

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.**

SECOND APPEAL NO. 201 OF 2018

Pushkaraj S/o. Ratnakar Wagh,
Age : 47 years, occu. Business,
R/o. K/128, MIDC Waluj,
Tq. Gangapur, Dist. Aurangabad,
At Present R/o. Flat No. 8, Sneha Vihar,
Sneha Nagar, Opp. Mickeys high School,
Bibwewadi, Pune.

....Appellant
(Orig. Defendant)

Versus

1. V. V. Industries,
A Registered Partnership Firm
Having its registered office at
Plot No. K-129, MIDC Waluj,
Industrial Area, Gangapur,
Dist. Aurangabad, through its Partner
Sandip S/o. Gangadhar Dhahale,
Age : 37 years, Occu. Business,
R/o. Vivekanand Colony, Tilak Nagar,
Aurangabad.

2. The Maharashtra Industrial Development Corporation,
Aurangabad Region, Aurangabad, through its
Regional Officer, MIDC, Railway Station,
Aurangabad.

....Respondents
(Orig. Plaintiffs)

.....

Mr Rahul R. Karpe, Advocate for the appellant
Ms Neha Kamble h/f Mr S. V. Adwant, Advocate for respondent No. 1
Mr Khaire h/f Mr S. S. Dande, Advocate for respondent No. 2

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CORAM : A. M. DHAVAL, J.

DATE OF RESERVING THE JUDGMENT : 12.12.2018
DATE OF PRONOUNCING THE JUDGMENT : 19.12.2018

JUDGMENT :-

1. This Second Appeal is preferred by defendant No. 1 against
whom ex-parte decree is passed directing him to execute registered

deed of assignment of the suit property in favour of the plaintiff and whose application for condonation of delay of 121 days was rejected by the first appellate Court.

2. Heard Shri. Rahul R. Karpe, learned counsel for the appellant, Ms Neha Kamble, learned advocate for respondent No. 1 and Mr Khaire, learned counsel for respondent No. 2. This appeal is admitted by formulating following substantial question of law.

Whether the first appellate Court erred in not following settled principles of law while rejecting the application for condonation of delay?

3. Sans unnecessary details, the essential facts are as under:

Respondent No. 1, a registered Partnership Firm filed a Spl. Civil Suit No. 22/2013 against the appellant herein and respondent No. 2 – MIDC, Waluj, contending that the appellant had agreed to transfer his leasehold rights in MIDC Plot No. K-129, Waluj, Aurangabad, adm. 2250 sq.mtrs. in his favour for Rs. 5,25,000/-. He had paid all the dues. Defendant No. 1 had sworn in affidavit on 18.11.2009 and undertaking on 29.12.2009 before the MIDC Officer. Since the transfer was not materialized, the suit came to be filed. Both the defendants were served with summonses but they did not file Written Statement. Respondent No. 1/Plaintiff led oral evidence. The ld. 3rd Civil Judge Sr. Divn., Aurangabad, decreed the suit on

05.03.2015 (around two years and two months from the date of institution).

4. Defendant No. 1 filed First Appeal along with application for condonation of delay (MARJI No. 239/2015) on 03.08.2015. It was his contention that, he was residing at Pune and though he had engaged a lawyer in the court at Aurangabad, he did not communicate the stages and about the disposal. The appellant's father a senior citizen aged about 78 years (retired IAS Officer) is totally dependant upon him. The appellant also met with an accident and hence he could not attend the court. When he received notice of caveat on 04.06.2015, he filed the appeal along with the request for condonation of delay of 121 days.

5. The said application was opposed by the plaintiff contending that the conduct of the appellant was deliberate and intentional so as to protract the litigation. Both the parties led evidence. The ld. First Appellate Court observed that, the appellant was coming to Aurangabad every week in connection with his business work. The ground about responsibility to take care of his father is not proved. The ld. Appellate Court has held that, there were no details about the dates of communications and there was no sufficient cause for condonation of delay. Hence, this appeal.

6. Mr. Karpe, learned counsel for the appellant submitted that, there should be pragmatic, liberal, justice oriented and non-pedantic approach while condoning the delay so that the matters can be decided on merits. The length of delay is not material. The cause shown should be sufficient. The appellant had shown sufficient cause and the delay should have been condoned. The delay is not huge. The property is actually worth Rs. 2.5 crores which is shown to have been agreed to be assigned for Rs. 5.25 lakhs.

7. Per contra, Ms Neha Kamble, learned counsel for respondent No. 1, has invited my attention to the fact that, the conduct of the appellant is very much material. Though duly served and appeared, he had not filed Written Statement. He was coming to Aurangabad but he was not making enquiry with his lawyer and was not attending the matter. The court cannot help such negligent litigant. She has placed reliance on Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy reported in 2013(12) SCC 649, Baswaraj and another Vs. Special Land Acquisition Officer reported in (2013) 14 SCC 81, Prem Singh Versus State of Haryana reported in (2013) 14 SCC 88, Shantilal babu Patel v. Ramakant Subrao Shetye reported in 2018 SCC OnLine Bom 1860 and The Superintending Archaeologist,

Aurangabad Vs. Jayraj S/o. Kamlakar Pande reported in 2018 (5) All.M.R. 185.

8. In the light of the arguments advanced, I answer the issue in the affirmative and hold that the delay should have been condoned subject to costs.

REASONS

9. The basic principle of natural justice is that no one shall be condemned unheard. There should be always endeavour of the court to see that the matter is decided on merits in presence of both the parties. Though the parties and the advocates are bound to take care of technicalities, it should be the endeavour of the court to see that the justice is delivered on merits rather than on technicalities. Of course, if the technicalities go to the root of the matter, those cannot be ignored and the court is not empowered to neglect them.

10. It is true that, in the present matter, the notice was served on appellant/orig. defendant No. 1. He is resident of Pune and the matter was pending in the court at Aurangabad. The plaintiff had engaged a lawyer.

11. A layman is not aware about the court procedure and about necessity of his appearance and about steps to be taken on a

particular day. Hence, he engages a lawyer and the lawyer when entrusted with a brief is expected to follow the norms of professional ethics and try to protect the interests of his clients, in relation to whom he occupies a position of trust. The interest and duties of a lawyer are explained in Kokkanda B. Poondacha and others Vs. K. D. Ganapathi and another reported in (2011) 12 SCC 600, which are as follows:

13. The duties of an advocate to the Court, the client, opponent and colleagues are enumerated in Chapter II of Part IV of the Bar Council of India Rules, 1975 (for short, "the Rules"). Rules 12, 13, 14 and 15 of Section II, Chapter II of Part IV of the Rules, which regulate the duty of an advocate to the client, read as under:

- "12. An advocate shall not ordinarily withdraw from engagements, once accepted, without sufficient cause and unless reasonable and sufficient notice is given to the client. Upon his withdrawal from a case, he shall refund such part of the fee as has not been earned.
13. An advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness, and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear as an advocate if he can retire without jeopardising his client's interests.
14. An advocate shall, at the commencement of his engagement and during the continuance thereof, make all such full and frank disclosures to his client relating to his connection with the parties and any interest in or about the controversy as are likely to affect his client's judgment in either engaging him or continuing the engagement.

15. It shall be the duty of an advocate fearlessly to uphold the interests of his client by all fair and honourable means without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence."
14. An analysis of the above reproduced Rules show that one of the most important duty imposed upon an advocate is to uphold the interest of the client fearlessly by all fair and honourable means. An advocate cannot ordinarily withdraw from engagement without sufficient cause and without giving reasonable and sufficient notice to the client.
12. There is no doubt that, the appellant should have been diligent. He should have filed Written Statement and he should have remained in touch with his advocate and should have attended the court as and when required by his advocate when the matter is likely to be reached up. The admission of the appellant that he was attending his official work in Aurangabad regularly, shows that there was some amount of negligence on his part. Nonetheless, it is the matter of fact that the suit was filed in respect of property of high stake. It is a plot of 2250 sq.mtrs. i.e. around 22500 sq.ft in Waluj MIDC, Aurangabad. I find substance in the contention of Mr Karpe, the learned counsel for the appellant that the value of the suit plot might be quite high.

13. In Esha Bhattacharjee (supra), the Apex Court after taking resume of several earlier judgment, laid down following guidelines.

15. From the aforesaid authorities the principles that can broadly be culled out are:

- i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
- ii) The terms “sufficient cause” should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.
- iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.
- 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.
- v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.
- vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.
- vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.
- 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.

- 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.
- 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.
- xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.
- xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.
- xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

. The apex Court added few more guidelines in para 16 of its judgment in Esha's case (supra).

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are: -

- a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.
- b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.
- c) Though no precise formula can be laid down regard being

had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

- d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters.

14. Here it is relevant to record some additional judgments. In *Lanka Venkateswarlu v. State of A.P.* reported in 2011 (4) Mh.L.J. 104, while dealing with condonation of delay in bringing the legal heirs on record, it is observed that, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason.

15. In *R. B. Ramlingam Versus R. B. Bhvaneswari* reported in (2009) 2 SCC 689, there was delay of 568 days in filing SLP. It was on account of time consumed in awaiting the decision of review petition. It was found that, pendency of review petition was not bar for filing SLP. It is held, test of 'sufficient cause' is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of Limitation has left the concept of "sufficient cause" delightfully undefined, thereby leaving

to the Court a well-intentioned discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the Court as such.

16. In the context of the facts of the present case, I may refer to the judgment in M. K. Prasad vs. P. Arumugam AIR 2001 SC 2497. In this case, the appeal was filed and the counsel did not appear after 1993 and the other defendant did not contest the claim of the respondent. The trial court decreed the suit ex-parte without any reasoned judgment on 05.03.1996. The appellant came to know about passing of the decree after receipt of notice of execution decree. There was a delay of 554 days in preferring appeal. It was condoned subject to costs of Rs. 5,0000/-. it was observed:

“9. Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant,. He should have been more vigilant but on his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the exparte decree, the Court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the Court in this case can be compensated by awarding appropriate and exemplary costs. In the interests of justice and under the peculiar circumstances of the case we set aside the order

impugned and condone the delay in filing the application for setting aside ex-parte decree.”

17. The appellant herein had not filed Written Statement. When the appellant had engaged advocate, it was his duty to appear & represent his client and safeguard his interest. If for any reason, his advocate was unable to appear either on account of not receiving instructions or his fees, the advocate must request the court and after giving registered notice, he should withdraw from the appearance. When the advocate is on record, it is the duty of the court to enquire why the defendant is not appearing and whether he had been informed by the advocate. The advocate cannot continue to be advocate on record and at the same time not attending the matter and not taking any steps in the matter. If the advocate has issued notice to the appellant and copy of the same with acknowledgement would have been filed in the court then the appellant would have no defence open. In that case, the appellant was bound to take immediate steps to contest the suit. The facts of this case indicate that the above referred Supreme Court judgment in M. K. Prasad's case is directly applicable. Before proceeding ex-parte or dismissing the matter for default, the court should always ask itself whether this is matter in which the absent party should be penalized with ex-parte hearing or dismissal for non-appearance or whether the party deserves a last chance of intimation of notice. If the matter comes

before the court only on few dates, the parties can be expected to be very diligent. It is also a matter of common sense that, the parties take public opinion as to how much time will be required in their matters to reach the stage of hearing and general public opinion is that, it takes long time for reaching the hearing. In the light of this background, particularly when a litigant is from outstation, his advocate as well as the court should be cautious to see that the principles of natural justice are followed and the client has been given warning that if he would not attend the matter, it would proceed in his absence. Since the advocate did not issue any notice of withdrawal of his appearance, the appellant could not attend the matter. He had no knowledge about the judgment and therefore there was delay. In similar circumstances, in M. K. Prasad's case (supra), the apex Court has condoned the delay. The 1st. First Appellate Court did not properly follow the principles on the question of delay condonation in such matters and arrived at a wrong conclusion. In the result, the appeal deserves to be allowed but considering the conduct of the appellant, exemplary costs and conditions should be imposed upon him. Hence, I answer the substantial question of law accordingly and pass the order as follows.

ORDER

- (i) The Second Appeal is allowed.

(ii) The order of learned 1st Appellate Court dt. 23.01.2018 in MARJI No. 239/2015 is set aside. The application is allowed subject to costs of Rs. 10,000/- payable to the respondent No.1/plaintiff. The appellant shall also file an undertaking that, henceforth he would personally look into the dates in the matter. He shall always remain in touch with his advocate on every date fixed in the matter.

(iii) Needless to state that, the observations made herein are only for the purpose of deciding the issues before this Court and shall not influence the first appellate Court or trial Court while deciding the other issues. The parties are directed to remain present before the first appellate Court on 15.01.2019. The first appellate Court shall decide the appeal expeditiously and within a period of three months from the date of receipt of record.

(iv) On request of the advocate for the appellant, it is directed that the statement made by counsel for respondent 'not to execute decree' shall continue till 15.01.2019.

[A. M. DHAVAL]
JUDGE

Punde