

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH, NAGPUR

Civil Application (CAO) No.1473 of 2015

In

Misc. Civil Application Stamp No.15068 of 2015

In

Second Appeal No.271 of 2011

(Smt. Chhaya w/o Dattatray Aurangabadkar (Dead), through LR. Smt. Raju
Prakash Umalkar v. Shri Waman s/o Pundlik Bhaje)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

Shri S.D. Deshpande, Advocate for Applicant/Appellant.
Shri J.M. Gandhi, Advocate for Non-Applicant/Respondent.

Coram : R.K. Deshpande, J.

Date : 14th February, 2017

1. This second appeal was filed along with Civil Application Stamp No.8746 of 2011 for condonation of 13 days' delay caused in filing an appeal. This matter was called out for admission on 9-9-2011, when this Court passed an order as under :

“ None present for the appellant.
The second appeal is dismissed in default.”

2. The appellant filed Misc. Civil Application Stamp No.15068 of 2015 on 4-8-2015 for restoration of appeal. Civil Application (O) No.1473 of 2015 was filed on 4-8-2015 for condonation of delay of 300 days caused in filing an application

for restoration. Both these appeals are supported by the solemn affirmation duly signed by Shri Shrinivas s/o Devidas Deshpande, aged about 90 years, the learned counsel appearing for the appellant.

3. In the application for condonation of delay, it is an averment that on the date when the matter was listed before this Court on 9-9-2011, the counsel for the appellant was absent, as he was in the hospital undergoing angioplasty. It is further stated that the appellant is from Gondia and, therefore, he could not contact the counsel because of some domestic reasons.

4. Shri J.M. Gandhi, the learned counsel appearing for the respondent, opposed the application for condonation of delay placing reliance upon the following decisions of the Apex Court as well as of this Court :

1. **AIR 1998 Bombay 176**
[Laxman N. Divekar v. State of Maharashtra]
2. **AIR 1998 Bombay 346**
[Victor Albuquerque v. Saraswat Co-operative Bank Ltd. and others].
3. **AIR 1998 SC 2276**
[P.K. Ramachandran v. State of Kerala and another]
4. **(2013) 14 SCC 81**
[Basawaraj and another v. Special Land Acquisition

Officer]

5. **AIR 2014 SC 746**

[Basawaraj and another v. The Special Land Acquisition Officer]

6. **AIR 2014 SC 1612**

[Brijesh Kumar and others v. State of Haryana and others]

7. **2015 (6) ABR 798**

[Vasant Vithal Gawand v. Shantaram Tukaram Gawand and others]

5. Shri Gandhi submits that there is a delay of 3 years 10 months, approximately 1500 days, and the same has not been explained in the application. He further submits that the delay caused, shown in the application is of 300 days only and keeping in view the law laid down by the Apex Court in the aforesaid decisions, the application has to be dismissed on the ground that there is no explanation furnished for certain period of delay and no sufficient cause is made out to condone the delay.

6. In cases where the matter is dismissed for want of prosecution due to absence of the counsel engaged, normally it would be a fault on the part of the counsel and not of the client, who engaged the counsel to take the care of his matter. In such cases, the question of negligence or lack of bona fides on the part of the litigant does not at all arise and the presumption would be

of the lack of knowledge of such order to the counsel and consequently to his client. Such presumption can be rebutted by showing the positive event or the evidence of such knowledge, if any by the non-applicant. The period of limitation for claiming restoration in such cases shall start running from the date of knowledge of such order shown either by the applicant or by the non-applicant, as the case may be, to determine the sufficient cause to condone delay. The dispute, if any, about the date of knowledge will have to be determined on the basis of preponderance of probabilities.

7. The cases in which the orders are passed in presence of the counsel engaged, cannot be equated with the cases where the counsel was absent. In such cases, there would be a presumption of knowledge of the order to the client, who engaged the counsel, and the burden of proof about lack of knowledge, shall be upon the applicant, which will have to be discharged by leading positive evidence, either by filing an affidavit of the counsel engaged or examining him on oath or by showing the efforts which the client made to keep the track of the case by remaining in touch with the counsel in regular intervals. The explanation furnished after the date of knowledge will have to be considered to find out as to whether there is negligence or lack of bona fides or a false case is made out to claim sufficient cause to condone delay.

8. A distinction has to be, therefore, understood between the cases where the condonation of delay is sought for restoration of the matter dismissed in default due to non-appearance of the counsel engaged and the cases where the condonation of delay caused in challenging the orders passed in presence of the counsel engaged. A litigant cannot be made to suffer for the default on the part of his counsel. On the contrary, filing of an appeal within a period of limitation and engaging the counsel to contest the matter, shows the interest of the client in prosecuting the matter, and there is no presumption that a litigant is not interested in prosecuting the matter, which is dismissed in absence of a counsel. Filing of an application for restoration shows the interest of the client to prosecute, and the Court will have to consider as to whether the explanation furnished is true, correct, bona fide and proper to constitute a sufficient cause.

9. It is well settled that in condoning delay, the Court has to adopt a practical and pragmatic approach rather than technical and pedantic. The application has to be read as a whole to find out whether the explanation furnished covers the whole period, the condonation of which is sought. The discretion to condone or not to condone the delay need to be exercised depending upon the facts and circumstances of each case and no straitjacket formula is available. In the absence of lack of bona fides,

negligence, false case, the inclination of the Court will be to condone the delay upon proper explanation furnished. Of course, creation of rights in favour of the opponent will have to be given due weightage.

10. I have gone through all the decisions cited by Shri Gandhi, the learned counsel for the respondent. I find that all these decisions arises out of the cases where the Courts below decided the matter on merits in presence of the parties or the counsels engaged. Not even single decision is cited as a precedent laying down a law that if the matter is dismissed in default for the absence of the counsel engaged, the presumption would be of knowledge to the counsel or his client on the date of passing of such order. None of these decisions would be of any help to oppose the application for condonation of delay. On the contrary, it is significant to note what has been held by the Apex Court in para 11 of its judgment, reproduced below, in the case of *Basawaraj and another v. Special Land Acquisition Officer*, reported in (2013) 14 SCC 81 :

“11. The expression “sufficient cause” should be given a liberal interpretation to ensure that substantial justice is done, but only so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned, whether or not sufficient cause has been furnished, can be

decided on the facts of a particular case and no straitjacket formula is possible. (Vide Madanlal v. Shyamlal – (2002) 1 SCC 535 : AIR 2002 SC 100 and Ram Nath Sao v. Gobardhan Sao – (2002) 3 SCC 195 : AIR 2002 SC 1201.).”

11. Turning to the facts of this case, it cannot be brushed aside that a counsel appearing for the appellant is aged about 90 years and the fact that he had undergone angioplasty at the relevant time, cannot be disputed, though the reply filed opposing it, sworn-in by the respondent, denies the same for want of knowledge and particulars. Shri Deshpande, the learned counsel for the appellant, and Shri Gandhi, the learned counsel for the respondent, both are regular practitioners in this Court. I can understand personal knowledge of Shri Gandhi about the illness of Shri Deshpande. It was open for Shri Gandhi to have filed his own affidavit if he wanted to really dispute the fact of the learned counsel for the appellant undergoing angioplasty on the date when the matter was listed before this Court.

12. The reply denying the averments in the application sworn-in by the non-applicant/respondent-Waman s/o Pundlik Bhaje, without disclosing as to how he had personal knowledge of the illness of the counsel for the appellant, cannot be accepted. No doubt, that the averments in the application are somewhat

vague, but should be taken to presume lack of knowledge of dismissal of the matter in default to the counsel and consequently to his client. The appellant is claiming ownership of 1239 sq.ft. of land on the basis of the decree passed for partition in Regular Civil Suit No.1225-A/1959, and it cannot be said that he was not interested in prosecuting the matter. The delay caused in filing an application for restoration is sufficiently explained and I am satisfied that in the absence of lack of bona fides and negligence, the application makes sufficient cause for condonation of delay.

13. Hence, the civil application is allowed. The delay caused in filing application for restoration is condoned. Consequently, the application for restoration is also allowed, and Civil Application Stamp No.8764 of 2011 for condonation of 13 days' delay caused in filing an appeal, is restored.

14. Heard the learned counsels appearing for the parties on Civil Application Stamp No.8764 of 2011 for condonation of 13 days' delay caused in filing an appeal.

15. Notice was issued. All the respondents are served. There is no reply filed to oppose the application.

16. For the reasons stated in the application, which remain

uncontroverted, I am satisfied that a sufficient cause is made out for condonation of delay. Hence, the delay caused is condoned.

17. Civil Application Stamp No.8764 of 2011 is disposed of.

18. Shri Gandhi, the learned counsel appearing for the respondent, submits that the admission of the second appeal be deferred, for the reason that the respondent wanted to challenge the order passed on Civil Application (CAO) No.1473 of 2015 in Misc. Civil Application Stamp No.15068 of 2015 today, for the Apex Court. There is no prohibition against the respondent in preferring an appeal to the Apex Court. The matter is listed for admission and if this Court is satisfied that the substantial question of law is involved, it is not necessary to hear the respondent for admission of the matter.

19. The prayer for deferring the admission of the second appeal is, therefore, rejected.

Judge.

Nikhare/Lanjewar