

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

**14 SECOND APPEAL NO. 729 OF 2018
WITH
CA/10925/2018 IN SA/729/2018**

The Municipal Council, Paithan,
Tq. Paithan, Dist. Aurangabad,
Through its Chief Officer,
Somnath S/o Bhagwanrao Jadhav.

... Appellants
(Orig. Defendant)

Versus

M/s Solid Waste Management
Institute of Maharashtra,
Through its Chairman/Managing Director,
Iaxman S/o Namdeo Mane.

... Respondent
(Orig. Plaintiff)

...
Mr. Yuvraj V. Kakade, Advocate for the Appellant.
Mr. A.D. Kasliwal, Advocate for the Respondent.

....

CORAM : V.L. ACHLIYA, J.

DATED : 18th SEPTEMBER, 2018

PER COURT:-

1. This Second Appeal is directed against the order dated 30.07.2018 passed in Civil M.A. No. 64/2018. By the impugned order, the first Appellate Court decline to condone the delay of 106 days in filing the appeal and rejected the application. Being aggrieved, the appellant has preferred this Second Appeal.

2. While admitting the appeal, the following substantial questions of law are framed:

[a] Whether the impugned order passed is legally sustainable in law.

[b] Whether the reasons and findings recorded by the first appellate court in refusing to condone the delay, are legal proper and sustainable in law.

3. Learned counsel representing the appellant assailed the reasons and findings recorded by the first appellate court with contention that the order passed is perverse and not sustainable in law. By referring the cause assigned for condoning the delay, the learned counsel submits that the first appellate court has totally ignored the reasons assigned for condoning the delay. It is contended that the reasons assigned in rejecting the application are totally perverse and not sustainable in law. So also the first appellate Court ignored the settle principles of law to be borne in mind while dealing with condonation of delay.

4. On the other hand, the learned counsel for the respondent supported the order passed by the first appellate court and submits that the reasons assigned to condone the delay cannot be termed as sufficient cause to condone the delay. He submits that only cause assigned to condone the delay is the transfer of Chief Officer of Municipal Council. He further submits that even before the trial court, the defendants failed to defend the case. Although, the trial court adjourned the case for more than one year to cross examine the witnesses for plaintiff the defendants and their advocate failed to appear and cross examine the witnesses. He further submits that in appeal, no evidence was adduced to support the cause assigned for condonation of delay.

5. The reasons mentioned in para 8 and 9 of the application seeking condonation of delay reads as under:-

"8. Being aggrieved and dissatisfied by the judgment and order passed by the learned trial court applicant approach to this Hon'ble Court by filing the regular civil appeal. But for filing the present appeal delay is caused. The trial court has passed the impugned judgment and decree on 26/09/2017. The then chief officer of applicant council transfer from the Municipal council Paithan to Municipal Council Kalamnuri and the present chief officer has resume duty by the order of the Maharashtra Arbitration Tribunal in the month of October, 2017. After joining the duty the present chief officer has come to the knowledge about the impugned judgment and decree passed by the trial court as the caveat petition has filed by the respondent on 27.11.2017. After the knowledge the further steps for filing the present appeal taken by the chief officer. The application for seeking certified copies of judgment and decree filed on 14.12.2017 and the same has received on 06.01.2018. After receipt of the same the necessary steps for filing the present first appeal is initiated but some time has consume to approach to this Hon'ble Court by filing present appeal. The applicant is a local body and for filing the appeal it is necessary to take the permission from the body and after the obtaining the necessary permission, applicant filed present appeal by challenging the judgment and order. The delay for filing the present appeal of 106 days is not intentional, deliberate on the parts of the applicant. The delay which is caused for filing present appeal needs to be condoned.

9. In view of the statements made herein above, applicant hopes to succeed in the same if delay of 106 days is not condoned in filing present appeal then the applicant would suffer irreparable loss and hardship on the contrary no hardship would caused to the respondent. The balance of convenience heavily tilts in favour of applicant."

6. The reasons recorded to reject the application by the first appellate court read as under:-

"5 At present total 106 days delay is caused for presenting the appeal. Here appellant is a Municipal Council who is a juridical person and decree is of huge amount of 72,00,000/- rupees. It is expected Municipal council is vigilant in respect of its right as the amount involved is a public money and reason of transfer of officer cannot be accepted at this stage. The applicant ought to have adduce oral evidence in support of his contention. Therefore according to me appellant/applicant has failed to made out sufficient reason caused for condonation of delay. Therefore I am not inclined to grant any relief. Hence I pass the following order.

ORDER

1) The application is hereby rejected."

7. I am of the view the reasons recorded by the first appellate court in refusing to condone the delay are not satisfactory and not sustainable in the law. While dealing with the application seeking condonation of delay, the first appellate court was expected to have confined its enquiry to satisfy as whether the sufficient cause has been assigned or not to condone the delay. The merit of the matter could not have been looked into while deciding the application seeking condonation of delay. Whether the appellant would succeed or not can be examined while deciding the appeal on merit and not at the stage of deciding the application seeking condonation of delay. The fact that the Chief Officer of the appellant Council was transferred and incumbent has taken the charge in the month of October, 2017 is not in dispute. In support of this contention, the copy of the order has been produced before the first appellate Court. It is

quite settled position in law that while dealing with the application seeking condonation of delay, the Court is expected to adopt a liberal and pragmatic approach. In my view, the cause assigned by the appellant seeking condonation of delay is sufficient to condone the delay of 106 days in filing the appeal. If the delay is condoned, no serious prejudice would cause to the respondent. On the contrary, if delay is not condoned, there is every likelihood that meritorious matter may be rejected for technical reasons.

8. The Apex Court in the case of ***Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and others*** reported in ***(2013) 12 Supreme Court Cases 649*** wherein the Apex Court after taking the survey of precedents of law on the issue of condonation of delay laid down the broad principles to be followed while dealing with an application for condonation of delay. The principles laid down are as under:-

- (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 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.
- (xiv) 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.

- (xv) 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.
- (xvi) 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.
- (xvii) 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.

9. Thus, considering the facts of the case in the light of the principles laid down in the case of *Esha Bhattacharjee* (supra), I am of the view the reasons and findings recorded by the first appellate Court to decline to condone the delay are not legally sustainable and the impugned order is liable to be set aside. So far as the prejudice caused to the respondent on account of delay can be compensated in terms of money. I am therefore inclined to record the findings to substantial questions (a) and (b) framed in the matter in negative. In the result, the appeal deserves to be allowed. Hence, the following order:-

ORDER

- [i] The appeal is allowed.

[ii] The impugned order dated 30.07.2018 passed below Exhibit 1 in Civil Misc. Application No.64/2018 (The Municipal Council, Paithan Vs. M/s Solid Waste Management) passed by the District Judge-6, Aurangabad is hereby set aside and the application seeking condonation of delay filed by the appellant is allowed subject to cost of Rs.25,000/- (Rupees Twenty Five Thousand) to be payable by the appellant to the respondent within two weeks from the date of this order.

[iii] On deposit of cost, the appeal be registered. In case, the appellant fails to comply with the order of payment/deposit of cost, the order of condonation of delay stands recalled.

[iv] In case, the cost is deposited and appeal be registered, the same be decided as expeditiously as possible and preferably within six months.

[v] In view of disposal of the appeal, the civil application no.10925/2018 stands disposed of.

[vi] Decree be drawn up accordingly.

[vii] All concerned to act upon the authenticated copy of the order.

(V.L. ACHLIYA)
JUDGE