

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

917. SECOND APPEAL NO. 689 OF 2018
WITH
CA/8069/2018
IN
SA/689/2018

1. Naim Ahemad s/o Abdul Mannan
Age : 46 Yrs., Occ. : Business,
R/o : H.No. 244, Block No. 2,
Dharmabad, Tq. Dharmabad,
District : Nanded.
2. Mukhtar Ahemad s/o Abdul Mannan
Age : 44 Yrs., Occ. : Business,
R/o : H.No. 244, Block No. 2,
Dharmabad, Tq. Dharmabad,
District : Nanded.
3. Nisar Ahemad s/o Abdul Mannan
Age : 42 Yrs., Occ. : Business,
R/o : H.No. 244, Block No. 2,
Dharmabad, Tq. Dharmabad,
District : Nanded.

.... APPELLANTS/
[ORI. DEFENDANTS]

VERSUS

Maharunnisa w/o Abdul Mannan
Died – Thr. her L.Rs.

1. Shahnaz Begum w/o Gulam Mohammad
Age : 44 Yrs., Occ. Household,
R/o : Khusoro Nagar, Chunna Bhatti,

Nanded, Tq. & Dist. : Nanded.

2. Basheera w/o Sk. Raheman
Age : 36 Yrs., Occ. Household,
R/o : Mudkhed, Tq. Mudkhed,
Dist. : Nanded.
 3. Afroz w/o Sikandar Khan
Age : 34 Yrs., Occ. Household,
R/o : Dharmabad, Tq. Dharmabad,
Dist. : Nanded.
 4. Ishrat Begum w/o Mohd. Ayubkhan
Age : 33 Yrs., Occ. Business,
R/o : Nizamabad [A.P].
 5. Layeek Ahemad S/o Abdul Mannan
Age : 32 Yrs., Occ. Business,
R/o : Dharmabad, Tq. Dharmabad,
Dist. : Nanded.
 6. Soheli Ahemad S/o Abdul Mannan
Age : 31 Yrs., Occ. Business,
R/o : Dharmabad, Tq. Dharmabad,
Dist. : Nanded.
- RESPONDENTS/
[ORI. PLAINTIFFS]

.....
Mrs. M.A.Kulkarni, Advocate for appellants.
Mr. Rajendra Deshmukh, Advocate for Respts.
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CORAM : VL.ACHLIYA, J.

DATE OF JUDGMENT : 21/09/2018

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ORAL JUDGMENT :

1. Being aggrieved by the Order dated 17/04/2018 passed in Misc.RJE No. 21/2016 rejecting the application filed by appellant to condone the delay of 11 months in filing the appeal, the appellants – original defendants have preferred this second appeal.

2. By the Order dated 19/09/2018, the appeal came to be admitted on satisfaction that appeal raises following substantial question of law.

“ Whether the impugned order passed by the first appellate Court declining to condone the delay is sustainable in law ? ”

3. In view of the challenge raised in the appeal confines to legality of the order passed by the first appellate Court, which declined to condone the delay, it is not necessary to discuss the facts in detail. Deceased Maharunnisa w/o Abdul Mannan, the mother of present appellants as well as respondent Nos. 1 to 6 had filed R.C.S. No. 55/2012 as against her sons i.e. the present appellants for declaration of ownership as well as possession of suit property. During the pendency of Suit, original plaintiff i.e. mother of the appellants and respondent Nos. 1 to 6 expired. Respondent Nos. 1 to 6 are brought on record as legal heirs of deceased Maharunnisa i.e. original plaintiff. By the Judgment and Order dated 30/10/2015, the trial Court has decreed the Suit. By the Judgment delivered, deceased plaintiff i.e.

Maharunnisa w/o Abdul Mannan was declared as an owner of suit property and defendant Nos. 1 to 3 i.e. the present appellants are directed to vacate the suit property and deliver vacant possession of suit property to the L.Rs. of original plaintiff. Being aggrieved, the appellants have preferred first appeal before appellate Court along with application seeking condonation of 11 months delay in filing appeal. The delay was sought to be condoned on the ground that as the wife of appellant No. 1 was suffering from mental illness, the appellants could not file appeal within time as they were disturbed state of mind due to her illness. So also the appellants were adopting the remedy before the wrong forum by filing objection petition u/s 47 of C.P.C. before the executing Court. On rejection of petition as per the advice received in the matter, the appellants have preferred appeal along with application for condonation of 11 months delay caused in filing appeal. The first appellate Court has rejected the application by observing that no sufficient cause has been assigned to condone the delay. Being aggrieved, the appellants have preferred this appeal.

4. Mrs. M.A.Kulkarni, learned counsel for appellants assailed the impugned order with contention that the order passed is not legally sustainable for the reason that first appellate Court has failed to take into consideration the cause assigned to condone the delay. It is contended that while dealing with the application for condonation of

delay, the first appellate Court ignored the broad principles to be followed while dealing with application seeking condonation of delay. In this context, learned counsel has referred and relied upon the decision of Apex Court in the case of ***Collector, Land Acquisition, Anant Nag V/s Mst. Catiji reported in AIR 1987 SC 1353.***

5. On the other hand, Mr. Rajendra Deshmukh, learned counsel for respondents supported the impugned order with contention that order passed by the trial Court is reasoned order. He submits that the appeal has been filed after rejection of objection raised u/s 47 of C.P.C. and, therefore, the appellants can not take plea that they were prosecuting the remedy before the wrong forum so as to exclude the time in filing appeal. It is submitted that the order passed by the executing Court rejecting the application u/s 47 of C.P.C. has not been challenged. It is submitted that the reasons assigned to condone the delay are false, concocted and by way of after-thought. No documentary evidence has been produced to show that the wife of appellant No. 1 was suffering from mental illness which prevented the appellants to file appeal within time.

6. On due consideration of submissions advanced in the light of order passed by the Courts below, I am of the view the impugned order is not sustainable in law. While passing the order, the first appellate

Court has failed to take into account the settled principles of law in dealing with the application seeking condonation of delay. The Apex Court in the case of *Isha Bhattacharjee V/s Managing Committee of Raghunathpur Nafar Academy and others reported in (2013) 12 SCC 649* after taking survey of all the previous decisions on the aspect of condonation of delay, laid down the following broad principles to be followed while dealing with the application for condonation of delay.

- [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 encapsulate the conception of reasonableness and it can not be allowed a totally unfettered free play.
- [viii] There is a distinction between inordinate delay and a delay of short duration of 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 can not 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.

7. Considering the cause assigned in condoning the delay in the light of the principles quoted above, I am of the view the order passed by the first appellate Court is not legally sustainable as same is against

the settled principles of law. By and large the Apex Court has repeatedly held that while dealing with the application seeking condonation of delay, the Court must adopt a liberal, pragmatic, justice-oriented, non-pedantic approach. Substantial justice being paramount and pivotal consideration in dispensation of justice while dealing with the procedural matters, such as condonation of delay the Courts are not expected to be too technical in its approach to condone the delay. In the case in hand, the fact is not in dispute that the applicants had filed application u/s 47 of C.P.C. raising objection as to the execution of decree in view of the peculiar facts of the case that the decree has been passed against the appellants who are also legal representatives of original plaintiff beside the respondents. They were directed to hand over possession to L.Rs. of original plaintiff. On rejection of objection, as they were advised to file appeal, they have preferred appeal before first appellate Court. In filing the appeal, the delay of 11 months was caused. Therefore, the applicants had moved application seeking condonation of delay on the ground of mental illness of wife of petitioner No. 1 as well as prosecuting remedy by filing objection u/s 47 of C.P.C. Since the objection was rejected and found that they were prosecuting remedy before the wrong forum as legal advice, they filed appeal with application seeking condonation of delay. In that view, it can not be said that the delay caused in filing appeal was deliberate and intentional. No malafides can be attributed

to the appellants in filing the application after the prescribed period of limitation. In the facts and circumstances of the case, if delay is not condoned, there is every likelihood that serious prejudice may result to the applicants. On the contrary, if delay is condoned, no prejudice would cause to the respondents, as ultimately the appeal will be decided on its own merit. So also, prejudice caused to the respondents on account of delay caused in filing appeal can be compensated in terms of money.

8. In view of above, I am inclined to hold that the impugned order passed declining to condone the delay is not sustainable in law as same is against the settled principles of law and accordingly answer the issue in the negative.

9. In the result, the following order is passed.

ORDER

[i] Appeal is allowed with no order as to costs.

[ii] The impugned Order dated 17/04/2018 passed in Misc.RJE No. 21/2016 is set aside. The application filed by the appellants/applicants seeking condonation of delay is allowed. The delay in filing First Appeal is condoned subject to payment of cost of Rs. 15,000/- [Rupees Fifteen Thousand] to be deposited by appellants within three weeks from the date of this order in the first appellate Court.

- [iii] In the event the cost is deposited, the appellate Court is directed to register the appeal and decide the same as expeditiously as possible and preferably within six months from the date of first date of listing of appeal before the appellate Court.
- [iv] In case if the cost is not deposited within the stipulated period, the order condoning delay stands recalled.
- [v] On deposit of amount of cost, the respondents will be at liberty to withdraw the same.
- [vi] The parties are directed to appear before the first appellate Court on 10/10/2018.
- [vii] Interim order operating in the matter to continue for the further period of four weeks from the date of this order.
- [viii] Decree be drawn up accordingly.
- [ix] The appeal stands disposed of in above terms.
- [x] C.A. No. 8069 of 2018 stands disposed of in terms of disposal of appeal.

[V.L.ACHLIYA]
JUDGE

