

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO.4883 OF 2018

Mr. T. Malla Reddy	]	Petitioner
Vs.		
M/s. Sushila Constructions	]	
A partnership Firm, Registered under The	]	
Indian Partnership Act, 1932, through	]	
Its Director/Partner	]	
Smt. Sushiladevi Shriprakash Malpani	]	Respondent

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Mr. Ram U. Singh i/b Deepak Pathak, for Petitioner.
 Mr. Ashish Dubey, for Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 12TH JULY, 2018.

P.C:

Heard Mr. Singh, learned Counsel for the petitioner and Mr. Dubey, learned Counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and decree dated 5th January, 2016 passed by the learned Judge, Court Room No.40 of the Court of Small Causes at Mumbai (Bandra Branch) in L.E. Suit No.32/41 of 2011 as also the judgment and order dated 29th January, 2018 passed by the Appellate Bench of the Court of Small Causes at Mumbai in MARJI Application No.65 of 2017. By order dated 5th January, 2016, the learned trial Judge decreed the suit and directed the petitioner, hereinafter referred to as 'defendant' to hand over vacant and peaceful possession of Room admeasuring 160 square feet situate

on the ground floor, B Wing, Shivdham Building, Satya Nagar, Saibaba Road, Borivali (West), Mumbai – 400 092 (for short 'suit premises') to the respondent/plaintiff within two months from the date of the order. Aggrieved by this decision, defendant instituted appeal before the Appellate Bench of the Court of Small Causes at Mumbai. As there was delay of one year, five months and twelve days in filing the appeal, the defendant took out MARJI Application No.65 of 2017 for condonation of delay. By order dated 29th January, 2018, the Appellate Court rejected the application. It is against the order dated 29th January, 2018, defendant has instituted the present Petition.

3. In support of this Petition, Mr. Singh relied upon the following decisions:

- [1] **Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others, AIR 1987 Supreme Court 1353** and in particular paragraph 3 thereof, where the Apex Court after observing that the Courts have to adopt liberal approach in deciding the application for condonation of delay, laid down principles to be followed in deciding the application for condonation of delay.
- [2] **G. Ramegowda, Major etc Vs. The Special Land Acquisition Officer, Bangalore, AIR 1988 Supreme Court 897** and in particular paragraph 7 thereof. In paragraph 7, the Apex Court observed that expression 'sufficient cause' in section 5 must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay. The Apex Court also

referred to the decision of Collector, Land Acquisition, Anantnag and another (supra).

4. On the other hand, Mr. Dubey supported the impugned order, He relied on the decision of the Apex Court in **Balwant Singh Vs. Jagdish Singh & Others, 2010 (8) SCC 685** to contend that while considering the application for condonation of delay, the Courts have to adopt liberal approach, none the less, the applicant must make out a sufficient cause for condoning delay. He submitted that in the present case, the Appellate Court held that the defendant has not made out a sufficient cause for condoning the delay. He has invited my attention to paragraphs 5 and 6 of the impugned order.

5. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. The respondent/plaintiff had instituted suit against the defendant, *inter alia*, contending that the plaintiff/Firm carries on business of construction and had constructed building where suit premises is situate. At the time of the said construction, the defendant was working with the plaintiff as a labour contractor. On the request of the defendant, the plaintiff had allowed the defendant to use and occupy the suit premises without any charge for temporary residence. Arrangement of temporary residence was made till completion of entire building. The defendant had also executed writing in which he had admitted the said fact. Construction of building is completed and the plaintiff intended to convey the building along with appurtenant land to the society. The plaintiff, therefore, called upon the defendant to vacate and hand over the suit premises to the plaintiff. As the defendant has failed and neglected to do the same, the plaintiff issued notices dated 2nd December, 2010 and 18th February, 2011. Despite service of these notices, the defendant failed and neglected to hand over possession.

6. The defendant filed written statement Exhibit 11 resisting the suit. In paragraph 5, the learned trial Judge noted the facts which are admitted by the parties. In paragraph 6, the learned trial Judge observed that the defendant admitted that the plaintiff is the owner of the suit property and that he was working with the plaintiff as a labour contractor. He also admitted that the plaintiff allotted him the suit premises to occupy it. He, however, claimed that he was paying certain amount to the plaintiff and thus, he is not a gratuitous licensee. The learned trial Judge also noted that in support of plaintiff's case, Sushiladevi, P.W.1 was examined. The defendant did not cross-examine the plaintiff's witness and evidence of P.W.1 remained unchallenged. The plaintiff, therefore, established its case. The defendant is occupying the suit premises as a gratuitous licensee. Though defendant claimed that he had paid certain amount to the plaintiff, no evidence was adduced to prove the said fact. The learned trial Judge, therefore, observed that in the absence of any evidence to that effect, adverse inference requires to be drawn that there was no contract of tenancy between the parties. After considering the evidence on record, the learned trial Judge held that the defendant was inducted as a gratuitous licensee and the licence was duly revoked by notice dated 18th February, 2011 Exhibit 18.

7. Aggrieved by this decision, the defendant preferred an appeal. As there was delay of one year, five months and five days i.e 545 days in filing the appeal, he took out MARJI Application. In support of MARJI Application, he filed affidavit. In paragraph 3, the defendant contended that the delay in filing the appeal is due to conduct of the previous Advocate who failed to intimate him status of the suit before the trial Court. In paragraph 4, it is asserted that his Advocate was not able to attend the trial and also for cross-examination of the plaintiff's witness. He was totally dependent upon his previous Advocate for the matter and his Advocate did not intimate progress of the suit. In

paragraph 5, it is asserted that his Advocate failed to appear and plead his case before the Court. The defendant was not properly defended before the trial Court. In paragraph 7, it is contended that due to lack of knowledge of legal process, he was unable to file appeal in time. After contacting the present Advocate, he realized that decree was passed against him by the trial Court. His present Advocate informed him about the delay in filing the appeal, he immediately instructed him to file the appeal with condonation of delay application. In the process, there is delay of one year, five months and 5 days i.e 545 days in filing the appeal.

8. In paragraph 5, the Appellate Court noted that the suit was decreed on 5th January, 2016. The defendant filed MARJI application on 18th July, 2017. The defendant contended that on 22nd April, 2017, notice of execution application was served on him. On 17th July, 2017, the defendant along with his Advocate remained present before the trial Court but failed to file reply till 3rd October, 2017 and accordingly the executing Court issued warrant of possession against the defendant. Thus, in spite of having knowledge of passing of decree dated 5th January, 2016 on 22nd April, 2017 and even after remaining present in execution proceedings on 17th July, 2017 and 10th August, 2017, the defendant has not taken effective steps. The Appellate Court, therefore, came to the conclusion that no sufficient cause is made out by the defendant.

9. During the course of hearing, suggestion was given to Mr. Singh that if the defendant is ready to hand over possession of the suit premises to the plaintiff within stipulated time, the Court will consider setting aside ex-parte decree passed by the trial Court and directing the plaintiff not to create third party interest and part with possession and that he will abide by the outcome of the suit. At the request of Mr. Singh, hearing of this Petition was

deferred till today. On instructions of his client, Mr. Singh expresses inability to accept the suggestion given to him.

10. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. I have already indicated the reasons recorded by the trial Court while decreeing the suit. The learned trial Judge after considering the evidence on record has recorded a categoric finding that the defendant is a gratuitous licensee. The defendant has not established transaction of tenancy as also payment of any amount to the plaintiff. In fact, the defendant did not cross-examine the plaintiff's witness and evidence of plaintiff's witness P.W.1 remained unchallenged. Having regard to the findings recorded by the learned trial Judge and also having regard to the fact that there is inordinate delay of 545 days in filing the appeal, I do not find that the Appellate Court committed any error in rejecting the MARJI application on the ground that no sufficient cause is made out.

11. Mr. Singh relied on the decision of **Collector, Land Acquisition, Anantnag and another** (supra). As against this, Mr. Dubey relied on the decision of **Balwant Singh** (supra). In the present case, the Appellate Court has recorded a categoric finding that no sufficient cause is made out for condoning delay. It is settled principle of law that while considering the application for condonation of delay, the Courts have to adopt liberal approach. At the same time, in the present case, fact cannot be lost sight of that the defendant has alleged negligence of his Advocate.

12. In the case of **Salil Dutta Vs. T.M. & M.C. Private Ltd. (1993) 2 Supreme Court Cases 185**, the Apex Court in paragraph 8 has observed thus;

“The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e the party who engaged him.

It is true that in certain situations, the court may, in the interest of justice, set aside a dismissal order or an ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief”.

13. In the present case, except alleging negligence of previous Advocate, no other ground for condonation of delay is made out. It is very easy to blame earlier Advocate. However, the petitioner has not substantiated the negligence of previous Advocate. The petitioner is not an innocent litigant. The petitioner has not brought on record any material to show that despite he being in contact with his previous Advocate, the concerned Advocate failed to defend him.

14. In the light of the above discussion, Petition fails and the same is dismissed.

[R.G. KETKAR, J.]