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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION No. 1262 OF 2018
IN
SECOND APPEAL No. 404 OF 2003
WITH
CIVIL APPLICATION No. 1263 OF 2018

Musa Fakruddin Shaikh ... Applicant
Vs.
State of Maharashtra & Ors. ... Respondents

Mr. Surel Shah, for the Appellant in SA. 405/2003, and
Applicant in CAS. 1262/2018, 1263/2018.

Mr. Ashok B. Tajane, for the Respondent No. 4A in SA.
405/2003, and for Respondent No. 3A in SA. 404/2003, CAS.
1262/2018.

CORAM : A. M. DHAVALA, J.
DATE : OCTOBER 19, 2018

PC :-

1. Civil Application No. 1263/2018, is by the appellant
for condonation of delay of 6 years and restoration of Second
Appeal No. 404/2003 which stands abated for not bringing LR.
of Respondent No. 4 and 8 on record. Respondent Nos. 1 to 3
were the defendants in the suit. Respondent No. 3 has died and

his legal heirs are brought on record. Since Respondent No. 4 – Elahi Fakruddin Shaikh and Respondent No.8 Yusuf Fakruddin Shaikh are real brothers of the applicant, he cannot say that he was not aware about the death of Respondent No. 3.

2. Learned advocate for the applicant has relied on **P. B. Devaswom Vs. Bhargavi Amma : [2009(2) Mh.L.J. 1.** In this case, second appeal was filed in 1993. The Appellant – Managing Committee, then existing was changed in 2003. The Committee came to know about pendency of appeal from its lawyer on 7.9.2003. The new Committee filed application for condonation of delay of 394 days in bringing legal heirs of respondent on record. The Apex Court observed that appeal was in suspended animation, as it could not reach the stage of hearing. The Appellant was not aware about the death and the advocate for the respondent had not communicated about the death as per Order 22, Rule 10A of C.P.C. The Apex Court observed that the appellant cannot be punished for ignorance of death of the respondent. The Apex Court observed as follows:

“8. The principles applicable in considering applications for setting aside abatement may thus be summarized as follows :

(i) The words "sufficient cause for not making the application within the period of limitation" should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words 'sufficient cause' in section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, want of bonafides, deliberate inaction or negligence on the part of the appellant.

(ii) In considering the reasons for condonation of delay, the courts are more liberal with reference to applications for setting aside abatement, than other cases. While the court will have to keep in view that a valuable right accrues to the legal representatives of the deceased respondent when the appeal abates, it will not punish an appellant with foreclosure of the appeal, for unintended lapses. The courts tend to set aside abatement and decide the matter on merits, rather than terminate the appeal on the ground of abatement.

(iii) The decisive factor in condonation of delay, is not the length of delay, but sufficiency of a satisfactory explanation.

(iv) The extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than

applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.

(v) Want of 'diligence' or 'inaction' can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

3. In the present case, the above ruling will not be applicable as the respondents are real brothers and the appellant cannot say that he was not aware about the death since he has not taken steps to bring on record the legal heirs. The appeal was in suspended animation. The delay cannot be condoned on the principles of equity. In this regard, Learned advocate Mr. Tajane, for Respondent No. 3A relied on **Katari Suryanarayan Vs. Koppiseti Subba Rao : (2009) 11 SCC 183**. There was a delay of 2381 days and 2601 in bringing legal heirs

of Respondent No. 2 and 3 respectively. It is observed that:

“13. In the instant case parties were neighbours and hence, difficult to appreciate that the appellant was not aware of the dates of death of the Respondent Nos. 2 and 3. Besides, it is difficult to conceive that the petitioners were not in touch with their learned advocates from 1999 to December 2006. If not every week, they are expected to contact their lawyers once in a year. Ignorance of legal consequence without something more would, in our opinion, be not sufficient to condone such a huge delay. Appellants are literates and had been litigating for a long time.”

5. I find that this ruling is squarely applicable. The issue whether death of Respondent No. 4 and 8 resulted in abatement, will be considered later. If their presence was necessary, on their death, legal heirs should have been brought within time. For the above reasons, Civil Application No. 1263 of 2018 deserves to be rejected and is accordingly rejected.

6. The applicant in Civil Application No. 1262 of 2018 is unsuccessful plaintiff. He had filed two suits, viz. Regular Civil Suit No. 218/1989 and 199/1989 in the Court of Civil Judge, S. D. Pandharpur. Both suits were in respect of the same land. The plaintiff's predecessor had constructed a shed on the

plot bearing No. 8, admeasuring 826.6 sq. ft. at village Akluj. By order dated 17.1.985 the said plot was allotted to father of defendant No. 3 and the Collector passed order to deliver possession of the said plot to defendant No. 3's father. The said order was challenged in Regular Civil Suit No. 199/1989. The appellant's predecessor filed suit, viz. Regular Civil Suit No. 218/1989 for perpetual injunction against the government that they should not remove the construction. Both the suits came to be dismissed. Two appeals were preferred against the judgment and decree of dismissal of both suits. The decree of dismissal passed in R.C.S. No. 199/1989 was confirmed, whereas the decree in R.C.S. No. 218/1989 was modified. It was held that the government has no right to remove the said structure, as the said plot was already allotted to father of defendant No. 3. Therefore, injunction was granted against defendant Nos. 1 and 2 but not against defendant No. 3. Thus, appeal was partly allowed. Aggrieved by these judgment and orders, the appellant who is one of the legal heirs of plaintiff filed two appeals.

Second Appeal No. 404 of 2003 is filed against the judgment and decree of dismissal of R.C.S. No. 218/1989 and decree in the counter-claim therein and decision in appeal, viz. Regular Civil Appeal No. 241 of 2000 dated 4th December, 2002. Second Appeal No. 405 of 2013 is filed against the confirmation of judgment and decree in R.C.S. No. 199/1989 and judgment & order in Regular Civil Appeal No. 247 of 2000.

7. The Appellant had engaged advocate Mr. Milind Deshmukh in both matters. Both the matters were admitted and both the matters were ripe for hearing. By order dated 14.10.2012 there was a direction to the Appellant to file the paper-book within three months from that date. This order was not complied. The said order disclose that if the paper-book would not be filed, the matter would stand dismissed, without referring to the court. Learned advocate Mr. Tajane submits that there was earlier order in 2003 for filing paper-book and this order was freshly passed. The said order was not complied and both the appeals came to be dismissed. When Respondent

3(a) took execution proceeding, the appellant learnt about dismissal of his Second Appeal No. 405/2003. He engaged another advocate Mr. Surel Shah, who filed restoration application, being Civil Application No. 452/2013. The paper-book was filed in that matter and by order 26th March, 2013 the appeal was restored. It is not in dispute that application for restoration of Second Appeal No. 404/2003 could have been filed simultaneously alongwith the said application and if such application would have been filed, it would have been also allowed.

8. Thereafter Respondent No. 3(a) filed application, being Civil Application No. 775/2015 for expediting hearing of Second Appeal No. 405/2003. In the said application, he recorded that Second Appeal No. 404/2003 was dismissed. Thus the appellant had a notice at least in 2015. Mr. Surel Shah submitted that normally in such case, he does not object for expeditious hearing and therefore, he did not read it and did not object it. The said application came to be allowed on 28.9.2015.

Then, Second Appeal No. 405 of 2003 was listed before me on 17.06.2018, and at the time of hearing, learned advocate Mr. Tajane raised objection that dismissal of Second Appeal No. 404/2003 operates as *res judicata* with regard to the findings recorded by the lower courts, which have attained finality. The same will have an adverse effect on Second Appeal No. 405/2003 and it will not be maintainable. Then on 6.9.2018 learned advocate Mr. Surel Shah took time, and filed this Civil Application No. 1262/2018 for restoration of Second Appeal No. 404/2003. There is delay of 5 years and 8-9 days in filing this application. Mr. Surel Shah argued that as soon as the Appellant came to know about dismissal of Second Appeal No. 405/2003, he had immediately taken steps for restoration of the same. The order of submission of paper-book is communicated to the advocate, and advocate Mr. Deshmukh did not communicate the said fact to the appellant's previous advocate. Advocate Mr. Deshmukh was negligent and therefore, both the appeals came to be dismissed. The appellant cannot be

punished for negligence of his advocate. When the appellant came to know about dismissal, he has changed his advocate and has got Second Appeal No. 405/2003 restored. Somehow, it did not strike to him that Second Appeal No. 404/2003 was also required to be restored. Mr. Shah was not aware about dismissal of another appeal, i.e. Second Appeal No. 404/2003 alongwith Second Appeal No. 405/2003 for the same reasons. Therefore, no such application was filed for restoration of Second Appeal No. 404/2003. When this fact was brought to the notice by way of filing civil application by the defendant for expediting hearing in 2015, advocate Mr. Shah did not wish to oppose it, and therefore, did not read the contents. Advocate Mr. Surel Shah relied on following judgments:

- (i) **Kailpada Das Vs. Bimal Krishna Gupta : [(1983) 1 SCC 14]**. In this case, the appeal was dismissed for not supplying paper-book by the appellant. The Apex Court observed that:

“A procedural step is in aid of justice and not substantive justice itself. Therefore, penalty on failure to comply with the court's order providing a procedural stage must be commensurate with or

proportionate to the gravity of the lapse or omission. A procedural step which facilitates hearing of the appeal cannot impede access to justice. Supplying paper-books is a procedural requirement and the omission or lapse arising out of non compliance with the court's order regarding supply of paper-books was not of such a serious gravity as to dismiss the appeal. If the High Court felt that the appellants were trying to delay the hearing of the appeal and that on account of this dilatory tactics the respondent-landlords who had obtained a decree would suffer, it was open to that court to direct the respondents to get the paper-books prepared and impose the cost of the same on the appellants. It was also open to the High Court to create a sanction behind its order by providing that if the paper-books were not supplied in time the interim stay of possession would be vacated. Instead of these permissible modes of achieving the end, thwarting the access to justice by imposing a disproportionate penalty of dismissal of the appeal by the High Court was not justified and therefore, must be interfered with."

(ii) **Imratlal Vs. Collector (LA) : [(2014) 14 SCC 133].**

In this case, there was delay of 1110 days for filing the appeal for enhancement of compensation. It was recorded that the appellants were illiterate villagers and they are not conversant with intricacies of law. They are usually guided by their co-villagers, who are familiar with proceedings in the courts or the advocates with whom they get in touch for redressal of their grievance.

This ruling will not be applicable for the reason that the principles of condonation of delay in the matters of land acquisition compensation are totally different and are based on principles of equality that all the landholders whose lands are acquired under one notification should get equal compensation, depending on quality of their land. The principles of condonation of delay in appeals from land acquisition cases cannot be considered in condonation of delay other appeals.

- (iii) **Rafiq Vs. Mnshilal : (1981) 2 SCC 788.** There was Ex parte order of dismissal of appeal for non-appearance of the appellant's advocate. The advocate filed an application for recalling the order and permission to participate in the hearing. It was rejected on the ground of unexplained delay. It was a case of short delay. The affidavit was sworn on October 29, 1980, it was not presented to the court till November 12, 1980. Thus, there was delay of only 14 days. In the light of these facts, it has been observed that:

“3. The disturbing feature of the case is that under our present adversary legal system where the parties

generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job.

Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss.”

- (iv) **R. B. Ramlingam Vs. R. B. Bhavaneswari : (2009) 2 SCC 689.** The SLP was filed after a delay of 568 days. It was on account of pendency of review application before the Madras High Court. The issue before the Apex Court was whether the time consumed in review proceeding will be a sufficient cause or not, as there were divergent opinions. It was observed that:

“5. ... we are of the view that there is a dichotomy between the appellate jurisdiction of this Court and discretionary jurisdiction under Article 136 of the Constitution (See: Kunhayammed and Ors. v. State of Kerala reported in 2000 (6) SCC 359). Reading the said judgment, it also becomes clear that filing of Review Petition is no impediment to the filing of the special leave petition.”

“6. ... The test of "sufficient cause" is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of "sufficient cause" delightfully undefined, thereby leaving to the Court a well-intentioned discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the Court as such.”

- (v) **M. K. Prasad Vs. P. Arumugam : (2001) 6 SCC 176.** There was exparte decree. The advocate for the defendant had not communicated decision of the proceeding. The appellant came to know only after the notice of execution proceeding was received. He filed appeal with application for condonation of delay of 554 days. The Apex Court observed that:

“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. 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.”

- (vi) In **Pralhad Tajale Vs. State of Maharashtra : (2018) 4 SCC 615** the legality of the order dated 14.5.2012 passed by the State Minister for Revenue (MH) was challenged by way of writ before the High Court Bombay. The writ petition was decided on 27.11.2012. LPA was filed before the Division Bench. It was allowed to be withdrawn on 24.3.2014, and review application was filed on 17.4.2014 alongwith application for condonation of delay. As the office objections were not removed in spite of extension of time by the registry, the review petition came to be dismissed by the Registrar by order dated 19.10.2015. The application for restoration of review petition was moved on 5.3.2018. But it was rejected for not showing sufficient cause. The Apex Court relying on

principles of natural justice and philosophy of necessity of giving opportunity of hearing, as laid down in *Sangram Singh Vs. Election Tribunal* : AIR 1955 SC 125 (para 16 & 17) held that appellant should have been given one more opportunity to cure the defect and allowed the restoration.

“16. ... a code of procedure must be regarded as such. It is *procedure* something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to *both sides*) lest the very means designed for the furtherance of justice be used to frustrate it.”

“17. ... our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”

Learned Advocate Mr. Tajne relied on **Oriental Aroma Chemical Industries Ltd. Vs. G.I.D. Corporation : 2010 (5) Mh.L.J. 262** wherein it is observed that:

“The law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time. A reading of the impugned order makes it clear that the High Court did make a bald reference to the application for condonation of delay filed by the respondents but allowed the same without advertent to the averments contained therein and the reply filed on behalf of the appellant. Not only this, the High Court erroneously assumed that the delay was of 1067 days, though, as a matter of fact, the appeal was filed after more than four years. Another erroneous assumption made by the High Court was that the appellant had not filed reply to controvert the averments contained in the application for condonation of delay. The High Court committed grave error by condoning more than four years’ delay in filing of appeal ignoring the judicially accepted parameters for exercise of discretion under

Section 5 of the Limitation Act.”

(vii) **P. K. Ramchandran Vs. State of Kerala : (1997) 7 SCC 556.** In this case, there was delay of 565 days, which was sought to be condoned on the ground that the Advocate General's office *was fed up with some important arbitration matters*. In this context, the Apex Court observed thus:

“ ... We are not satisfied that in the facts and circumstances of this case, any explanation, much less reasonable or satisfactory one had been offered by the respondents-State for condonation of the inordinate delay of 565 days.”

9. The factual grounds discussed hereinabove disclose that the appellant engaged advocate Mr. Milind Deshmukh. It was his duty to intimate the appellant that he has to take steps for supplying paper-book. The same was not done by him, and therefore, both the appeals, viz. Second Appeal Nos. 4004/2003 and 405/2003 were dismissed on completion of three months on 14.8.2012. There can be no dispute that this order could have been recalled and the appeals could have been restored if the application was moved in time. In fact, the advocate did not

inform the appellant about dismissal of these appeals and the appellant came to know about dismissal of appeals, when he received notice of execution. The record shows that immediately thereafter, he changed his advocate and engaged advocate Mr. Surel Shah. Unfortunately, there was no proper instructions given to advocate Mr. Surel Shah to take steps for restoration of both the second appeals. He took steps only for restoration of Second Appeal No. 405/2003 and the same was restored without any objections. The paper-book copies were provided and the said appeal is pending before this Court. It is not disputed that Second Appeal No. 404/2003 is closely connected with Second Appeal No. 405/2003 and its decision is dependent on the decision of other appeal. Perhaps, there could have been a single suit for prosecuting the rights claimed in both suits.

10. It cannot be disputed that the appellant should have considered that since Second Appeal No. 405/2003 was dismissed, he should have made inquiry of Second Appeal No. 404/2003, as well but the facts indicate that he was interested

in contesting the appeals and he had taken steps for restoring Second Appeal No. 405/2003. In the light of these facts, I find that the judgment in *Kailpada Das Vs. Bimal Krishna Gupta (supra)*, which lay down that normally an appeal should not be dismissed on technical ground that paper-book was not supplied, is directly applicable. As regards the delay, I rely *M. K. Prasad Vs. P. Arumugam (supra)*, wherein it is observed that in the matters of condonation of delay, the court should consider that hearing the matters on merits is fundamental principle of natural justice. These observations are clearly applicable. It is by way of just part of fair procedure, contemplated under Article 21 of the Constitution of India and if this has not been followed, there should be some gross negligence on the part of the appellant. No doubt, there is huge delay of 5 years, 9 months, but the fact that appellant has taken steps for restoration of another connected appeal, being Second Appeal No. 405/2003 within time is very much relevant. It was due to inexperience or ignorance of the appellant, he did not take steps for restoration

of both the appeals, which he should have done. In such case, the negligence can be condoned subject to imposition of heavy costs, but opportunity of hearing should not be denied. Considering the fact and delay of 5 years, 9 months, I pass the following order.

ORDER

- (i) Civil Application No. 1263 of 2018 is rejected.
- (ii) Civil Application No. 1262 of 2018 filed for restoration of Second Appeal No. 404 of 2003 is allowed subject to payment of cost of Rs.1,00,000/- to be paid by the Applicant to Respondent No. 3A or to be deposited in this Court within 30 days. On failure to pay / deposit the costs within 30 days, this application shall stand dismissed.

Sd/-

[A. M. DHAVALE, J.]

Vinayak Halemath