on 01.08.2014. The appellant challenged that order of dismissal by filing Second Appeal (Stamp) No.29243 of 2014. After hearing both the parties, this Court partly allowed that appeal, set aside the order dated 01.08.2014 passed by the first appellate Court and remanded the matter for being decided afresh after extending both the parties sufficient opportunity to lead evidence in support of their respective contentions.

4. After remand of the matter, the learned Judge of the first appellate Court extended both the parties sufficient opportunity to produce the

evidence in respect of their respective contentions. After considering that evidence and hearing the learned Counsel for the parties, the learned Judge of the first appellate Court again dismissed that Misc. Civil Application as per the impugned order 09.12.2015 holding that the appellant failed to establish sufficient cause for the delay in filing the appeal.

5. The learned Asstt. Solicitor General of India ("A.S.G.I.", for short) appearing for the appellant submits that the learned Judge of the first appellate Court decided the Misc. Civil Application by taking a very pedantic and strict view. According to him, in the matter of condonation of delay, a liberal and pragmatic view is required to be taken in order to do substantial justice. He submits that the dispute relates to immovable property, which is adjacent to the national monument 'Bibi-ka-Makbara'. The valuable rights of the appellant over the said property

ought not to have been thrown away at the threshold on technical grounds. He submits that after the trial Court delivered the judgment, the appellant moved its Head Office situate in New Delhi, seeking permission to file an appeal. Due to some procedural lapse, the higher authority intimated the appellant about its decision of filing the appeal in November-2010. The appellant informed the Advocate in the third week of November, 2010 to file an appeal, however, the landlord of the building, where the office of the Advocate was situate, took up the work of renovation of that building by demolishing it. The Advocate was required to shift his office hurriedly by packing his books, pending files, furnitures etc. in another office situate in Amodi Complex. It took 3-4 months for making some interior repairs in that office. The file of the present matter was not traceable since it was misplaced. After it was traced out, the appellant

filed the appeal with the above-mentioned Misc. Civil Application for condonation of delay. The learned A.S.G.I. submits that the delay has been sufficiently and satisfactorily explained by the appellant. The delay was not deliberate or intentional. Relying on certain judgments, he submits that the impugned judgment and order passed by the first appellate Court may be set aside, the delay may be condoned and the appeal before the first appellate Court may be ordered to be admitted.

6. On the other hand, the learned Counsel for the respondent submits that as per the order dated 06.04.2014 passed by this Court in Second Appeal (Stamp) No.29243 of 2014, the earlier order dated 01.08.2014 passed by the first appellate Court was set aside and the matter was remanded to the first appellate Court for reconsideration, only on the ground that the appellant should get sufficient opportunity to produce evidence to

establish sufficient cause for condonation of delay. He submits that though this opportunity was given to the appellant, the appellant did not avail of it by producing necessary evidence to explain the inordinate delay in filing the appeal. The witnesses examined by the appellant had no personal knowledge about the circumstances, under which the delay was caused. The witnesses having personal knowledge, though were available, have not been examined. The learned Counsel for the respondent submits that the witnesses of the appellant unequivocally admitted that the verdict given by the trial Court in R.C.S. No.408 of 2001 on 30.08.2006 was communicated to the office of the appellant on the same date, on which it was pronounced. However, the appellant did not produce any evidence to show, as to what correspondence was made from the date of the decision pronounced by the trial Court till 25.05.2010, when the letter Exh.40 was received by the appellant

authorising it to file the appeal. Though it is stated by the witnesses of the appellant that such record was available in the office of the appellant, it was not produced before the Court despite getting opportunity to produce it and without giving any explanation for non-production thereof. He submits that the delay in filing the appeal from the date of the judgment of the trial Court till the date of receipt of the letter Exh.40, has not at all been explained. He submits that the grounds shown by the appellant for the delay have not at all been substantiated. They are not at all natural and probable. Therefore, according to him, the learned Judge of the first appellate Court rightly dismissed the Misc. Civil Application for condonation of delay for want of proof of sufficient cause, as contemplated under Section 5 of the Indian Limitation Act. In support of of his case, the learned Counsel for the respondent also cited certain judgments.

7. In view of the rival contentions raised by the learned Counsel for the parties, the following substantial questions of law arise for my consideration :-

(i) Whether the appellant established sufficient cause for the delay in filing the appeal, as contemplated under Section 5 of the Limitation Act ?

(ii) Whether the impugned judgment and order passed by the first appellate Court are perverse ?

8. Since the above-mentioned substantial questions are involving in this Second Appeal, I think fit to admit it.

9. Admit the appeal. On admission, the learned Counsel for the respondent waives service of notice on behalf of the respondent.

10. With the consent of the learned A.S.G.I. for the appellant and the learned Counsel for the respondent, heard the appeal finally.

11. The learned A.S.G.I. cited the judgments in the case of :

(i) Indian Oil Corporation Ltd. and ors. Vs. Subrata Borah Chowlek, etc., (2010) 14 SCC 419;

(ii) State of Rajasthan and anr. Vs. Bal Kishan Mathur (D), thorough Lrs. and ors., (2014)1 SCC 592;

(iii) State of Karnataka Vs. Y. Moideen Kunhi (dead) by Lrs. and ors., 2009(13) SCC 192;

(iv) Union of India Vs. Giani, 2011(11) SCC 480;

(v) N.Balakrishnan Vs. M.  
Krishnamurthy, 1998(7) SCC 123

The learned Counsel for the respondent relied on  
the following judgments :-

(i) Rajendra Namdeorao Akre Vs.  
Rajkumar Bhalerao Balbudhe and anr.,  
2016(7) ALL MR 86;

(ii) General Manager, Northern  
Railway Vs. Julfi Ram and others, 2014  
STPL (Web) 2025 HP;

(iii) Maniben Devraj Shah Vs.  
Municipal Corporation of Brihan Mumbai,  
2012 STPL (Web) 210 SC;

(iv) Kashmir Singh Vs. Harnam Singh  
and anr., AIR 2008 SC 1749;

(v) Yashomandir Sahakari Patpedhi  
Maryadit Vs. Ashok Raj Enterprises and  
ors., 2013(7) All MR 1;

(vi) Commissioner Nagar Parishad Bhilwara Vs. Labour Court, Bhilwara and anr., 2009(2) All MR 429;

(vii) P.K. Ramachandran Vs. State of Kerala and anr., AIR 1998 SC 2276;

(viii) Oriental Aroma Chemical Industries Ltd. Vs. Gujarat Industrial Development Corporation and anr., 2010 ALL SCR 816;

(ix) Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and ors., 2013 STPL (Web) 737 SC;

(x) Brijesh Kumar and ors. Vs. State of Haryana and ors., 2014 STPL (Web) 191 SC.

12. I have gone through the above-mentioned judgments cited by the learned A.S.G.I. and the learned Counsel for the respondent. In my view, it

is not necessary to discuss the facts subject-matter of the above-mentioned cases individually because after considering various judicial pronouncements on the subject, including most of the decisions cited by the learned Counsel for the parties, the Hon'ble the Apex Court has been pleased to formulate the principles governing the question of condonation of delay in paragraphs 15 and 16 of the judgment in the case of **Esha Bhattacharjee** (supra), which read as under :-

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 consideration 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 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 unnecessary 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.

13. The facts of the present case will have to be tested on the touchstone of the above-mentioned principles.

14. The reasons explaining delay in filing the appeal have been given in paragraphs 2 and 3 of the above-mentioned Misc. Civil Application. They are reproduced below :-

"2. Against the said order whether to file appeal or otherwise proposal was sent to legal department. Due to official procedure it took long time. The legal department is situated at Head Office at New Delhi. Without permission of Higher Authority the officer at Aurangabad cannot proceed with the matter. The Higher Authority intimated for filing appeal in November-2010.

3. In third week of November-2010 the Advocate was intimated by the appellant to file the appeal. At that time, the office of the advocate was at Town Hall, Aurangabad. The Landlord of that office started construction of land

building at the relevant time and started to remove the terrace and walls etc. The advocate was required to shift the office hurriedly by packing all his books, pending files and other furniture etc. The advocate was required to purchase other office at Amodi Complex, Aurangabad and was required to make necessary interior etc. which took about three to four months thereafter. Thereafter, the files were started to keep at relevant places. The present file was not traced out and was misplaced. It is just recently traced out and the matter is filed."

15. To substantiate the above-mentioned grounds in the application for delay in filing the appeal, the appellant, after remand of the matter, examined Ratneshkumar (Exh.35), who is working as Joint Hindi Translator in the office of the appellant at Aurangabad. The appellant had examined one Prakash Deshmukh at Exh.24, who was serving as Assistant Superintendent in the office

of the appellant. The affidavit in lieu of the examination-in-chief of A.M.V. Subramanyam, Deputy Superintending Archaeologist, also was filed on 05.04.2013, however, he was not subjected to cross-examination. Therefore, that affidavit has not been considered for deciding the Misc. Civil Application.

16. It has come in the evidence of Ratneshkumar that he was serving in the office of the appellant from 2012 onwards. He states that after pronouncement of the judgment by the trial Court, a proposal was sent to the Legal Department to seek opinion, whether appeal should be filed or not. Due to the official procedure, it took long time and ultimately, it was decided in November, 2010, to file appeal. The same is the version of Prakash Deshmukh. However, there is absolutely nothing in their evidence to show as to on what date the proposal was sent to the the Legal Department seeking opinion about filing of appeal

or otherwise. It has come in the cross-examination of Ratneshkumar that he does not remember, whether he had seen any letter, document or correspondence regarding filing of appeal against the decision of the trial Court between August, 2006 and 01.10.2009.

17. Prakash Deshmukh states in his cross-examination that all the papers in respect of this case have been maintained in his office including the correspondence that was made during the period from 2006-2010. He further states that the said correspondence is available in the Head Office of the appellant at New Delhi also. It is pertinent to note that the matter was remanded only with a view to extend the appellant an opportunity to produce evidence to justify the delay in filing the appeal. The correspondence made by the office of the appellant with the Legal Department or the Head Office seeking opinion/approval for filing the appeal certainly would have been very material for

explaining the said delay. Though the said record is stated to be available, it has not been produced by the appellant without assigning any reason. Therefore, adverse inference will have to be drawn and accordingly is drawn that no such correspondence was available in the office of the appellant.

18. Attempt has been made to show that it is only when the Advocate Mr.Mustafa, who was appearing for the appellant in the matter that was pending between the parties before the City Surveyor, informed the appellant vide letter Exh.39 dated 01.10.2009, that steps were taken to file appeal. However, it is clear from the unequivocal admission of Ratneshkumar given in paragraph 3 in his deposition, that his department had got knowledge about the decision of the trial Court on the day of pronouncement itself. Prakash Deshmukh also states that his office had got the knowledge about the decision of the trial Court at the same

time when it was rendered in 2006. The judgment of the trial Court shows that the appellant contested the suit by filing its statement, by cross-examining the witnesses of the respondent and by examining his own witnesses. The learned D.G.P. was representing the appellant. The above circumstances coupled with the active participation of the appellant in contesting the suit, makes it clear that the decision of the trial Court was within the knowledge of the appellant in the month of August, 2006 itself, when it was delivered. Therefore, it was incumbent on the part of the appellant to explain the delay from after one month of the date of the judgment passed by the trial Court onwards. As stated above, there is not a single document produced by the appellant to show that any correspondence was made by its office with the Head Office or with the legal Department, seeking opinion/approval for filing the appeal. It is hard to digest that the Legal Department or the

Head Office of the appellant would take time of more than 4 years for taking decision to file the appeal and to communicate that decision to the appellant. In the absence of any evidence to show that any proposal was sent by the appellant to the Legal Department or Head Office for filing the appeal, there is no alternative but to hold that no such proposal was sent by the appellant.

19. According to the appellant, the permission to file appeal before the first appellate Court was granted for the first time as per the letter Exh.40 dated 18.05.2010. Ratneshkumar and Prakash Deshmukh also tried to show that the letter Exh.40 was the permission granted by the Head Office for filing the appeal. In my opinion, it is necessary to reproduce the said letter so that the factual position would be crystal clear. The letter reads thus :-

"File No.33/18/2010-M

Government of India  
Archaeological Survey of India

Janpath, New Delhi,  
the Dated 18.05.2010

To,  
The Superintending Archaeologist,  
Archaeological Survey of India  
All Circle

Sub: Authorization to file an  
appeal/affidavit/counter affidavit by the  
Superintending Archaeologists, ASI of the  
Circle before the Hon'ble High Court or other  
Courts on behalf of ASI.-reg.

Sir,

Instances have come to the notice that Superintending Archaeologists of Circles are approaching this office to authorize them to file appeal/affidavit/counter affidavit in various courts wherein the Secretary, Culture, Govt. of India, Director General, Archaeological Survey of India and Superintending Archaeologist, are respondents despite instruction to defend the cases in public interest from time to time in the past.

Therefore, with a view to avoid delay in filing appeal/affidavit and defend the court cases before the Courts, the Superintending Archaeologists of the respective circles are hereby directed to file the appeal/affidavit on behalf of the Director General, ASI, Govt. of India in consultation with respective ASG's or Central Govt. Counsel.

The Superintending Archaeologists may not approach the Directorate General for seeking authorization to file affidavit and defend the case before the courts to avoid any unusual delay in filing affidavits and defend the matter before the courts. Only such matters

could be referred to the office of Directorate General wherein opinions/ vetting of the Ministry of Law Govt. of India is necessary.

Yours faithfully,  
Sd/-  
(V.Bakshi)  
Assistant Director (M)  
For Director General."

20. As seen from the contents of the letter Exh.40, it is clear that it was a letter giving general authorisation to the Superintending Archaeologists of all the circles of the Archaeological Survey of India. This letter does not speak of any approval given by the Head Office to the appellant to file appeal in the present case. There is no reference in this letter about any communication received from the side of the appellant for filing of appeal in the present case. Therefore, the contention of the appellant that it is for the first time that it received approval from the Head Office vide letter Exh.40 for filing of appeal in the present case, being far from the truth, cannot be accepted.

21. The evidence of Ratneshkumar and Prakash Deshmukh that after receipt of the letter Exh.40, the Advocate was instructed to file appeal and the Advocate could not file the appeal because he was required to shift his office and in the meanwhile, the papers of the case were misplaced and were not traceable also, is not believable. The appellant could have examined the Advocate concerned, to explain the delay from May-2010 till the date of filing the appeal with the application for condonation of delay. Non-examination of the said Advocate also would lead one to draw an adverse inference that no such circumstances existed, which caused further delay in filing the appeal.

22. As stated above, the grounds for delay in filing the appeal shown by the appellant are far away from the factual position. There was absolutely no correspondence made by the appellant to its Head Office seeking approval for filing the

appeal. No steps were taken to file the appeal even though the decision rendered by the trial Court was known to the office of the appellant on the very day, on which it was rendered. There is total lack of diligence on the part of the appellant. There is inordinate delay of 4 years and 10 months in filing the appeal, which has not only remained unexplained but the appellant has put forth baseless and misleading explanation for that delay. Here, reference may be made to paragraphs 12 and 18 of the judgment in the case of **Maniben Devraj Shah** (supra), which reads as under :-

"12. We have considered the respective arguments/submissions and carefully scrutinized the record. The law of limitation is founded on public policy. The Limitation Act, 1963 has not been enacted with the object of destroying the rights of the parties but to ensure that they approach the Court for vindication of their rights without unreasonable delay. The idea underlying the concept of limitation is that every remedy should remain alive only till the expiry of

the period fixed by the Legislature. At the same time, the Courts are empowered to condone the delay provided that sufficient cause is shown by the applicant for not availing the remedy within the prescribed period of limitation. The expression sufficient cause used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the Courts to apply the law in a meaningful manner which serve the ends of justice. No hard and fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years this Court has advocated that a liberal approach should be adopted in such matters so that substantive rights of the parties are not defeated merely because of delay.

18. What needs to be emphasized is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of

time is consumed at various stages of litigation apart from the cost. What colour the expression sufficient cause would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and/or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground

of bar of limitation will cause injury to the public interest."

23. As held in the judgment cited above, the proof of sufficient cause for the delay is a pre-condition for exercise of discretion in favour of the appellant/applicant for condoning the delay. In the present case, sufficient cause has not at all been established by the appellant behind the inordinate delay of 4 years 10 days in filing the appeal. The explanation furnished by the appellant is wholly baseless, misleading and unacceptable. In the circumstances, it cannot be said that the appellant has established sufficient cause for the delay in filing the appeal, as contemplated under Section 5 of the Limitation Act. Therefore, I answer Question no.(i) in the negative.

24. The learned Judge of the first appellate Court has rightly considered the facts of the case and rightly appreciated the evidence on record. The learned Judge rightly disbelieved the case of

the appellant and rejected the Misc. Civil Application for condonation of delay. The judgment and order passed by the learned Judge does not suffer from any infirmity. It cannot be called as perverse at all. Therefore, my answer to Question No.(ii), is in the negative.

25. The appellant failed to establish its case for condonation of delay. The appeal is devoid of any substance. It is liable to be dismissed. However, the appellant would be at liberty to approach the appropriate forum, if desired, for seeking appropriate relief, as permissible under the law, if it has any valid claim against the property Survey No.164. With these observations, I pass the following order :-

**O R D E R**

- (i) The Second Appeal is dismissed.
- (ii) The parties shall bear their own costs.

**[SANGITRAO S. PATIL, J.]**