

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD
WRIT PETITION NO. 11584 OF 2016

Gulabchan Fakirchand Gandhi,
deceased, through his legal
representatives :-

- 1) Kiran Gulabchand Gandhi,
Age 33 years, occup: Business,
- 2) Sarla Dhanesh Bhalgat,
Age 34 years, Occup. Household,

Nos. 1 and 2 R/o Kolpewadi,
Tq. Kopargaon, Dist. Ahmednagar,
- 3) Mandabai Amrutlal Gehlot,
Age 58 years, Occup: Household,
R/o Raikar Chal, Ward No. 3,
Shrirampur, Tq. Shrirampur,
District Ahmednagar,
- 4) Chandabai Mithulal Bhalgat,
Age 53 years, Occup : Household,
R/o Wakadi, Tq. Rahata,
District Ahmednagar,
- 5) Mayabai Rajkumar Bhandari,
Age 48 years, Occup: Household,
R/o Rahui Factory, Tq. Rahuri,
District Ahmednagar,
- 6) Kalpana Dilipkumar Bora,
Age 43 years, occup.: Household,
R/o Pimpri Chinchwad, Kolpewadi,
Tadenagar, Pune - 13
- 7) Sunita Anilkumar Bora,
Age 41 years, occup. Household,
R/o Pimpalgaon Malvi,
Tq. and Dist. Ahmednagar,

- 8) Prakash Gulabchand Gandhi,
Age 51 years, Occup.: Business & agri. .. Petitioners/
R/o Sawli Vihar Bk. Tq. Rahata, original
District Ahmednagar defendants

versus

- 1) Indubai Pundlik Jape, deceased,
through legal representatives :-
- 1-A) Shakuntala Laxman Shirsath,
Age Major, Occup: Household,
R/o A/p Deswandi, Tq. Rahuri,
District Ahmednagar
- 1-B) Mandakini Bhagwat Agalawe,
Age Major, Occup: Household,
R/o Sawali Vihar Bk. Tq. Rahata,
District Ahmednagar
- 1-C) Shashikala Keshav Musmade,
Age Major, Occup: Household,
R/o Tambhere, Tq. Rahuri,
District Ahmednagar
- 1-D) Ratnamala Dilip Patil
Age Major, Occup. Household,
R/o Sawali Vihar Bk. Tq. Rahata,
District Ahmednagar
- 2) Haribhau Pundlik Jape,
Age 53 years, occup. Household &
Agri., R/o at present 5519, Maliwadi,
District Ahmednagar
- 3) Chandrakant Pundlik Jape,
Age 41 years, occup: Household,
R/o Sawali Vihar Bk., Tq. Rahata, .. Respondents/
District Ahmednagar Orig. Plaintiffs

Mr. Uday S. Malte, Advocate for petitioners
Mr. P. B. Shirsath, Advocate for respondents No. 1-A to 3

CORAM : SUNIL P. DESHMUKH, J.
DATE : 5th April, 2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forth with. Writ petition is taken up for final disposal by consent of learned counsel for appearing parties.

2. The subject – matter of challenge in this writ petition is order dated 05-03-2016 passed on Exhibit – 1 in civil delay application no. 49 of 2014 whereunder learned judge of the appellate court [Additional Sessions Judge, Kopergaon] rejected the request for condonation of delay in making application seeking restoration of regular civil appeal no. 47 of 2011 which had been dismissed on 11-03-2014 in default.

3. Regular civil suit no. 674 of 2004 [erstwhile regular civil suit no. 104 of 2004] for recovery of possession of gut number 195 admeasuring 2.12 acre situated at village Savlivihir Bk. Taluka Rahata at the instance of present respondents had been decreed under judgment and order dated 16-04-2011 by trial court [Civil Judge, Junior Division, Rahata]. Aggrieved by said judgment and decree, aforesaid

regular civil appeal no. 47 of 2011 had been filed by present petitioners – defendants in said suit. Due to absence of petitioners' advocate on 11-03-2014, said appeal had been dismissed in default. To set aside the order of dismissal of appeal and have the same restored, petitioners had filed application on 19-09-2014 along with application for condonation of delay in filing restoration application which was belated by about 160-161 days since the limitation prescribed under the Limitation Act, 1963 for filing such an application is thirty days.

4. In the application for condonation of delay, the petitioners had referred to that they had become aware around August, 2014 about order of dismissal of appeal dated 11-03-2014 while they had seen certified copy of said order on 28-08-2014. It is their case that there had been understanding between them on one hand and their advocate on the other that their day to day attendance may not be necessary in prosecution of the appeal and further the same is not required.

5. On 11-03-2014, petitioners' advocate could not attend to the proceedings in said regular civil appeal since he had

been indisposed. The advocate concerned is from different place than where the regular civil appeal had been pending, that is to day, the advocate hails from Shrirampur whereas proceedings are pending in court at Kopargaon. Petitioner no. 1 also comes from different place, namely, Rahata which is at some distance from Kopargaon. Petitioners no. 2 to 7 are married daughters of petitioner no. 1 and living at different places. Dismissal of appeal as such had been noticed by petitioners only in August, 2014 and accordingly delay condonation application to present restoration application had been filed.

6. It has been the contention on behalf of the petitioners that having regard to relevant provisions under Order XLI and rules thereunder particularly rule 19 of the Code of Civil Procedure, 1973, one more remedy had been available about re-admission of appeal on dismissal of the same in absence which does not appear to have particular period of limitation. It is in the circumstances, in the interest of justice and for the reasons contained in the application, delay was requested to be condoned.

7. Present respondents – who are also respondents in said proceedings filed reply at Exhibit 24 and resisted aforesaid application for condonation of delay, contending that the proceedings, regular civil suit no. 104 of 2004 had been prolonged due to petitioners till 2011 and after judgment and decree in 2011, petitioners-defendants had preferred appeal with a view to deprive the respondents – plaintiffs of fruits of the decree and were interested only in keeping the appeal pending and with that intention they had been before the appellate court. Petitioners and their advocate remained absent on number of dates in appeal and, therefore, ultimately appeal was dismissed on 11-03-2014 in default. There was no sufficient ground for non appearance of the petitioners in appeal and also for delay in making application for restoration of appeal. Delay is not sufficiently explained and as such the application was requested to be rejected.

8. The appellate court considered that suit had been instituted in 2004 and was decreed in 2011 and aggrieved by the same, writ petitioners – appellants had preferred regular civil appeal. Said appeal had been dismissed for want of presence of petitioners-appellants and their advocate when the matter was called out on 11-03-2014. The appellate

court further considered that thirty days period has been prescribed for restoration of appeal on dismissal in default.

9. The appellate court considered that the petitioners have submitted, there was understanding between them and their advocate that it is not necessary for them to attend the appeal on each and every date and the matter would be looked after by the advocate. It is under these circumstances, the matter was not attended to by the petitioners on 11-03-2014 and their advocate also could not attend it due to illness. The petitioners did not get knowledge about dismissal of appeal till August, 2014 and as such they have contended that delay has not been caused deliberately or negligently and it is largely attributable to the default by their advocate and they should not suffer due to fault of advocate.

10. In support of their submissions, the petitioners had relied on quite a few cases.

11. The respondents on the other hand opposed aforesaid submissions, contending that the matter was deliberately prolonged by the petitioners initially in the suit and thereafter in the appeal intentionally keeping the same pending and as such the matter was not being attended to by the petitioners

and their advocate. After waiting for some dates, ultimately, the court had no alternative but to dismiss the appeal on 11-03-2014 for absence of the petitioners and their advocate.

12. Apart from aforesaid, it is the contention of the respondents that the petitioners had not prosecuted appeal and it is only after warrant in execution proceedings that they had filed application for condonation of delay in restoration application. The record shows that the advocate for the appellant was not ailing on 11-03-2014 but, he, in fact, on that date had attended to some proceedings at different place i.e. Sangamner and thus the reason given for delay condonation is not proper and the delay has not been caused for the reasons which can be termed as sufficient cause.

13. Upon aforesaid submissions, the learned appellate judge has observed that it is only the contention of the petitioners that on 11-03-2014 while regular civil appeal no. 47 of 2011 was called for hearing, their advocate was absent due to illness. Learned judge appears to have considered that the application does not indicate that even after 11-03-2014, advocate for petitioners was suffering illness. No affidavit of the advocate concerned is filed by petitioners on record to

show that he was suffering illness on that particular date and thereafter suffered continuous illness. Petitioners claimed to have got knowledge in August, 2014 of dismissal of their appeal. Learned judge observed that the petitioners had produced certificate of illness of their advocate issued by Sanjivani Surgical Hospital to show that he was suffering from extreme fever from 05-03-2014 to 20-03-2014. According to the certificate, the advocate was fit to join from 21-03-2014. The learned judge, under the circumstances, had considered that after 20-03-2014 the advocate must have attended the court. As such, there had been no impediment for making application for restoration from 21-03-2014 onwards. In the circumstances, the court considered that the petitioners have not sufficiently explained the delay caused in filing the application for restoration. It further appears that the court had considered *roznama* of some other proceedings in court at Sangamner produced by the respondents indicates that the concerned advocate had lodged appearance in said proceedings.

14. Learned judge then observed that adopting liberal approach shall not tantamount to granting licence to file restoration application beyond the period of limitation. The

petitioners are required to show what prevented them from filing application for restoration of appeal within time. Sufficient cause is such a cause for which the petitioners could not be blamed for their absence. He appears to have appreciated sufficient cause to mean that applicant should not act negligently or deliberately causing delay and thus preventing the respondents from execution of the decree. What appears to have weighed with the learned judge is, absence had not only been on 11-03-2014 but also earlier there had been non appearance of the advocate of petitioners in the regular civil appeal. In the circumstances, the court considered that the matter is being got deliberately delayed by the petitioners and as such rejected their request.

15. Mr. Malte, learned counsel appearing on behalf of the petitioners, submits that impugned order has been passed pedantically without appreciating genuineness of the reasons given in the application. Besides, according to him, one may have to take into account that litigation initiated in 2004 had been in respect of some transaction of 1964. Over and above, he submits that while the petitioners had filed regular civil appeal, it may not be necessary for them to attend the appeal court day to day. Presence of the petitioners was not

essential and necessary. In this particular case, advocate had given an understanding to the petitioners that it is not necessary for them to attend to each and every date in appeal and their presence as and when required would accordingly be informed by him to them. He further submits that no advantage is being gained by the petitioners by causing delay because it is, in fact, their own interest which is at peril under the decree and they are seeking to protect the same by setting up a challenge to the decree by filing appeal. He further submits that apart from their contention in the application that the matter can be deemed to be and given treatment as an application for re-admission of appeal does not appear to have received its due in the impugned order passed by the appellate court. He submits that, medical certificate which has been issued by the hospital to the petitioners' advocate does not appear to have been disputed as would appear from the observations in the order impugned. As such, the case sought to be made out about presence of petitioners' advocate somewhere else appears to have been referred to in the impugned order shall not harm and damage interest of the petitioners and merits of the case, for, the appellate court has considered that there has been

submission on behalf of the petitioners that for fault of the lawyer, litigant should not suffer and yet, while passing operative order, said consideration appears to have been fallen in oblivion. Mr. Malte submits that the regular civil appeal had been ready only in 2013 and only a few dates have been missed out in the process to be attended to and in the process if any inconvenience is caused to the respondents because of the events and delay in filing application, the same can be made good by awarding costs.

16. In support of his submissions, learned counsel Mr. Malte has relied on quite a few decisions of the supreme court and particularly has focused on the guidelines given in the case of *Collector, Land Acquisition, Anantnag vs. Mst. Katiji*, reported in *AIR 1987 SC 1353* and the one in the case of *Esha Bhattacharjee vs. Managing Committee of Reghunathpur Nafar Academy*, reported in *(2013) 12 SCC 649* and lays emphasis on paragraphs no. 21 and 24 of the same reading thus:

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

21.1 (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 legalize injustice but are obliged to remove injustice.

21.2 (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.*

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

21.4 (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.*

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

21.6 (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.*

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

21.8 (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.*

21.9 (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.*

21.10 (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.*

21.11 (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.*

21.12 (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.*

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

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

22.1 (a) *An application for condonation of delay should be drafted with careful concern and not in a haphazard 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.*

22.2 (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.*

22.3 (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.*

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

23. *Presently to the assertions made in the application for condonation of delay and the asseveration in oppugnation of the same. It may be stated here that the Division Bench while dealing with the application for condonation of delay has also adverted to the legal tenability of the interim order in a matter of appointment and approval of a teacher, and condoned the delay. It does not require Solomon's wisdom to perceive that the delay was colossal.*

24. *In the application for condonation of delay the appellant before the High Court had stated about the circumstances in which*

the order came to be passed by the learned Single Judge, the order in the earlier contempt petition and the second petition for contempt, the extinction of right of the respondent employee to continue in the post and thereafter proceeded to state the grounds for condonation of delay. We think it apposite to reproduce the grounds :

" 14. That from the record it appears that the order impugned was communicated to the then Managing Committee including the headmaster in question and the said fact is totally unknown to the newly elected Managing Committee as they have been elected on 20-9-2009 and they have been handed over charge on 21-11-2009 and to the teacher in charge who has been handed over charge on 1-3-2010. It is pertinent to mention in this context that after having received the notice and the contempt application the applicants entrusted the learned advocate for taking appropriate steps and they have been advised to defend the case but due to miscommunication the applicant herein again handed over brief from Mr Banik, learned advocate to Mr Baidya, learned advocate. After having received the said papers and after perusing all the records he opined to prefer an appeal before the appeal court or to prefer an application for vacating the interim order and ultimately the same was filed on 7-6-2010 after several pursuance in spite of taking the application for vacating the interim order the court below day to day is proceeding with the contempt application.

15. Having got no other alternative applicant have been advised to prefer an appeal without certified copy and the leave has been prayed for and the same was allowed.

The photocopy of the receipt for application of xerox certified copy is annexed herewith and marked with letter 'A'.

16. That the delay occasioned in presenting the said mandamus appeal has taken place due to the aforesaid reasons which was beyond the control of the applicants and was completely unintentional. "

17. Learned counsel submits that having regard to aforesaid guidelines particularly that entire gamut of facts has to be taken into account. He, therefore, urges to indulge into the request being made by petitioners.

18. Countering aforesaid submissions, Mr. Shirsath learned counsel appearing for respondents no. 1-A to 1-D to 3, submits that the reasons as have been given for condonation of delay in filing restoration application can hardly be said to be sufficient cause as would be required for delay condonation. He submits that in the background of the matter, quite a few dates matter was not being attended to making it incumbent on the court to pass order of dismissal of appeal. It is an indication of deliberation and intention on the part of the petitioners and their advocate. Emptiness in veracity of the reason of illness of the advocate in the wake of his appearance in the court at Sangamner on 11-03-2014 the date on which appeal was dismissed gets exposed. It is rather intriguing that from March, 2014 to August, 2014 and further after becoming aware in August 2014 to the date of filing application in later half of September, 2014, no plausible explanation is coming forth. This shows deliberate intention

of the petitioners to delay the proceedings and harass respondents and deprive them of enjoyment of fruits of decree. He submits that, may be the matter is with regard to immovable property and may be assuming it involves substantial question of law, yet involvement of such question would hardly be a cause for condonation of unexplained delay.

19. Mr. Shirsath relies on a decision of honourable single judge of this court in the case of *Pushpaben Dayashankar Pandya vs. Jagannath Valji Kapadia*, reported in *1987 Mh.L. J. 209*, focusing on paragraph 6 thereunder to lend credence to his aforesaid submission. (Learned counsel Mr. Malte, however, referring to paragraph no. 7 of said judgment points out that even under those circumstances, the matter had been remanded for re-decision.)

20. Learned counsel Mr. Shirsath further refers to a decision rendered by honourable single judge of this court in civil revision application no. 216 of 2014 [Nanasaheb Laxman Jadhav and others vs. Dinkar Laxman Jadhav and others] decided on 05-02-2015 whereunder request of the applicants therein to condone delay had been rejected. According to learned counsel facts in said case and the one in the present

case are quite close. In cited case, delay of 114 days has been refused to be condoned. He further refers to that the petition for special leave to appeal against decision in said civil revision application 216 of 2014 too had been dismissed.

21. Mr Shirsath further refers to guidelines of the supreme court in the case of *Esha Bhattacharjee (supra)* as appearing in clause 21.1 (i) onwards thereunder and submits that the same holds good for the present case. Learned counsel, therefore, submits that delay condonation applications are not meant for consideration too widely and liberally and having regard to the same, here in the present case there is deliberate delay to defeat the respondents' right under the decree.

22. Mr. Shirsath alternatively submits that in case the court considers condonation of delay, appellate court may be directed to proceed with appeal expeditiously and dispose of the same preferably within a period six months.

23. Having heard learned counsel for the parties as above, there does not appear to be any particular dispute over that the litigants are not essentially and necessarily required to attend to appellate proceedings on each and every date

before the appellate court. Here, it has been submitted on behalf of the petitioners that their advocate had given an understanding to them that it is not necessary for them to attend the appeal proceedings on every date and that they would be informed if their presence is required. In the circumstances, it appears that the regular civil appeal had been pending since 2011 and it took a bit of time for getting the appeal prepared and after it became ready for hearing, petitioners' advocate had missed out a few dates as well the date 11-03-2014 had not been attended to by him and resultantly the matter had been dismissed in default on 11-03-2014. It appears that for quite a while petitioners were not aware of such order having been passed. Said submission on behalf of the petitioners appears to carry a lot of force as there is no counter material produced indicating that the petitioners had been personally aware of the date of dismissal of appeal or at any time before August, 2014. Their lawyer, if at all, had caused appearance in some proceedings on the relevant date at some other place, he does not appear to have informed the petitioners about the developments taking place in the appeal and thus they cannot be blamed for the same. Petitioners' interest in the appeal appears to have

come in peril. In the events as those have occurred, petitioners can hardly be said to have played any active role, nor can it be said that they have gained any advantage in getting their own matter dismissed in default although it is being contended on behalf of the respondents that this was with a view to delay the litigation and deprive them of the fruits of decree. It may have to be taken into account, a litigant may not gain benefit from causing delay deliberately. In this particular case, decree had been running against petitioners and they had challenged the same. The matter was to be considered on merits. It does not appear to be a case that the petitioners have gained any particular advantage in causing delay. The fault of the lawyer, in the circumstances, having regard to the observations by appellate judge, can hardly be attributed to the petitioners. Learned judge has, in fact, observed that sufficient cause would mean the cause for which the petitioners could not be blamed for their absence. In this matter, absence or non appearance of the petitioners on 11-03-2014 can hardly be attributed to them in the circumstances.

24. In aforesaid context, reference to paragraph no. 21 in *Esha Bhattacharjee's* case (supra) would be useful. It has been

observed in clause 21.6.(vi) of paragraph no. 21 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 and substantial justice being paramount, technical considerations should not receive undue importance as appearing under clause 21.3.(iii) of paragraph no 21. In clause 21.8 (viii) of paragraph no. 21, it has been observed, there is distinction between inordinate delay and a delay of short period, for, to inordinate delay doctrine of prejudice is attracted while to short duration it may not be attracted and further that the first one warrants strict approach whereas the second calls for a liberal delineation.

25. In present matter, having regard to that delay in filing restoration application is of about 160-161 days, in the facts and circumstances of the case, the same does not appear to be inordinate, deliberate or intentional delay particularly taking into account the background in which litigation has emerged.

26. Taking over all view of the matter, it appears to be expedient to give precedence to contest on merits having

regard to facts and circumstances and the background rather than getting bogged down by technicalities. Inconvenience caused to other side can be compensated in terms of money. The reasons under the application for condonation of delay do not appear in the circumstances to be vacuous nor it can be said that no credence can be given to those at all.

27. In the circumstances, writ petition stands allowed. Delay of five months and nine days in filing application seeking restoration of regular civil appeal no. 47 of 2011 stands condoned subject to payment of costs of Rs.20,000/-. It has been given to understand that said amount is already deposited and lying in this court under order dated 13-02-2015 passed in writ petition no. 1402 of 2015 among the same parties. Said amount as such be remitted to the appellate court for appropriation towards costs to be paid to respondents – plaintiffs pursuant to aforesaid order in the present writ petition. The plaintiffs as such be allowed to withdraw said amount of Rs.20,000/- from the appellate court. The appellate court to proceed with restoration application as soon as possible and dispose of the same within a period of sixty days from the date of receipt of writ of this order. In case restoration application is allowed, the

appellate court to proceed with the appeal expeditiously thereafter and preferably dispose of the same within a further period of five months. Parties graciously agree to appear before the appellate court on 19-06-2017.

28. Rule made absolute in aforesaid terms. Writ petition stands disposed of.

SUNIL P. DESHMUKH,
JUDGE

pnd