

Anand

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.745 OF 2017
WITH
CIVIL APPLICATION NO.1468 OF 2017
(For Stay)
IN
SECOND APPEAL NO.745 OF 2017**

- | | | |
|----|------------------------------------|--------------|
| 1. | Mrs. Anuradha Raghunandan Kashikar | .Appellants/ |
| 2. | Ms Niti Merchant | Applicants |
| 3. | Mr. Darius Rafat | |

Vs.

- | | | |
|----|----------------------|--------------|
| 1. | Mr. Firoz Vakil | .Respondents |
| 2. | Shernaz Firoze Vakil | |
| 3. | Jahangir Firoz Vakil | |
| 4. | Mr. Meher Firoze Gil | |
| 5. | Mr. Vivek S. Gil | |

Mr. V. A. Shastri, Advocate, for the Appellants/Applicants
Ms Ferzana B. Kamdin a/w Mr. Sadhil Bijliwala i/b. FZB and Associates, Advocate, for the Respondent Nos.1 & 2

CORAM : REVATI MOHITE DERE, J.

DATE : 10.10.2017

ORAL ORDER

. Heard learned counsel for the parties.

2. By consent, the Second Appeal is taken up for hearing at the admission stage, since it involves a short question of law as noted herein below.

3. By this Appeal, the Appellants have impugned the Judgment and Order dated 16.06.2017 passed by the learned Ad-hoc District Judge – 2, Raigad – Alibag, by which Civil Misc. Application No.113 of 2011 (for condonation of delay) filed in the First Appeal came to be rejected.

4. Learned counsel for the Appellants submitted that the impugned Judgment and Order is perverse, inasmuch as, the learned Judge had failed to consider that the Appellants had knowledge about the disposal of their suit only in 2011 and not prior thereto. He submitted that the learned Judge had failed to exercise his discretion judiciously, by refusing to condone the delay of 55 days in filing the First Appeal. He further submitted that the delay was neither intentional nor deliberate and that the Appellants had led evidence to show that there was sufficient cause for condoning the delay. Learned counsel tendered a compilation of Judgments in support of his submissions.

5. Learned counsel for the Respondents opposes the Appeal. She submitted that the Appellants had failed to participate in the trial Court proceedings; that despite the fact, that they had appointed two lawyers, the Appellants had neither filed their Written Statement nor had

the Appellants or their lawyers participated in the trial Court proceedings, as a result of which the suit proceeded and was decreed in favour of the Respondents. She submitted that the evidence of Firoze Ghalte, caretaker of the Appellants clearly shows that he was aware of the dismissal of the suit and that he was in touch with the lawyers. Learned counsel submitted that no sufficient cause has been shown by the Appellants to condone the delay. According to the learned counsel for the Respondents, the Appellants deliberately failed to participate in the proceedings, as a consequence of which the suit proceeded and was decreed in favour of the Respondents.

6. The only short question of law involved in this appeal is whether, in the facts, the Appellate Court was justified in rejecting the application seeking condonation of delay on the ground of limitation ?' The answer is in the negative.

7. At the outset, it would be necessary to consider the expression “sufficient cause” as appearing in Section 5 of the Limitation Act, 1963. It is pertinent to note that the Apex Court in the case of ***S. Ganeshraju (dead) through legal heirs Vs. Narasamma (dead) through legal heirs***, reported in ***(2013)11 SCC 341*** whilst dealing with

the issue of condonation of delay, held that Section 5 of the Limitation Act is required to be given a liberal construction so as to advance substantial justice. It was observed that unless there are malafides in not approaching the Court during the period of limitation, as a normal rule, delay ought to be condoned; that the object of the rules of limitation are not meant to destroy or foreclose the right of the parties, but are meant to see that parties do not resort to dilatory tactics; that there is no presumption that the delay in approaching the Court is always deliberate; and that it is obvious just, fair and appropriate that matters should be heard on merits, rather than shutting the doors of justice at the threshold. It was further observed, that no doubt the term “sufficient cause” has not been defined, however, the Courts are left with the discretion to come to the conclusion, whether circumstances establishing sufficient cause exist, for condoning the delay. The Apex Court in the case of ***Basavraj Vs. SLAO***, reported in ***(2013)14 SCC 81*** whilst explaining the term “sufficient cause” was considering the case in which there was a delay of more than five years. The Apex Court observed in para 9 as under :-

“9. Sufficient cause is the cause for which Defendant could not be blamed for his absence. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended.

Therefore, the word "sufficient" embraces no more than that which provides a platitude, which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case, duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the Court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the Court should not allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose. (See: (Manindra Land and Building Corporation Ltd. v. Bhootnath Banerjee and Ors.) 12, AIR 1964 SC 1336; (Lala Matadin v. A. Narayanan)13, AIR 1970 SC 1953; (Parimal v. Veena @ Bharti)14 , 2011(4) Bom.C.R. 395(S.C.) : AIR 2011 SC 1150; and (Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai), AIR 2012 SC 1629. In (Arjun Singh v. Mohindra Kumar)15, AIR 1964 SC 993 this Court explained the difference between a "good cause" and a "sufficient cause" and observed that every "sufficient cause" is a good cause and vice versa. However, if any difference exists it can only be that the requirement of good cause is complied with on a lesser degree of proof that

of "sufficient cause".

8. The Apex Court even in the case of ***Collector, Land Acquisition, Anantnag Vs. Mst. Katiji***, reported in ***A.I.R. 1987 S.C. 1353*** whilst considering an Application for condonation of delay, in para 3 of the Judgment observed as under :-

“3. The legislature has conferred the power to condone delay by enacting S. 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends @page-SC1354 of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters, instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that :-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay. every second's delay ? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

9. From all the aforesaid Judgments, it is evident that the expression "sufficient cause" as appearing in Section 5 of the Limitation Act, 1963 is to be given a liberal construction so as to advance substantial justice. The Court is under an obligation to exercise its discretion, judiciously. Unless the contesting party is able to show malafides on the part of the party approaching the Court, seeking condonation of delay, as a normal rule, the delay should be condoned.

The Court while exercising its discretion is under an obligation also to test the bonafides of the parties seeking condonation of delay. Keeping in mind the aforesaid principles, I am of the opinion, in the facts of this case, that the Appellants have shown sufficient cause for condoning the delay of 55 days caused in filing the First Appeal in the Court of the learned learned Ad-hoc District Judge – 2, Raigad – Alibag.

10. It is pertinent to note, that Special Civil Suit No.90 of 2008 was filed by the Respondent Nos.1 to 3 as against the Appellants and Respondent No.5 in the Court of the learned Civil Judge (Senior Division), Alibag, for removal of encroachment. According to the Respondents (Original Plaintiffs), they are the owners of the land bearing Gat No.400/2 admeasuring 0.80.0 hectares and that the Respondent Nos.1 to 3 had purchased the said property from them under a registered Sale Deed on 24.12.1990 and that since then they were in possession of the said land. According to the Respondents (Plaintiffs), in the month of April, 2007, they received information that the Appellants had encroached the suit land to the extent of 0.05.0 hectares. As the Appellants refused to remove the encroachment, the aforesaid suit was filed. The Appellants appearing in the said suit had engaged Advocates namely Mr. P. M. Thakur and Mr. B. D. Patil. It is a

matter of record, that no Written Statement was filed by the Appellants and that the suit proceeded and that neither the Appellants nor their Advocates participated in the said proceedings. The learned trial Court vide Judgment and Order dated 04.07.2011 passed by the learned 2nd Joint Civil Judge (Senior Division), Alibag was pleased to decree the suit. Accordingly, the Defendant No.1 was directed to handover vacant and peaceful possession of 0.05.0 hectares of the suit land to the Respondents - Plaintiffs and Defendant No.5 – Smt. Meher Firoz Vakil by removing encroachment and illegal construction in the suit property within one month from the date of the order. Defendant No.1 – Smt. Anuradha Raghunandan Kashikar was perpetually restrained from disturbing the peaceful possession of the Plaintiff and Defendant No.5 - Smt. Meher Firoz Vakil over the suit property, without following due process of law, by herself or through her agent or servant or any other person. According to the Appellants, it is only on 20.08.2011 when they received a Caveat notice from the Respondents' Advocate, that they learnt the suit was decreed. Pursuant thereto, they contacted the Advocates, obtained necessary documents, appointed an Advocate, who took inspection of the documents and thereafter, filed the First Appeal in the Court of the learned Ad-hoc District Judge – 2, Raigad – Alibag. The Appellants led evidence of the Appellant No.1 - Mrs. Anuradha

Kashikar and the caretaker of the property - Firoze Ghalte in support of the Application seeking condonation of delay caused in filing the First Appeal. The Appellant No.1 - Mrs. Anuradha Kashikar and her caretaker - Firoze Ghalte filed their Affidavit of evidence. Both, the Appellant No.1 - Mrs. Anuradha Kashikar and her caretaker - Firoze Ghalte were cross examined. The Appellant No.1 - Mrs. Anuradha Kashikar in her Affidavit has stated that they had appointed Advocates namely Mr. P. M. Thakur and Mr. B. D. Patil and had given them her Vakalatnama. She has stated that she was in touch with her Advocates and that she would even make enquiries with her Advocates and at times even Firoze Ghalte would contact the Advocates to find out the progress of the case. She has stated that her Advocates had disclosed that they were following up the matter and were protecting their interest and even disclosed to her that they would keep her informed about the progress in the said case. She has stated that she believed the assurance given by the Advocates. She has stated that she was confident that the Advocates would represent them in the said case diligently, as they were not aware of the Court procedure and rules and as such, were completely dependent on the Advocates. She has further stated that she was not even aware that Written Statement is required to be filed under her signature. She has further stated that on 20.08.2011, she received a

Caveat notice from Advocate, Mr. S. N. Joshi, when she learnt that the suit was decreed in favour of the Defendants (Respondents) and against her. She has stated that for the first time, she learnt about the decree in the suit and was shocked. She has stated that pursuant thereto, an Application was made on 22.08.2011 for seeking all the necessary documents and that the same were received on 09.09.2011; that on receipt of the documents, they contacted Advocate, Mr. S. Y. Bartakke and took his advice; that the Advocate checked the record and after verifying the record, realized that the suit had proceeded without filing of the Written Statement. She has stated that she was not aware that the Written Statement was to be filed by her. She has further stated that thereafter, on consulting the Advocates and getting all the requisite documents, the First Appeal was filed alongwith an Application seeking condonation of delay. According to the Appellants, the delay was neither intentional nor mala fide, and if the delay of 55 days was not condoned, irreparable damage would be caused to them. It is pertinent to note, that in the cross-examination of the Appellant No.1 - Mrs. Anuradha Kashikar, there is no challenge to her evidence, that she gained knowledge of the dismissal of the suit only on 20.08.2011. There is no cross-examination nor any suggestion made to the said witness to show, that the Appellant No.1 - Mrs. Anuradha Kashikar had knowledge

of the dismissal of the suit anytime prior to August, 2011. The tenor of the cross-examination of the Appellant No.1 - Mrs. Anuradha Kashikar was to show that she is a business woman and as such knowledgeable and that she did not take any action against her Advocates for not informing her about the proceedings.

11. Firoze Ghalte, caretaker of the property of Appellant No.1 - Mrs. Anuradha Kashikar had also filed his Affidavit of evidence. He has stated that he was in touch with the Advocates and would find out about the progress of the case. He has stated that in August, 2011, he learnt from the Caveat notice that the suit was decreed in favour of the Respondents, pursuant to which, he contacted the Advocates to confirm the same. There is also no cross-examination of the said witness to show that he had knowledge of the dismissal of the suit prior to August, 2011. It is, thus, evident that the Appellant No.1 - Mrs. Anuradha Kashikar and Firoze Ghalte, learnt of the dismissal of the suit only on 20.08.2011, pursuant to which, they filed an Application seeking all the necessary documents and on receipt of the same, consulted an Advocate and thereafter, filed the aforesaid Appeal alongwith an Application seeking condonation of delay. The learned Judge while rejecting the Application for condonation of delay has essentially rejected the said

Application on the ground that the Appellant No.1 had not taken any legal action against the Advocates for not informing the stages in the suit and ultimately the decision in the suit; and that the Appellant No.1, being an educated lady, as such, there was no excuse for not being aware of the case proceedings. It is also observed that the Appellant No.1 - Mrs. Anuradha Kashikar had removed her caretaker - Firoze Ghalte after almost one and half years and that no prompt action was even taken against him for failing to be diligent in pursuing the legal proceedings in the trial Court. The learned Judge has also relied on certain discrepancies that appear to have cropped up in the cross-examination of the said witness. Infact, the learned Judge has clearly glossed over the fact, that there was no cross-examination of either of the two witnesses to show that they had knowledge of the dismissal of the suit prior to August, 2011. Infact, as noted earlier, no suggestion has been made to either of the said witnesses, with regard to the same. Similarly, merely because no action was taken by the Appellants as against her lawyers, is not sufficient to attribute malafides to the Appellants and for refusing to condone the delay. The question that arises is, whether the Appellants have shown sufficient cause for condoning the delay of 55 days caused in filing the Appeal. In my view, the Appellants have shown sufficient cause for condoning the delay of

55 days caused in filing the Appeal. It is pertinent to note that the Apex Court in the case of *N. Balakrishnan Vs. M. Krishnamurthy*, reported in *AIR 1998 SC 3222*, in paras 12, 13 & 14 have held as under:-

“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*, AIR 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.

14. It is further observed in the said law report that “it becomes plain that the expression “sufficient cause” within the meaning of Section 5 of the Act or Order 22, Rule 9 of the Code or any other similar

provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a particular case whether explanation furnished would constitute “sufficient cause” or not will be dependent upon facts of each case. There cannot be a strait-jacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception moreso when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However, by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the list terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way. (Emphasis supplied)”

12. It is pertinent to note, that every day's explanation cannot

be expected for considering the delay caused in taking steps. One thing is clear, that the Courts should not proceed with fault finding, rather than the cause shown and reject the petition outright. Acceptance of an explanation furnished, should be the general rule and refusal an exception, moreso, when no negligence or inaction or want of bonafides can be imputed to the defaulting party. On the other hand, neither can the Courts lose sight of the fact, that by not taking steps within the time prescribed, a valuable right has accrued to the other party, which should also not be lightly defeated by condoning delay in a routine like manner. While considering such matters, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way. In the facts, not only have the Appellants shown sufficient cause for condoning the delay, but also the delay caused does not appear to be intentional, deliberate and mala fide.

13. Accordingly, the Appeal is allowed on the following terms & conditions:-

O R D E R

(i) The impugned Judgment and Order dated 16.06.2017 passed by the learned Ad-hoc District Judge – 2, Raigad – Alibag, by which Civil Misc. Application No.113 of 2011 (for condonation of delay) filed in First Appeal, is quashed & set aside;

- (ii) The delay of 55 days in filing the Appeal is condoned and the First Appeal is restored to its original file;
- (iii) The Appellants to pay costs of Rs.50,000/- to 'FZB and Associates' within four weeks from today. The costs are condition precedent and the Appellate Court shall not entertain the Appeal till the said costs are deposited within the stipulated period;
- (iv) The execution proceedings are stayed for a period of four weeks from today, so as to enable the Appellants to file an appropriate Application seeking stay of the execution proceedings before the Appellate Court. If an Application is filed within the stipulated period, the Appellate Court shall decide the same on its own merits;
- (v) Hearing of the First Appeal is expedited. Learned Judge shall decide the case as expeditiously as possible and in any event within a period of six months from the date of receipt of this order.

14. Appeal is disposed of in the aforesaid terms.

15. In view of disposal of the Appeal, the Civil Application for stay does not survive and the same stands disposed of accordingly.

All concerned to act on the authenticated copy of this order.

(REVATI MOHITE DERE, J.)