

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.**

**CIVIL APPLICATION NO. 2965 OF 2018
IN
FIRST APPEAL NO. 1765 OF 2008**

Smt. Nirmala Kailash Jaiswal & Ors. ... Applicants

V/s.

Kum. Shreyas Kailash Jaiswal & Anr. ... Respondents

Mr. Rajesh Khobragade with Gayatri Nayak for the Applicant.
Mr. Kiran Arjun Nikam for the Respondent Nos. 1 and 2.

**CORAM : K. K. TATED, &
N.J.JAMADAR, JJ.
DATE : 1st NOVEMBER, 2018**

PC:

1. This civil application is preferred by the applicants (original appellants) for condonation of delay of 8 years and 33 days in seeking the restoration of First Appeal No. 1765 2008, which was dismissed for failure to serve the respondents therein, in terms of the order dated 07th June, 2010.

2 The background facts can be stated in brief as under:

a) The respondents herein and one Kalpana alias Pushpalata (the deceased plaintiff No.1) had instituted a Special Civil Suit bearing No. 236 of 2005 against the applicants (appellants-defendants) and

Smt. Manikbai Jaiswal, the deceased mother-in-law of applicant No.1, for partition and separate possession of the properties, of the deceased Kailash Jaiswal, claiming to be the heirs of late Kailash. It was the claim of the plaintiffs that the deceased Kailash had married Kalpana, the deceased plaintiff No.1, on 11th May, 1985, concealing the fact of marriage with applicant No.1 herein, and respondent Nos. 1 and 2 (plaintiff nos. 2 and 3) were born out of the said wedlock.

b) The Special Civil Suit No. 236 of 2005 came to be decreed by Judgment and Decree dated 02nd May 2008, passed by the learned Civil Judge Senior Division, Kalyan. It was held that the respondents were entitled to partition and separate possession of their 1/3rd share in the suit flats bearing Nos. 103 and 104 at Panchsheel Plaza and 'Ratnamala Jewellers,' situated at Dombivali (East), more particularly described in paragraph No. 5(a) and 5(b) of the plaint.

c) Being aggrieved by and dissatisfied with the aforesaid Judgment and Decree dated 02nd May 2008, the applicants herein preferred First Appeal No. 1765 of 2008. Initially, notices were ordered to be issued to the respondents. However, the notices could not be served. Ultimately, by order dated 07th June 2010 passed by the Division Bench, the appellants were granted eight weeks' time to serve the respondents and file the affidavit of service, failing which appeal

would stand dismissed for non-prosecution as against the unserved respondents, without further reference to the Court. The applicants-appellants failed to serve the respondents and file affidavit of service as directed and thus the appeal stood dismissed in terms of aforesaid order dated 07th June 2010.

3 In the aforesaid backdrop, the applicants have preferred this application for condonation of delay of 8 years and 33 days in seeking restoration of the said Appeal to file. The principal cause for delay is stated to be the ill-health of applicant No.1. The applicants have asserted that the respondents could not be served as their addresses were not known. After the dismissal of the appeal, the applicant No.1 lost her husband. The deceased husband of the applicant No.1 had been suffering from AIDS. The applicant No.1 was also diagnosed with HIV. On account of the said illness and advanced age, the applicant No.1 could not move the court for restoration of the said appeal. It is further averred that the applicants came to know about the dismissal of the appeal when the respondents herein moved an execution petition before the Civil Judge Senior Division, Kalyan. Lastly, it was averred that the applicant Nos. 2 and 3 were not aware of the legal proceeding as the applicant No.1 was looking after the same and, therefore, there was delay of 8 years and 33 days. The applicants assert that if the

delay is not condoned, they will suffer irreparable loss. Hence, this application.

4 We have heard the learned Counsel for the applicants and respondents at length.

5 The sole question which crops up for determination is, whether the applicants have made out a 'sufficient cause' for condonation of delay in seeking restoration of the First Appeal No. 1765 of 2008, which stood dismissed pursuant to peremptory order dated 07th June 2010.

6 In the backdrop of the fact that the delay is of more than 8 years, we were anxious to ascertain the cause which prevented the applicants from preferring the application for restoration. Since it was urged that the applicant No.1 has been suffering from debilitating illness (HIV), we have carefully perused the application and the documents placed on record in support of the same.

7 We are conscious on the fact that an application for condonation of delay ought to be liberally construed. Ordinarily, the Court should lean in favour of condonation of delay as it is in public interest that a lis is decided on merits so as to advance cause of substantial justice. The expression "sufficient cause" thus receives a liberal construction. The length of delay, from this stand point, is not the sole decisive

factor. If the party is in a position to properly account for the delay and demonstrate that there were no laches, negligence, want of bonafide, on its part, long delay by itself is not a ground to foreclose the determination on merit.

8 In the case at hand, it is pertinent to note that the applicants have not indicated the precise date when they became aware of dismissal of the appeal pursuant to the order passed by this Court on 07th June 2010. If the averments in paragraph 6 to 14 are considered, it becomes evident that the applicants want the Court to believe that the respondents could not be served as their whereabouts were not traceable. After the dismissal of the appeal, the husband of applicant No.1 and father of applicant Nos. 2 and 3 expired, as is apparent from the use of word, “thereafter”, in paragraph No.7. Applicant No.1 was diagnosed with HIV. This claim was sought to be supported by placing on record medical case papers from the year 2012 onwards. The applicants became aware of the dismissal only when the respondents moved the executing court for execution of decree. Since, applicant No.1 was pursuing the litigation and applicant Nos. 2 and 3 did not understand the legal process, they could not move for restoration at an earlier point of time.

9 When we examined each of the above reasons put forth for not

approaching the court within the period of limitation, and for all the long 8 years, we found that the applicants have not made a clean breast and the statements were, at best, evasive, and, at worst, actuated by a desire to steer clear of 'the bar' of limitation. It is pertinent to note that deceased Kailash, husband of Applicant No.1 and father of applicant Nos. 2 and 3, was stated to have expired after the dismissal of the appeal. It was pointed out by the learned Counsel for the respondents that the husband of Applicant No.1 had died on 10th June 2005. In fact, Special Civil Suit No. 236 of 2005 was instituted after demise of the deceased Kailash. Even the fact that applicant No.1 was diagnosed with HIV, after the demise of deceased Kailash, was sought to be correlated to the point of time subsequent to the dismissal of the First Appeal. The documents placed on record by the applicants to show that applicant No. 1 has been suffering from HIV, indicate that the Applicant No.1 was diagnosed to be suffering from HIV on 15th September 2009. It is evident that applicant No.1 has been suffering from HIV since prior to dismissal of Appeal.

10 On the crucial aspect of time as to when the Applicants became aware of the dismissal of the First Appeal, a bald statement has been made to the effect that the applicant came to know about the same when the respondents moved the executing court without indicating

the precise month/year. The learned Counsel for the respondents submitted that the execution petition was instituted in August 2014 and the applicants were served in the year 2015. The applicants thus chose to make omnibus statements instead of making an honest disclosure about the knowledge of the dismissal of appeal.

11 The claim of the applicants that only applicant No.1, who was suffering from the illness, was pursuing the litigation and applicant Nos. 2 and 3 were unaware of the legal process, is also shown to be not factually correct. The learned Counsel for the respondents placed on record a copy of written statement, filed in Special Civil Suit No. 236 of 2005 on behalf of the applicants-defendants, which was verified by Shri. Sushil Jaiswal, the applicant No.3 (defendant No.4). Thus, the claim of the applicants that applicant No.1 alone was pursuing the litigation and applicant Nos. 2 and 3 were totally unaware of the proceeding, is unworthy of acceptance.

12 In view of the aforesaid infirmities in the claim of the applicants, we are of the view that the applicants have not approached the Court with clean hands. The applicants have endeavoured to suppress the facts and assigned reasons with a view to get the delay condoned, which on the face of the record, were shown to be factually incorrect. Can this conduct on the part of the applicants be said to be bonafide?

Since the applicants have resorted to the device of 'suggestio falsi and suppressio veri', we are inclined to hold that the Applicants have made deliberate incorrect statements and, therefore, the cause for the delay put forth by the Applicants can neither to be said to be bonafide, nor sufficient.

13 We are fortified in the view which we are persuaded to take by a judgment of the Supreme Court in the case of ***Pundlik Jalaram Patil (Dead) by Lrs. v/s. Executive Engineer, Jalgaon Medium Project and another***¹ wherein the delay in presenting an appeal against the Award passed by the Reference Court under Land Acquisition Act, was sought to be got condoned by making an incorrect statement that the applicants therein were unaware about the stand taken by SLAO as well as the impugned judgment and award therein. The Supreme Court after recording the observations that the said averment in the said application on the face of it was totally incorrect, observed as under:

“12) There is no doubt whatsoever in our mind that the respondent made totally incorrect statement in the application filed in the High Court. We express our reservation as to the manner in which a public authority conducted itself in its anxiety to somehow get the relief from the Court. In our considered opinion, incorrect statement made in the application seeking condonation of

1 (2008) 17 Supreme Court Cases 448

delay itself is sufficient to reject the application without any further inquiry as to whether the averments made in the application reveals sufficient cause to condone the delay. That a party taking a false stand to get rid of the bar of limitation should not be encouraged to get any premium on the falsehood on its part by condoning delay. (Bihari Singh v/s Union of India, 1 (1993) 1 SCC 572).”

11 In the light of aforesaid exposition of law, and the inordinate delay of 8 years and 33 days, which was sought to be got condoned by making incorrect and evasive statements, we are not inclined to condone the delay of 8 years and 33 days. The application, therefore, deserves to be rejected.

12 Hence, the following order:

a) The application for condonation of delay in seeking restoration of First Appeal No. 1765 of 2008 stands rejected.

b) In the circumstances, there shall be no order as to costs.

(N.J.JAMADAR, J.)

(K.K.TATED, J.)