

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.594 OF 2016 with

CIVIL APPLICATION NO.993 OF 2015

(for stay)

1. Arvind Yeshwant Kulkarni

2. Smt Parmila Yeshwant Kulkarni

The Appellants

(Orig.Deft.nos.1 & 2)

VS

1. Vinay Madhukar Kulkarni

2. Nalini Shivratna Kulkarni

3. Sunita Sharad Kulkarni

4. Smita Santosh Kulkarni

5. Madhukar Yeshwant Kulkarni

through his legal heirs

5A. Alka Madhukar Kulkarni

5B. Snehal Sanjeev Kulkarni

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The Respondents

(Respt no.1 Orig.Plffs &

Respt no.2 to 5B Orig.Deft)

Mr.A.Y.Sakhare Sr.Advocate with
Mr.Drupad Patil and Mr.R.M.Nakhwa
I/b Mr.Vasant Dhavan for Appellants

Mr.A.V.Anturkar Sr.Advocate with
Mr.Nagesh Y.Chawan for Respondent
nos.1 and 5 (A) and 5 (B)

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CORAM: A.M.DHAVALÉ, J

DATE: 8TH OCTOBER 2018

ORAL JUDGMENT

1. Heard learned Advocates for both the parties.

2. Following substantial questions of law has been framed :

(a) Whether the Ist Appellate Court erred in rejecting the application for delay by not following the established principles of law with regard to condonation of delay ?

3. Considering the narrow controversy involved, the Second Appeal is taken up for Final hearing with consent of the parties.

4. The facts relevant for deciding the appeal, may be stated as follows :

5. Arvind the Appellant, No.1 and Madhukar Respondent no. 5 were real brothers. Appellant no.2 is their sister. Respondent nos. 2 to 4 are cousins of the plaintiff. Respondent no.(1) Vinay who is son of respondent no.5 had filed Regular Civil Suit No.155 of 2007 in the Court of Civil Judge, Senior Division, Islampur against the appellants (his uncle and aunt) and cousins for a perpetual injunction not to create obstruction in his possession and not to create third party interest. The subject matter of the suit is one agricultural land admeasuring 3 hectares 74 ares and one

house property being city survey no.3259 admeasuring 120.4 sq meters situate at Uran Islampur, Taluka Walwa District Sangli. The said properties were belonging to the plaintiff's grand-father Ramchandra. He claimed that Ramchandra executed a Will and he bequethed the suit properties to him. Ramchandra died on 6.3.2006 and thereafter, all the legal heirs got knowledge about his Will which was not challenged by defendant nos.1 to 5. Thereafter, the plaintiffs was enjoying possession of the suit house. Defendant nos.1 to 5 though aware about the Will took advantage of the illness of defendant no.6, obtained his signatures and made attempts to make encroachment in the suit properties. Defendant nos.1 to 5 on the basis of the entries made in the government records were trying to dispose of the suit properties. Hence, the Suit.

6. Defendant nos.1 to 5 filed a detailed written statement on 24.4.2007 and strongly resisted the Suit raising several defences. The main defence is denial of the Will in favour of the plaintiffs. Defendant no.6, who is father of the plaintiffs filed a consenting written statement. The issues were framed on

15.10.2007. Thereafter, the plaintiff led his evidence on 18.2.2009 and examined his witness on 27.10.2009. The defendants had engaged three Advocates but, they have not cross-examined the plaintiffs and his witnesses. The learned trial Judge recorded that there was no cross-examination. As there was no challenge to the evidence of the plaintiff, the Suit came to be decreed on 23.3.2010. Defendant no.1 is the appellant no.1 residing at Andheri, Mumbai which is far away from the place of the Court. Defendant no.2 is Smt Pramila sister of defendant no.1. She is residing in same town and the evidence shows that she is residing near the Court premises. The appellants claimed that they came to know about the Judgment and Decree only in December 2010. They obtained certified copies of the relevant documents and filed First Appeal along with application for condonation of delay. The application was for condonation of delay of 10 months.

The application shows the following grounds :

“ The appellant no.1 was old-aged and was not keeping good health. He did not receive information about the date fixed by the Court and therefore, could not properly attend the matter. Appellant no.1 was also illiterate lady.”

Other challenges are on the merits of the case. The appellants produced a certificate showing that appellant no.1 was suffering from enlarged prostatic hyperplasia since 2004 and was under treatment of Dr.Pramod Chaudhari M.S.M.Ch.Exhibit 68. The original plaintiff as respondent no.1 in

the appeal challenged the same by his reply Exhibit 17.”

7. The learned Ist Appellate Court decided to record the evidence and the appellants have examined their Power of attorney Mr.Bhushan Shah residing at Islampur and one attendant serving in the hospital of Dr.Pramod Chaudhari to prove the medical certificates. The respondents did not examine any witness.

8. Mr.Sakhare learned senior Advocate appearing for the appellants argued that the appellant no.1 is aged 75 years and residing at Mumbai while, appellant no.2 is aged 80 years residing at Islampur. They are suffering ill-health due to old age, they were not informed about the dates fixed in the Courts and therefore, they could not attend the matter. In the matter of condonation of delay, a legal and pragmatic approach should have been shown and the delay should have been condoned. The interest of the appellants in properties worth lakhs of rupees is involved. The Advocate for the appellants in trial Court have not cross-examined the witnesses nor advanced any arguments nor given any intimation to the appellants hence, there was a delay and it should have been liberally construed in the interest of justice.

9. Per contra, Mr.Anturkar learned Senior Advocate appearing for the respondents submitted, that this is a ghost litigation and the appellants have sold their rights to their power of attorney Mrs.Shobha Shah who has led evidence. The appellants were not personally examined. The plaintiff has filed separate suits against Mrs.Shobha Shah for partition in which the plaintiffs have also sold his rights to his wife and daughters. The main contesting parties are not before the Court. Mrs.Shah has also filed a partition Suit. Considering these facts, the appellants have no right to pursue the litigation. He further argued that the contention of the appellants that the appellant no.1 was illiterate is a blatant lie. She was a teacher and was residing 50 meters away from the Court premises. As far as appellant no.1 is concerned, the application was silent about the name of the doctor. The doctor was not examined and the certificates given on different dates are identical. It raises a suspicion that several certificates were obtained and dates were filled up by the and lateron by the appellant no.1 himself. The appellant no.1 was a Deputy Commissioner of Municipal Corporation, Mumbai and he should have been diligent in prosecuting the appeal. Both parties have

relied on a number of Judgments which will be considered in due course.

10. Mr.Anturkar learned Senior advocate appearing for the respondents submitted that the respondents in First Appeal had filed affidavit of the clerk of Advocate to show that certified copies were collected by the Advocate on 26.1.2010. In the first place, the trial Court had decided to record the evidence and therefore, without obtaining permission, such an affidavit could not have been filed and could not have been considered.

11. The Ist Appellate Court after recording the evidence and submissions in a cryptic manner, by an order dated 29.4.2014 gave reasons for rejection of the application which are as follows :

“If the application is perused, then it would appear that the applicants have stated that they came to know about the passing of the impugned judgment and decree in the month of December, 2010. No particulars are given from whom they learnt about the passing of decree. Apart from it, from the record the applicants appears to have received the certified copy of the judgment and decree on 28.12.2010. However, the appeal came to be filed on 25.2.2011 i.e. practically after two months. The medical certificate produced on record in support of the application is dated 21.3.2011. Thus, the medical certificate appears to have been obtained after filing of the application. Even it appears that the applicants failed to contest the suit before

the trial Court. Considering the above facts and circumstances, I am not inclined to condone the delay. In the result, I pass the following order :

ORDER

The application is rejected.

Dt.29.4.2014

S/d
District Judge-1, Islampur

12. It may be stated that the plaintiff is an advocate practicing at Islampur and delay of defendant nos.1 and 2 was of 10 months and 6 days.

13. I agree with the learned Senior advocate for the appellants that one of the appellants should have himself stepped into the witness box to lead evidence. The Power of Attorney holder cannot speak about the knowledge of the appellants.

14. Mr.Anturkar learned senior advocate appearing for the respondents rightly relied on Janki Vashdeo Bhojwani vs IndusInd Bank Ltd (2005) 2 Supreme Court cases 217 to submit that a power of attorney cannot lead evidence on behalf of the executant. He can only depose about the facts known to his

personal knowledge.

15. The arguments advanced disclose that the appellant have sold different properties to Shobha Shah and not the suit properties. The appellants have therefore, very much interest in the matter and it is not a ghost litigation as argued. Hence this point is given up.

16. As held in **Bhagwanti vs Damodar Agrawal 1990 Mh.L.J. 1097** when a medical certificate issued by a registered medical practitioner is produced in application for condonation of delay it can be directly exhibited without examining doctor. Both the appellants are old persons aged about 75 and appellant no.1 is admittedly residing at Andheri, Mumbai and there is material to show that he was suffering from ill-health and was under treatment. As far as identical medical certificates is concerned, one and same doctor is treating the appellant no.1 and the illness is also same. Therefore, separate identical certificates given do not raise any doubt.

17. However, the most material fact is failure in performance of duties by Advocate for the appellant in the Court at Islampur. The appellants had filed a written statement and were contesting the Suit. However, the appellant no.1 is residing at Mumbai and it is not expected that he would go to Islampur on each and every date and it was for the Advocate to inform the appellant no.1 when his presence would be required in Court. A judicial notice can be taken of the fact that normally, Suits require a long time for reaching the stage of hearing. This Suit has reached the stage of hearing within two years and the appellant no.1 might not have assumed that the Suit would reach the stage of hearing so early. It was for the Advocate appearing for the appellant to give him intimation and if the appellants were not responding, he should have withdrawn his appearance after issuing a registered notice. It is reported that the appellant had engaged three Advocates. But, none of them has followed this procedure. When the Advocate files a vakalatnama, it is a bounden duty to perform the obligations of an Advocate.

18. Mr.Sakhare learned senior advocate appearing for the

appellants has relied on following judgments :

(i) **Yuvraj Vithu Sutar vs Dinkar Lahu Sutar 2012 (2) MH.L.J. 174** wherein it is held that in matters of condonation of delay, a highly pedantic approach should be eschewed and the approach which furthers the cause of substantial justice should be adopted. It is also a trite that the party should be allowed to prosecute its remedy on merits rather than being thrown out on technicalities. In my view, in the facts and circumstances of the case, the learned Ad-hoc District Judge Kolhapur has taken a highly technical view of the matter in rejecting the application for condonation of delay of 6 days.”.

(ii) Besides, he also relied on **State of Nagaland vs Lipok AG (2005) 3 Supreme Court Cases 752** in which it is held that expression sufficient cause should be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The observations were in the context of delay on the part of government officials on account of red-tapism. There was a delay of only 57 days.

19. Mr.Anturkar learned senior Advocate for the respondents relied on **Maharashtra State Warehousing Corporation vs Sudhadevi 2018 (5) Mh.L.J. 163** wherein, in para 23 it is held thus:

“3. The Legislature has conferred the power to condone delay by enacting Section 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 matters instituted in this Court.”

20. **Vasant Vithal Gawand vs Shantaram Tukaram Gawand 2016 (2) ALL MR 235.** In this case, there was delay of one year and two months which was condoned subject to costs of Rs.15,000/-. It was contended by the Advocate for the appellant who appeared in the trial court did not inform the decision in the suit. Relying on **Basawaraj vs Special Land Acquisition Officer 2013 (5)ALL MR 934** it was held that when the applicant was negligent or lacked in bonafides or not acted diligently or was inactive, there cannot be justifiable ground to condone the delay. Delay can be condoned only if there is sufficient ground.

21. **Jahed Naziruddin s/o Zaheeruddin & ors vs State of Maharashtra 2014 (2) ALL MR 58.** In this case, there was a delay of 1 year and 7 months. Five medical certificates were

produced. However, authenticity of those certificates was doubted, as all of them were in same format with only change in dates. Correct and true facts not disclosed before appellate authority. This Court (Aurangabad Bench) declined to condone the delay.

22. I rely on Isha Bhattacharjee vs Managing committee of Raghunathpur Nafar Academy (2013) 12 SCC 649. In this case, the apex Court took resume of its several earlier judgments in the matters of condonation of delay and laid down the guidelines as follows:

21. (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 bonafides 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 declineation.

(ix) The conduct, behaviour and attitude of a party relating to its in-action 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 representating 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 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.

(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 achieved in a non-chalant manner requires to be curbed, of course within legal parameters.

23. It is laid down that there should be difference between small delay and in-ordinate delay. Different principles will apply in such matters. The Court has to adopt pragmatic justice oriented approach. There cannot be a condonation of delay with sufficient cause. Once cause is shown, the court should be liberal to advance the cause of justice.

24. I also rely on **M.K.Prasad vs.P.Arumugam AIR 2001 SC 2497** wherein it is held in para 9 : The counsel for the appellant did not appear after 17.9.1993 and other defendants did not contest the claim of the respondents. The trial Court decreed the suit ex-parte without any reasoned judgment on 5.3.1996. The appellant came to know about passing of the decree after receipt of notice of execution of decree. There was a delay of 554 days in preferring appeal. It was condoned subject to costs of Rs.50000/-. It was observed :

“9. Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant,. He should have been more vigilant but on his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the ex-parte decree, the Court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the respondent for the delay on account of the appellant being absent from the Court in this case can be compensated by awarding appropriate and exemplary costs. In the interests of justice and under the peculiar circumstances of the case we set aside the order impugned and condone the delay in filing the application for setting aside ex-parte decree.”

This judgment is squarely applicable to the facts of this case.

25. In this case, Advocates for the appellants have failed to perform their duties in the trial Court. Then, it was the duty of the trial Court to call upon the Advocates to either perform their duty or to intimate the litigant and withdraw his appearance. But, the same has not been done. I find no plausible reason as to why the appellant would remain absent in the matter, when they were contesting the matter by filing the written statement and by engaging three Advocates.

26. They did not inform the appellant which can be inferred as there can be no plausible explanation for their absence nor the Advocates were asked to issue intimation to their client by registered post A.D. and thereafter withdrew from the suit. I find that there was sufficient cause for condonation of delay. The learned Ist appellate court showed casual approach when substantial delay was properly explained. It should have been condoned. In every appeal, there is some negligence on the part of the clients.

27. In the circumstances, if the appellants were not aware about the progress of the case, the main role is attributable to their Advocate. No doubt the appellants could have made enquiry themselves or could have seen progress of the case by opening the web-site of the High Court. However, I find that it was not a fit case for the learned trial Judge to proceed ex-parte when the appellants were contesting the matter and have engaged Advocates and they had not retired from the matter but were not performing their duties. Considering the fact, I hold that substantial part of the delay has been properly explained.

28. Considering the guidelines, in the above referred judgment, I find that the findings recorded by the Ist appellate Court is not sustainable. At the same time, the appellants should have been diligent and laxity on their part needs to be considered for imposing some exemplary costs.

29. Hence, substantial question of law is answered in the affirmative.

(i) The appeal is allowed as follows :

(ii) The Appeal is allowed. The order of rejection of condonation of delay passed by the Ist appellate Court is set aside subject to costs of Rs.10,000/- to be paid to the respondents within a period of fifteen days in the Ist appellate Court.

(iii) On deposit of costs, the appeal shall be taken up for scrutiny.

(iv) The parties shall appear before the Ist appellate Court on **19.11.2018**.

(v) The Ist appellate Court shall try the appeal expeditiously and dispose of the appeal within three months from the receipt of the record and from the date of appearance of the parties.

Civil Application stands disposed of.

Record and proceedings be sent back immediately.

{A.M.DHAVALA, J}

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16-sa.594.16.c.a.993.15.