

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CIVIL REVISION APPLICATION NO.67 OF 2015

(Jankilal Sunderlalji Chandak and another Vs. Pralhadrai Khushalchand Lohiya and others)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Shri B.N. Mohta, Advocate for Applicants.
Shri A.C. Dharmadhikari, Advocate for Respondent No.1.

CORAM: SMT. DR. SHALINI PHANSALKAR-JOSHI, J.

DATE: 8th JUNE, 2017.

This revision application is preferred against the order dated 20.03.2015 passed by the District Judge-1 Khamgaon in M.J.C. No.28/2012. The said order was of condoning the delay in preferring the appeal filed by the respondents. The respondents are the legal heirs of the decree holder. They had filed execution proceeding and vide order dated 15.06.2005, passed in the said proceeding the plot belonging to the present applicants came to be attached. The present applicants, therefore, moved an application vide Exh.36 to release the said plot from the attachment. The said application was allowed by the Civil Judge, Senior Division, Khamgaon vide its order dated 19.09.2009. According to the respondents they learnt about the said order only when they received the notice of the caveat filed by the applicants. Thereafter, obtaining the

certified copy, the respondents filed Writ Petition No.1086/2010. However, when respondents came to know that the writ petition is not maintainable, as the statutory right of appeal is provided against the impugned order dated 19.09.2009, the respondents withdrew the writ petition and filed the appeal along with the application for condoning delay.

This application came to be resisted by the applicants herein, contending that respondents have to explain the day to day delay. In this case, it was contended that, respondents have not explained it. They have not even disclosed when they received information about the order dated 19.09.2009 and when they applied for certified copy. It is also not stated as to after how many days of receiving certified copy, writ petition was filed. It was submitted that the delay caused in preferring the appeal was thus not properly explained. Respondents had throughout remained negligent and not at all diligent in pursuing the remedy. Hence, application for condonation of delay should not be allowed.

The learned District Judge was however pleased to hold that the delay caused in the matter appears to be satisfactorily explained in view of the averments made in the application by respondent No.1,

that he came to know about the decision only after receiving the copy of caveat. The learned District Judge thus condoned the delay by further holding that no prejudice would be caused to the applicants if delay is condoned.

While challenging this order, the submission of learned counsel for the applicants, is that the learned District Judge has not at all given any valid or cogent reasons for condonation of such delay. It is further submitted that entire approach adopted by the respondent No.1 of seeking execution of the decree against the present applicants is *mala fide*. Moreover respondent No.1 has never remained diligent in pursuing his remedy. He has taken recourse to adopt the wrong remedy of filing the writ petition in the Court. In such situation, as the delay is not properly explained, the learned District Judge has committed an error in allowing this application for condonation of delay. It is submitted that the grave prejudice is likely to be caused to the applicants as they are unnecessarily dragged to contest the litigation. On merit the applicants are having very good case, but by filing of such frivolous litigation, the respondent No.1 is causing harassment and prejudice to the applicants. It is submitted that the District Judge, has therefore not correctly appreciated the facts of the case and

erroneously allowed the application of respondent No.1.

In support of his submission, the learned counsel for the applicants has placed reliance on the decision of the Hon'ble Apex Court in the case of *H. Dohil Constructions Company Private Limited vs. Nahar Exports Limited and another* reported at 2015(1) SCC 680, wherein after placing reliance on its recent decision in the case of *Esha Bhattacharjee v. Raghunathpur Nafar, Academy*, reported at (2013) 12 SCC 649, the Apex Court was pleased to hold as follows:

23. *We may also usefully refer to the present decision of this Court in Esha Bhattacharjee where several principles were culled out to be kept in mind while dealing with such applications for condonation of delay. Principles (iv), (v), (viii), (ix) and (x) of para 21 can be usefully referred to, which read as under: (SCC pp. 658-59)*

“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.

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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.”*

The facts of this reported authority of H. Dohil reveals that in the said case the delay was to the extent of 1727 days which can be called as inordinate delay and therefore, it was held that such delay definitely calls for a stringent scrutiny and cannot be accepted as having been explained without proper reason. In this decision the Hon'ble Supreme Court has also explained the distinction between inordinate delay and the delay of short duration or few days, and it was held that so far as inordinate delay the doctrine of

prejudice is attracted, whereas in the case of the delay of short duration it may not be attracted. Similarly, it was further held that when there is inordinate delay it warrants strict approach, whereas in case of delay of short duration liberal approach is justified.

The law is also well settled to the effect that the doors of the Court should not be closed to a litigant on technical ground and litigation should not be thrown out of the Court at the threshold itself. The delay, if it is attempted to be explained satisfactorily, then the Court should adopt liberal approach and unless and until some *mala fide* intention or gross negligence on the part of the litigant is pointed out delay may be condoned.

In this case the delay is only of 96 days, and therefore, it cannot be termed as 'inordinate delay'. Hence, in view of above said principle of law as laid down, this case does not require any strict approach to be adopted, but liberal approach can do the justice.

It is also pertinent to note that the right of the first appeal is statutory right and hence, when there is delay in filing the first appeal, the law requires that such delay is required to be looked at from a different and liberal perspective. Moreover in this case, it can be noticed that the respondent No.1 has adopted legal

advice given to him that of filing the writ petition in the High Court against the order dated 19.09.2009. If ultimately, it was found that the said writ petition was not maintainable, and therefore, he has filed the appeal then, whatever time is consumed in pursuing the legal remedy, may be in a wrong forum, then delay caused thereby needs to be excluded under Section 14 of the Limitation Act.

Therefore, if the facts of this case are considered in the light of the legal provision discussed above, then it cannot be said that the delay caused in the matter is of such a nature that it should be viewed strictly. If as per the law, liberal approach is to be adopted, then having regard to the short duration of the delay, that has occurred in this case, it cannot be said that the learned District Judge has committed any error in allowing the application for condonation of delay in preferring the appeal.

One need not enter at this stage into the merits of the matter, but the fact remain that the property of the applicants is already released from the attachment and hence, even if the litigation is continued, no prejudice, as such, is likely to be caused to the applicants. Assuming and accepting that the applicants had to face the litigation of the first appeal,

but then the statutory right given to the litigant/respondents of challenging the decision of the Executing Court in the appeal court cannot be fore-closed by rejecting his application for condonation of delay, when the delay caused in preferring the appeal is explained satisfactorily.

In the revisional jurisdiction of this Court, it cannot be held that the impugned order of the District Judge suffers from any perversity, so as to warrant interference therein. The revision, therefore, holds no merits and hence stands dismissed.

JUDGE