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

SECOND APPEAL NO.812 OF 2018 WITH
CIVIL APPLICATION NO.12303 OF 2018

Datta s/o Dnyanoba Solav & anr. ... APPELLANTS

VERSUS

Suryakant s/o Palasaheb Choudhari ... RESPONDENT

.....
Shri V.A. Sarwade, Advocate holding for
Shri A.D. Khot, Advocate for appellants
.....

CORAM: A.M. DHAVALÉ, J.

DATED : 22nd October, 2018.

ORAL ORDER :

1. Heard learned counsel for the appellants. Regular Civil Suit No.316/2000 was filed by the respondent herein against the appellants for possession of encroached land and for mesne profits. The appellants herein filed written statement in the trial Court. The issues were framed. The appellants did not attend the matter. It is submitted that, their Advocate had cross-examined the plaintiff, but the defendants were not informed and, therefore, there was no evidence on the defendants' side. The suit came to be decreed on 28.2.2013 i.e. around 12 and half

years from the date of filing of the suit.

2. The appellants did not dispute that they were aware about this judgment and decree. They claimed that, they have given Vakalatnama to their Advocate for filing appeal. The learned Advocate submits that, the Advocate for the defendant misused the said Vakalatnama. He did not file any appeal, but he appeared in the execution proceedings. It was also not contested. The appellants were under belief that the First Appeal was filed. Thereafter, on 16.2.2018, i.e. almost after five years, the First Appeal came to be filed along with application for condonation of delay. The grounds for condonation of delay are as follows :

- (i) For lack of knowledge and intimation at the hands of the Advocate on the applicants and further consequential proceedings;
- (ii) Delay is not deliberate;
- (iii) The applicants are illiterate persons and were not aware about the legal consequences.

3. The plaintiff/ respondent, by filing reply, opposed the application, contending that the defendants/ appellants had appeared in execution proceedings on 11.8.2014 and they had knowledge about the judgment decree much prior; the delay was

intentional and deliberate. The learned first appellate Court recorded that there was no sufficient cause for explaining the inordinate delay of 4 years 10 months and 17 days. The appellants were aware about the judgment against them as they had appeared in the execution proceedings in 2014. hence, the application for condonation of delay was rejected.

4. Learned Advocate Shri Vinay Sarwade, holding for Shri A.D. Khot, learned Advocate for appellant submitted that, the Advocate of the appellants was hand-in-gloves with the other side and has given no intimation to the appellants. The Vakalatnama given to him for filing appeal was misused by him to appear in the execution proceedings. He did not file any appeal and kept the appellants in dark. The appellants are illiterate farmers and in the interest of justice, the matter should be heard on merits.

5. After carefully considering the arguments and the pleadings and orders on record, I find that, the appellants are grossly negligent. They had filed written statement in the trial Court and the suit came up for hearing after long period of 12 years. They were supposed to make enquiry with their advocate regularly. It is seen that, they did not appear in the Court to lead evidence and the suit almost proceeded ex parte and was decreed. Thereafter, they had intimation about the judgment and decree, they should have preferred appeal in time and should

have pursued the further progress in the matter. The application filed before the first appellate Court shows no allegations against the Advocate of the appellants except that he did not give intimation and also further consequential proceedings. The appellants have appeared in the execution proceedings. If there were really serious allegations against the Advocate, the appellants should have taken action against the Advocate, but no action has been taken against the Advocate. The first appeal was filed after a period of almost five years. The applicants cannot put entire blame on their Advocate. They should have made enquiry, if not every week, at least once in a year. If they are not making any enquiry for years together, there is gross negligence on their part. The illiteracy and lack of knowledge about the legal consequences cannot be the ground for condonation of huge delay.

6. The principles for condonation of delay are laid down by the Hon'ble Supreme Court in **Esha Bhattacharjee Vs. Managing Committee, Raghunathpur Nafar Academy and others** reported in **[(2013) 12 SCC 649]**. The relevant guidelines are as follows :

“21. From the aforesaid authorities, the principles that can broadly be culled out are :-

21.1 (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.

21.2 (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.

21.3 (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

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.

21.6 (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.

21.7 (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8 (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.

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 fact such a litigation.

21.11 (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.

21.12 (xii) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13 (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

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

22.1 (a) An application for condonation of delay should be drafted with careful concern and not in a haphazard 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.

22.2 (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.

22.3 (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.

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

7. In **Basawaraj Vs. Land Acquisition Officer,** reported in **[2013] 4 SCC 81**, the Hon'ble Supreme Court laid down following principles :-

“Sufficient cause is a cause when a defendant could not be blamed for his absence. It means party should not have acted in negligent manner. Unless satisfactory explanation is furnished, Court should not allow the application for condonation of delay. The Court has to examine whether mistake is bona fide or was merely a device to cover an ulterior purpose.”

8. In **P. Rameshchandra Rao Vs. State of Karnataka** reported in **[(2002) 4 SCC 578]**, it is held that “judicially engrafting principles of limitation amounts to legislating and would fly in the face of law laid down by the Constitution Bench in Abdul Rehman Antulay Vs. R.S. Nayak.”

9. In **Kumar Vs. Kamata ICU Bank** reported in **2013 (11) SCC 668**, it is laid down that bald statements with no reasons as to non-intimation cannot be sufficient cause. In this case, the High Court had condoned delay of 290 days and 785 days and though the said order was not directly challenged in appeal from the main order, the Apex Court held that the inordinate delay should not have been condoned.

10. In **Union of India & ors. Vs. Nripen Sarma,** reported in **2013 (4) SCC 57**, when the explanation given by the State for condonation of delay of 239 days in preferring the appeal was not found satisfactory, the delay was rightly not condoned by the High Court and the same was upheld by the Supreme Court.

11. When there is not even a whisper of allegations of collusion between the Advocate of the appellant and the other side i.e. the plaintiff. This ground cannot be considered for the first time in Second Appeal. The facts on record disclose that the order passed by the learned first appellate Court is according to the principles and precedents laid down in respect of condonation of delay. I do not find that the order is any way perverse or passed in ignorance of any evidence or by considering any inadmissible evidence. The appellants should have filed application under Order 9 Rule 13 of the Civil Procedure Code for setting aside the ex parte decree. That was not filed. In the appeal also there was inordinate delay. In such circumstances, a pure question of fact as to whether there is sufficient ground for condonation of delay or not cannot be interfered in this Appeal. Hence, as no substantial question of law is involved, the Second Appeal deserves to be dismissed in limine and the same is accordingly dismissed.

12. In view of dismissal of the Second Appeal, Civil Application No.12303/2018 does not survive and same is accordingly disposed of.

(A.M. DHAVALA)
JUDGE

fmp/