

Mr. R. P. Ojha i/b. Mr. H. P. Pandey for Petitioners.
Mr. P. J. Thorat i/b. Mr. Bipin J. Joshi for Respondents No.1 to 6.

P.C. :

2. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 16.12.2015 passed by the learned Civil Judge, Senior Division, Thane in Miscellaneous Application No.597 of 2013. By that order, the learned trial Judge refused to condone the delay of 2 months and 10 days in

filing the application for restoration of Special Civil Suit No.521 of 2007, which was dismissed in default on 05.08.2013.

3. In support of this Petition, Mr. Ojha submitted that by the impugned order, the learned trial Judge refused to condone the delay of two months and ten days in filing the application for restoration and thereby application made under Order IX, Rule 13 read with Section 151 stood dismissed and the order of dismissal of the Suit in default has attained finality. He submitted that as the learned trial Judge has refused to condone the delay, it has resulted in dismissal of Suit on technical ground and not on merits. Having regard to the fact that the delay is of two months and ten days, the learned trial Judge should have condoned the delay.

4. On the other hand, Mr. Thorat supported the impugned order. He submitted that plaintiffs No.2 and 3 have an equally efficacious, alternate remedy of filing Appeal from Order under Order XLIII, Rule 1(c) of C.P.C. as the order passed by the learned trial Judge is referable to Order IX, Rule 9 of C.P.C. On merits, he invited my attention to paragraphs 6 and 7 of the impugned order. In the application for restoration, plaintiffs No.2 and 3 have contended that plaintiff No.1 was looking after the Suit and he did not inform. However, application is not made by all the plaintiffs. Application is made by plaintiffs No.2 and 3. He further submitted that the issues were framed on 28.08.2012 and was posed for leading evidence on 25.09.2012 and 11.10.2012. Thereafter, the matter was kept for dismissal. He further submitted that the learned trial Judge observed in paragraph 7 that no sufficient cause is made out for condoning the delay. The learned trial Judge observed that plaintiffs No.2 and 3 have not taken care to properly draft the application for condonation of delay explaining it in proper perspective. They simply

blamed the Advocate stating that they were engaged in some business, without giving any particulars. The learned trial Judge, therefore, held that no sufficient cause is made out for condoning the delay.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that Suit is dismissed in default by passing following order:

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Plaintiffs are absent. Suit has been dragged for hearing from November'12. No evidence is led by plaintiffs. It shows that they are not interested in proceeding with Suit. Hence, it is dismissed for default and disposed of.

sd/-

5.8.13 ”

6. It is also not in dispute that on 15.10.2013, plaintiffs No.2 and 3 filed two applications. One application was numbered as Civil Miscellaneous Application No.597 of 2013. Perusal of that application shows that it is filed under Section 151 of C.P.C. for condonation of delay of two months and ten days in filing the application for restoration of the Suit. The other application is not numbered and is filed under Order IX, Rule 13 read with Section 151 of C.P.C. Perusal of the prayers made in that application shows that plaintiffs No.2 and 3 have prayed for injunction restraining defendants No.1 to 6 from creating third party interest as also for setting aside order of dismissal dated 05.08.2013 and for restoration of the Suit to its original file.

7. Mr. Ojha submitted that though the application is styled as one under Order IX, Rule 13, it is essentially under Order IX, Rule 9 of C.P.C. Mr. Thorat also did not dispute the said position. Mr. Thorat submitted that by the impugned order, the learned trial Judge has

rejected the application made under Order IX, Rule 9 and therefore, plaintiffs No.2 and 3 have remedy of filing appeal from order under Order XLIII, Rule 1(c) of C.P.C. It is not possible to accept this submission. As noted earlier, by the impugned order, the learned trial Judge has refused to condone the delay. In other words, the learned trial Judge has not considered the application made by the plaintiffs No.2 and 3 for setting aside the order of dismissal dated 05.08.2013 as also for restoration of the Suit. In other words, the application styled as one under Order IX, Rule 13 read with Section 151 of C.P.C. is not decided by the learned trial Judge. As the learned trial Judge has refused to condone the delay, plaintiffs No.2 and 3 have no remedy of filing appeal from order under Order XLIII.

8. In so far as merits of the case are concerned, Suit was dismissed in default on 05.08.2013 and the applications are made on 15.10.2013. In other words, there is delay of two months and ten days in filing the application for restoration. In the case of ***State of Nagaland Vs. Lipok AO, (2005) 3 SCC 752***, it is held by the Apex Court 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 expression “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.

9. Applying the principles laid down therein, in my opinion, the learned trial Judge should have condoned the delay. The approach of the Court in considering the application for condonation of delay should be liberal and not hyper-technical. Shortness of delay is relevant circumstance while exercising discretion. In view thereof, the impugned order cannot be sustained and as such is liable to be set aside and

accordingly it is set aside thereby condoning the delay of two months and ten days in filing the application under Order IX, Rule 9 (styled as under Order IX, Rule 13 read with Section 151) of C.P.C subject to petitioners depositing costs of Rs.10,000/- in this Court within two weeks from today under intimation in writing to the Advocate for respondents. The learned trial Judge will now proceed to decide the application made by the plaintiffs under Order IX, Rule 13 read with Section 151 of C.P.C. Rule is made absolute in the aforesaid terms.

10. After the costs is deposited, Registry is requested to transmit the said amount to Tata Memorial Hospital and Cancer Research Institute, Parel, Mumbai.. List the Petition for 'reporting compliance' after three weeks.

(R. G. KETKAR, J.)

Minal Parab