

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:
NAGPUR BENCH : NAGPUR
Second Appeal No. 343 of 2017
[Manohar Liladhar Amge & others Vs. Jagdish Tapandas Krishnani]

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

Court's or Judge's orders

Mr. B. N. Mohta, Adv., for the appellants.
Mr. Harish D. Dangre, Adv., for the respondent.

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CORAM : A. S. CHANDURKAR, J.

DATE : 11th September, 2017

Notice was issued on the following substantial question of law:-

“Whether the appellate Court was justified in refusing to condone the delay in the appeal filed by the present appellants?”

Accordingly, the learned counsel for the parties have been heard at length on the aforesaid question.

The appellants are the original defendants in the suit filed by the respondent for a declaration that the plaintiff was the owner of the suit property. This suit was decreed by the trial Court on 16th March, 2016. The appeal filed by the appellants herein along with an

application for condonation of delay that has been rejected by the first appellate Court. Hence the present appeal.

In the application for condonation of delay, it was stated that after receiving the suit summons in Special Civil Suit No. 406 of 2013, the appellants came in contact with one Mr. Satnamsingh Sokhi. The said Satnamsingh Sokhi gained their confidence and the appellants took his assistance in prosecuting the civil suit. They executed a Power of Attorney in his favour. The appellants were told that the said Power of Attorney holder would prosecute the matter and their presence would be sought as and when required. In November, 2015, the appellant no.3 approached said Satnamsingh Sokhi seeking various documents; but the same were not given to him. Thereafter, on 10th November, 2015, a Public Notice was issued in a daily newspaper cancelling the Power of Attorney granted to him. Thereafter, in the first/second week of July, 2016, they contacted Mr. Gade and instructed him to take a search of the civil suit. It was found that the said suit had been decreed. The appellants then found that this suit was not properly contested by the Power of Attorney holder. The appellants thereafter took steps to engage another counsel and after obtaining the certified copies, learnt that an appeal had been filed by the Power of Attorney Holder. In that appeal, the respondent filed an application for dismissal of the appeal. Though the

appellants intended to continue those proceedings, the appeal came to be dismissed as not maintainable on 22nd September, 2016. After applying for certified copies, another appeal was filed before the first appellate Court on 7th October, 2016.

Shri B. N. Mohta, learned counsel for the appellants, submitted that the first appellate Court committed an error in refusing to condone delay in filing the appeal under Section 96 of the Code of Civil Procedure, 1908. It was submitted that the appellants had reposed faith in the Power of Attorney Holder by executing the document of Power of Attorney. The record indicated that the suit was not properly contested which resulted in passing a decree against them. They also did not remain present before the trial Court as they relied upon the Power of Attorney Holder. In that regard, the learned counsel referred to the Roznama of Special Civil Suit No. 404 of 2013 which indicated that only the counsel for the defendants was shown present. As the appellants had no intimation about those proceedings, they did not attend the Court. Though the Power of Attorney was cancelled in November, 2015, the said Power of Attorney holder had preferred an appeal challenging the decree passed by the trial Court within limitation. Though the appellants expressed their desire to continue prosecution of that appeal, the same was dismissed on 22nd September, 2016. It was submitted that after dismissal of that appeal, the appellants took

immediate steps and filed the present appeal. On account of non-co-operation by the Power of Attorney holder, the appellants did not come in possession of the relevant documents. It was, thus, submitted that the appellants deserve to be granted an opportunity to contest the appeal on merits, inasmuch as the adjudication by the trial Court was contrary to law. He referred to the provisions of Section 14 of the Limitation Act, 1963 [for short, “the said Act”] in that regard. In support of his submissions, the learned counsel placed reliance on the following decisions:-

1. **Steel Authority of India Ltd. Vs. Amiya Steel Pvt. Ltd.** [AIR 2017 Calcutta 148],
2. **Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department & others** [(2008) 7 SCC 169],
3. **Tamil Nadu Mercantile Bank Ltd. Vs. G. Vijayalakshmi & others** [AIR 2017 SC 2691],
4. **Babu Nagapa Phulari Vs. President, Mahatma Phule Education Society, Parbhani & others** [2017 (4) Mh.L.J. 468],
and
5. **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy & others** [2013 (12) SCC 649].

Per contra, Shri H.D. Dangre, learned counsel for the respondent, submitted that the reasons furnished by the appellants in the application for condonation of delay were patently false to the knowledge of the appellants.

Till the date the power was granted to the attorney, the defendants had been prosecuting the suit. Thereafter, the Power of Attorney Holder had diligently prosecuted the suit. According to him, the defendants had another transaction with the Power of Attorney holder and in that regard, the said document of Power of Attorney was executed. Though the appellants cancelled the Power of Attorney by giving a Public Notice, they desired to continue the appeal filed by them. He referred to the documents at Exhs.36 to 54 that were placed on record of the first appellate Court along with the deposition of some of the appellants to urge that the first appellate Court rightly refused to condone the delay. He submitted that as the appellants had resorted to falsehood, no discretion deserves to be exercised in their favour. Considering their conduct, the delay had been rightly not condoned. In support of his submissions, the learned counsel placed reliance on the following decisions:-

1. **Oriental Aroma Chemical Industries Ltd. Vs. Gujarat Industrial Development Corporation & another** [(2010) 5 SCC 459],
2. **Mahanagar Telephone Nigam Ltd. Vs. State of Maharashtra & others** [(2013) 9 SCC 92],
3. **Pundlik Jalam Patil (dead) by LRS. Vs. Executive Engineer, Jalgaon Medium Project & another** [(2008) 17 SCC 448],
4. **S. P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. &**

others [AIR 1994 SC 853], and

5. Binod Bihari Singh Vs. Union of India
[(1993) 1 SCC 572].

I have heard the learned counsel for the parties at length and I have also perused the material on record.

It is necessary to note certain developments during the progress of the suit filed by the respondent before the trial Court. After the original defendants were duly served with the suit summons, Vakalatnama was filed on their behalf on 18th June, 2013. Thereafter, they filed their Written Statement on 30th August, 2013. They sought permission to file documents on record as per application below Exh.37. This application is dated 9th January, 2014 and various documents including extracts of the revenue records were permitted to be filed on record. The defendants then on 12th March, 2015 moved an application for striking out the pleadings in the plaint as per application at Exh.56. Said application is signed by the defendant no.1. Thereafter, on 7th September, 2015, the defendants sought for rejection of the plaint as per application below Exh.66 on the count that there was non-joinder of necessary parties. In para 4 of this application, it was stated that the defendants had agreed to sell the suit property in favour of Shri Satnamsingh Sodhi and others even before the suit was filed. Said agreement was dated 31st May, 2013. This application has been affirmed by

defendant no.3. Thereafter, on 14th September, 2015, the defendants applied as per application below Exh.76 for amending the Written Statement. This application is affirmed by defendant no.3 on 11th September, 2015. On 9th October, 2015 yet another application below Exh.45 was moved by the defendants seeking permission to place on record various documents including the document by which Power of Attorney was executed on 3rd October, 2013 in favour of Shri Satnamsingh Sokhi. Thus, for the first time, the defendants were represented by their Power of Attorney holder on 9th October, 2015. The plaintiff thereafter filed his affidavit in lieu of evidence as per Exh.101. Thereafter, on behalf of the defendants, their Power of Attorney holder filed his affidavit on 8th February, 2016.

From the aforesaid record of the trial Court, it can be gathered that the defendants and their counsel were prosecuting the suit till 9th October, 2015, on which date, the Power of Attorney holder first came in picture. All previous applications have been signed by one of the defendants and their counsel. Within a month of the appearance of the Power of Attorney Holder, a Public Notice was issued on 8th November, 2015 cancelling the said document of Power of Attorney. In the light of aforesaid, if the averments in the application for condonation of delay are perused, it can be noted that in para 11, it was stated that after receiving the suit summons, the defendants who were not having any

legal knowledge were introduced with Shri Satnamsingh Sokhi and he gained their confidence and told them that he would assist them in the suit. In para 13 of the application, it is stated that the defendants gave their thumb impressions and signatures on various documents. In November, 2015, the defendant no.3 approached the said Power of Attorney holder and requested him to hand over the necessary documents of the suit property. This was refused by the said Power of Attorney holder. On that basis, the defendants issued a Public Notice on 10th November, 2015 cancelling the document of Power of Attorney. It is then stated in para 16 that the defendants then contacted their well wisher who took search of the proceedings and it was then noticed that the Power of Attorney holder did not properly conduct the proceedings in the suit. It is further stated that the counsel engaged by the Power of Attorney holder refused to give consent for changing the lawyer and hence permission for engaging another counsel was sought. Thereafter, the occurrences after filing of appeal by the Power of Attorney holder have been narrated.

From the aforesaid, it can be seen that the defendants have not disclosed the entire facts which were within their knowledge before the Court. As noted above, after being served in the Civil Suit, the defendants themselves had engaged a counsel as per Exh.14. This counsel was not engaged by the Power of

Attorney holder, inasmuch as the Vakalatnama was filed on 18th June, 2013 while the document of Power of Attorney is executed on 3rd October, 2013. The other applications moved by the defendants indicate signatures of either of them in support of those applications. The Power of Attorney holder was not in the picture at least till 9th October, 2015. Moreover, the defendants had custody of various documents including the revenue records which they themselves had filed on record. Hence, the stand taken that there was no co-operation from the Power of Attorney holder and hence the defendants were constrained to revoke such power is not borne out from the record. The fact that the Power of Attorney holder was not prosecuting the suit diligently also cannot be gathered from the records, inasmuch as he had filed a detailed affidavit in lieu of evidence as per Exh.163 and he was also cross-examined.

It is to be noted that after the judgment of the trial Court on 16th March, 2016, the plaintiff had filed caveat at Exh.51 before the first appellate Court. Said caveat is dated 29th March, 2016. Each appellant was duly served with the caveat as per Exh.52. In paragraph 81 (V) of the Memorandum of Appeal filed by the Power of Attorney holder, it has been specifically stated that the appellants had received caveat filed by the respondent. However, the appellants in their application for condonation of delay in paragraph 17 have stated

that as they had no knowledge of the suit being decreed, they took search and found that the judgment had been challenged by the Power of Attorney holder by filing appeal. It was not possible for the Power of Attorney holder to get knowledge about the service of the caveat on the appellants unless they themselves had instructed him. All these facts have not been referred to in the application for condonation of delay. Moreover, the appeal was filed by the Power of Attorney holder along with substantial Court fees of Rs. 28,830/-. It is not the stand of the appellants that the Power of Attorney holder spent this amount from his own pocket without their instructions. The conduct of the power of attorney holder filing the appeal on his own accord also belies the stand of the appellants that he was not diligently prosecuting the proceedings on their behalf. The aforesaid factors also dis-entitle the appellants for exercise of discretion in their favour.

The appeal filed by the Power of Attorney holder though filed within limitation was dismissed as it was filed by the unauthorized person. This order was accepted by the appellants. Hence, it was for them to satisfactorily explain the period of delay from 16th March, 2016 till 10th October, 2016. The stand as regards conduct of the Power of Attorney has not been found to be acceptable in the light of substantial material available on record. In the light of aforesaid, therefore, the reliance placed on the provisions of

Section 14 of the said Act and the decisions in *Consolidated Engineering Enterprises* and *Steel Authority of India Ltd.* [supra] is misplaced. On the contrary, as held in *Mahanagar Telephone Nigam Ltd.* and *Pundlik Jalam Patil* [supra], deliberate concealment of material facts and raising of false pleas dis-entitles the appellants from having the delay condoned. After considering the principles as laid down in *Esha Bhattacharjee* [supra], I am not convinced that a case has been made out to condone the delay. Though it is true that the refusal to condone delay deprives the party from having an adjudication on merits, in the present case, the appellants are themselves to blame for the position in which they have landed.

The substantial question of law is answered by holding that the appellate Court was justified in refusing to condone the delay.

Accordingly, the Second Appeal stands dismissed.

Judge