

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.3337 OF 2018
IN
FIRST APPEAL (STAMP) NO.32571 OF 2017
[REJECTED CASE NO.750 OF 2018]

Nishant Mitrasen Mahimtura and Anr. Applicants
V/s.
Rekha Vipin Khakhar Respondent

Mr. Satyan N. Vaishnav, a/w. Ms. Nupur J. Mukherjee, I/by M/s. N.N. Vaishnava and Co., for the Applicants.

Mr. Prasad Dani, Senior Counsel, I/by Mr. Nitin Gangal, for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 19TH SEPTEMBER, 2018.

P.C. :

1. Heard Mr. Vaishnav, learned counsel for the Applicants, and Mr. Dani, learned Senior Counsel for the Respondent.
2. This is an application for condonation of delay of 101 days in preferring the application for restoration of the First Appeal, which came to be dismissed for default.
3. This application is strongly resisted by learned Senior Counsel for

the Respondent, i.e. Original Plaintiff, contending *inter alia* that, there is total absence of due diligence on the part of the Applicants-Appellants in prosecuting the Appeal filed by them. The objections were raised by the Registrar of this Court on 21st November 2017, pertaining to the caveat statement not made, names of the parties stated in the Appeal were not corresponding with the names given in the certified copies, Vakalatnama, Court fee stamp, address, mobile number etc. were not given properly. For removal of the said objections, three weeks time was granted on 22nd January 2018. The objections were not removed. Then again three weeks time was granted, as a last chance, to remove the office objections on 13th February 2018, but the objections were not removed. Even one opportunity was granted on 8th March 2018, thereby granting four weeks time for removal of the office objections. However, as the office objections were not removed within the stipulated time, the Appeal came to be dismissed for breach of the conditional order.

4. It is submitted that, thereafter also, the Applicants-Appellants have not moved this application within time. The explanation given for the delay or for non removal of the office objections within time is not at all satisfactory. It is submitted that, in case of such absence of due diligence, the application cannot be allowed.

5. To substantiate these submissions, learned counsel for the

Respondent has placed reliance on the Judgment of this Court in the case of *Mangala R. Awad Vs. Shashikala Kisan Awad and Anr., 2008(5) Mh.L.J. 112*, and hence it is urged that, as the Applicants are taking the Court for granted, such application for condonation of delay or for restoration of the Appeal, which is filed only after the execution proceedings were taken out, should not be allowed.

6. It is true that, there is negligence on the part of the Applicants-Appellants, but, as can be seen from the Applicants' averments made in the Civil Application, such negligence or inadvertence is on the part of the Applicants' Advocate and as held in this Judgment relied upon by learned counsel for the Respondent itself, for the negligence on the part of the Advocate, the party should not be penalized. Moreover, no case should be dismissed at the threshold itself, on technical ground of non-compliance of the office objections, which was to be done by the Advocate of the parties.

7. Here in the case, therefore, only with an intention to achieve the substantive cause of justice, this Civil Application needs to be allowed by condoning the delay and restoring the Appeal to its original file. However, in order to compensate the Respondent for the delay caused therein, the Civil Application is allowed, subject to costs of Rs.10,000/-, to be paid by the Applicants-Appellants to the Respondent and subject to

removal of the office objections within one week, failing which, this order will stand automatically vacated.

8. Civil Application is disposed off in the above terms.

[DR. SHALINI PHANSALKAR-JOSHI, J.]