

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

WRIT PETITION NO. 12931 OF 2017

Prakashchandra s/o Ratanlal Barjatia @
P. C. Badjatiya, Age 73 years, occup :
Retd., R/o – I-604, Rohan Nilay-1,
Aundh, Pune – 411 007

...Petitioner/
Orig.Resp.No.1

versus

1. Shri. Balasaheb s/o Maruti Ugale,
Age – 50 yrs., Occu. - Business,
R/o-Through Gold Star Electronics,
Near R. K. Petrol Pump, At post -
Kolhar (Bhagwati), Tq._ Rahata,
Dist. Ahmednagar
 2. Shri Sidhivinayak Sahakari Gruhanirman
Sanstha Maryadit, Savedi, Ahmednagar,
Dist. Ahmednagar
 3. Chairman,
Shri Sidhivinayak Sahakari Gruhanirman
Sanstha Maryadit, Savedi, Ahmednagar,
Dist. Ahmednagar
 4. Secretary,
Shri Sidhivinayak Sahakari Gruhanirman
Sanstha Maryadit, Savedi, Ahmednagar,
Dist. Ahmednagar
- .. Respondents/
Resp.No.1 orig
applicant,
Resps.no.2 to
4 orig. resps.

Mr Ajit M. Gholap, Advocate for petitioner
Mr K. J. Suryawanshi, Advocate for respondent no.1
Mr A. A. Nimbalkar, Advocate for respondents no. 2 to 4

CORAM : SUNIL P. DESHMUKH, J.
DATE : 16th October, 2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned
counsel for parties finally by consent.

2. Petitioner takes exception to order dated 21-09-2017 in miscellaneous application No. 14 of 2016 passed by co-operative appellate court, Aurangabad Bench, condoning delay of 12 years and 280 days in filing appeal by respondent no. 1 against judgment and award of co-operative court dated 30-04-2002 in dispute No. 74 of 1996.

3. The background in which challenge is sought to be posed is;

Petitioner had filed dispute bearing No. 74 of 1996 before the co-operative court, Ahmednagar pursuant to section 91 of the Maharashtra Co-operative Societies Act, 1960 against respondent no. 2 – Shri Sidhivinayak Sahgakari Gruhanirman Sanstha Maryadit and its chairman and secretary – respondents No. 3 and 4 respectively, staking claim to plot of land bearing No. B-10 of said society. The dispute had been allowed in favour of present petitioner under judgment and order dated 30-04-2002 passed by co-operative court.

No appeal had been preferred by respondent – society or its office bearers against aforesaid decision of co-operative court. However, respondent No. 1 filed dispute No. 544 of 2002 seeking injunction and declaration that the award in dispute No.74 of 1996 as cancelled and not binding on him claiming that he had become aware of award in dispute No. 74

of 1996 in July, 2002 and had immediately filed dispute No. 544 of 2002.

Dispute No. 544 of 2002 had been contested by present petitioner, taking objection to its maintainability contending that respondent No. 1 herein has no right to challenge award in earlier dispute no. 74 of 1996. After decision on 25-02-2015 in dispute No. 544 of 2002 dismissing the same as being not maintainable, respondent No. 1 had preferred two proceedings, viz; appeal No. 41 of 2015 against decision in dispute No. 544 of 2002 and another appeal was filed against award in dispute No. 74 of 1996, along with applications, one bearing No. 14 of 2015 for condonation of delay in preferring said appeal, and the other miscellaneous application bearing No. 35 of 2015 seeking leave to file appeal. Miscellaneous application No. 35 of 2016 had been granted by appellate court under order dated 27-01-2016. Said order had been challenged before this court in writ petition bearing no. 4492 of 2016 at the instance of present petitioner. The high court had, while dismissing said writ petition under its order dated 24-07-2017, observed thus;

" 6. Pursuant to the impugned order granting leave to appeal to respondent No.1, it be noted that the petitioner would be at liberty to contest the said proceedings on its merits, inclusive of the challenge to the delay caused by respondent no. 1.

In this context, all the contentions of the litigating sides are kept open. "

and thereafter said Miscellaneous application No. 14 of 2016 for condonation of delay has been allowed – the order impugned in present writ petition.

4. The appellate court appears to have considered that respondent No. 1 had not been a party to earlier dispute No. 74 of 1996 and that he had on becoming aware taken some steps and further that he is not an expert in law and had been guided by advocate's advice and it would not be proper to consider that delay had been intentional. Appellate court has further observed that it is not the case that by causing delay respondent No. 1 has been benefited or has lost interest in the subject-matter. Allowing application would not cause harm or prejudice to the petitioner and the case would be dealt with on merits. The court considered that, application for condonation of delay has to be liberally approached and as to whether there is sufficient cause. The case relied on, on behalf of the petitioner, *Balwant Sing vs Jagdish Singh* reported in *AIR 2010 SC 3043* had been found by appellate court to be based on different factual aspects. It has been considered that time spent in prosecution of wrong remedy would be required to be excluded as the proceedings are filed and prosecuted pursuant to

advocate's advice and under bonafide belief. The court has considered that similar situation had been referred to and dealt with in the case, *Mohan Khemlo Bandekar vs. Additional Collector-II, Panaji*, reported in *2016 (1) All MR 892* which was relied on by respondent No.1. It further appears to have been considered that while the matter had been before high court, the high court had not set aside order granting leave to appeal and grounds in said application as well as in application for delay condonation were the same and considered it appropriate to allow application for condonation of delay of about 12 years and 280 days.

5. Learned counsel Mr Gholap appearing for petitioner vehemently submits that no relief had been claimed against respondent No. 1 in dispute No. 74 of 1996 filed by petitioner. The same had been instituted against present respondents No. 2 to 4 seeking declaration and injunction and it was not necessary to implead respondent No. 1 herein as party to said dispute presumably because action under said dispute had been solicited against respondents No. 2 to 4 in respect of land plot bearing no. B-10, his claim for which had been pending from a long time. According to learned counsel, there had been no action undertaken by respondent No. 1 to get himself impleaded in said dispute despite being aware of its pendency.

6. Learned counsel Mr Gholap lays strong emphasis on that respondent No. 1 had simply claimed that he became aware of award in dispute No. 74 of 1996 in July, 2002 without divulging source and mode of knowledge, had filed appeal after period of limitation for filing an appeal against the award having expired, and the award had become final.

7. He submits that dispute No. 544 of 2002 had been filed by respondent no. 1 for injunction and declaration that award in dispute No. 74 of 1996 as cancelled and not binding on him. In the written statement, petitioner had taken specific objection to maintainability of said subsequent dispute No. 544 of 2002 and had claimed that respondent No. 1 had no right to challenge award in earlier dispute by filing fresh dispute.

8. It is, thus, contended by Mr Gholap that on such objection being taken, respondent No. 1 had become aware about non maintainability of his said subsequent dispute and the same not having been withdrawn immediately and in fact had persisted with its prosecution. It was a conscious and intentional prosecution avoiding withdrawal of said dispute with a view to bide time, exhausting 13 years precious time of the court. He further submits that persistence to go on with dispute No. 544 of 2002 is also revealed from the conduct of

respondent No. 1 as he had challenged dismissal of said dispute by filing appeal No. 41 of 2015 contending that such a dismissal is not proper and legal. He submits that neither the persistence nor the prosecution had been bonafide. He submits that while maintainability of said dispute had been objected to and pointed out by petitioner, persistence by respondent no. 1 to go on with the same would not at all be bonafide.

9. He submits that delay is huge of 13 years and there are no plausible and tangible reasons therefor. Respondent No. 1 would not be able to have benefit of exclusion of period of prosecution of dispute No. 544 of 2002, for, its prosecution being not bonafide as referred to above. He submits that such a prosecution does not even have trappings of it being bonafide.

10. For aforesaid purpose, learned counsel Mr Gholap refers to and relies on a decision in the case of *Ramji Pandey vs Swaran Kali*, reported in *AIR 2001 SC 489*.

In said case while a woman litigant had been fighting for her rights by initiating legal proceedings, a challenge to order in her favour had been posed before high court wherein it had

been immediately pointed out by her that having regard to claims, pecuniary jurisdiction would lie with district court yet there had been laxity and indolence to take note of the same and as such, it had been considered that benefit of section 14 of the Limitation Act would hardly be available.

11. It appears to be case of respondent no. 1 that he had no cause to appear in dispute No. 74 of 1996 since he had not been a party to the same nor any notice was issued to him. No relief had been claimed against him. Upon decision in said dispute, since the decision would impinge on his property, he was required to take action to assert right to property. According to advice, he had filed dispute No. 544 of 2002. Although petitioner had taken objection to its maintainability, his objection had been sustained only upon trial in the matter.

12. Respondent No. 1 has been seeking a remedy against a decision which would have affected the object of his rights. He went by the form of remedy suggested and advised to him. It is not that he is expert in law. Jurisprudentially as well, it is legitimately expected that person aggrieved is to have a remedy for redressal. In the circumstances, objection to maintainability of dispute No. 544 of 2002 not being heeded would not be decisive on lack of bonafides in prosecution of

remedy advised to respondent No. 1, particularly in the facts and circumstances of present case.

13. It may also have to be referred to that observations of supreme court relied on, on behalf of petitioner, emerge in the context of facts of that case. In present matter, facts are distinct and wide apart from those in cited case. Capital may not be made of such an objection relying on decision of the supreme court rendered in different factual context.

14. In cited case a forum having pecuniary jurisdiction had already been available and despite pointing out the same and objection to maintainability of appeal on that count before high court, the appellants therein had been procrastinating the matter and their said inaction to heed objection was not bonafide. In cited case, provisions were clear. In present matter, however, the situation cannot be said to be as clear as in cited case until it was so decided. Analogy from said judgment, therefore, can hardly be drawn and applied to present matter.

15. In present matter, procrastination is hardly attributable to respondent No.1 or for that matter it has given him any benefit in the process. Moreover, respondent No. 1 was guided

by legal advice coming his way. The subject-matter involved is a landed property. In the circumstances, decision relied on, on behalf of petitioner, which was given in peculiar facts of that case would not preclude condonation of delay and in the facts and circumstances prosecution of of appeal No. 544 of 2002 by respondent No. 1 would not be termed as not bonafide.

16. Besides, in present matter it appears that respondent no. 1 despite having interest in the property, had not been made party to dispute No. 74 of 1996.

17. It is also to be borne in mind that a liberal approach has to be adopted in the matter of condonation of delay. In this context, it would be worthwhile and useful to go by guidelines given by the supreme court in the case of *Collector, Land Acquisition, Anantnag vs. Mast. Katiji*, reported in *AIR 1987 SC 1553* particularly in paragraph 3 thereunder reading, thus :

" " 3. The legislature has conferred the power to condone delay by enacting S. 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in mattes instituted in this Court. But the message doe sot appear to have percolated down to all the other Courts in the hierarchy.

And such a liberal approach is adopted on principle as it is realized that:-

(1) Ordinarily a litigant does not stand to benefit by lodging an appeal late;

(2) Refusing to condone delay can result in meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned the highest that can happen is that cause would be decided on merits after hearing the parties.

(3) "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hours delay, every seconds delay? The doctrine must be applied in a rational common sense pragmatic manner.

(4) When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non deliberate delay.

(5) There was no presumption that delay is occasioned deliberately, or on account culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay in fact he runs a serious risk.

(6) It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. "

18. The supreme court in the case of *Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and others* reported in (2013) 12 SCC 649, has also given guidelines for consideration of delay condonation.

19. Though learned counsel has made remarkable and studied efforts to persuade this court to indulge into request under the writ petition, it is difficult to accede to the request in facts and circumstances, having regard to aforesaid decisions and in the larger interest of justice. In view of aforesaid, this court, therefore, is disinclined to exercise its discretionary powers in favour of petitioner.

20. In the circumstances, writ petition is dismissed.

21. Rule is discharged.

SUNIL P. DESHMUKH
JUDGE

pnd/-