

Sarnobat

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

**SECOND APPEAL NO. 149 2017
ALONGWITH
CIVIL APPLICATION NO. 308 OF 2016**

Smt. Radhika Sanjay Salunkhe. ... Appellant.
Vs.
Dada Vitthal Salunkhe & Anr. ... Respondents.

Mr. Sachin Gite, for the Appellant.
Mr. Prabhanjan Gujar, for the Respondent No. 1.

CORAM : A. M. DHAVALÉ, J.

DATE : 24th AUGUST, 2018.

ORAL JUDGMENT :

1. After hearing the learned advocates I formulate following substantial question of law;

(i) Whether Second Appeal lies against the judgment of condonation of rejection of application for condoning delay by the First Appellate Court?

(ii) Whether the First Appellate Court has ignored the material facts and misconceived himself with regard to the provisions of condonation of delay while rejecting the application for condonation?

2. Considering the nature of matter it is taken up for final

hearing at admission stage. Heard learned advocates for both the parties.

3. Regular Civil Suit No. 312/2003 was filed by the respondent against the Appellant for recovery of possession of encroached area of 3 R. The defendant had filed written statement and raised many pleas, on the basis of which nine issues were framed.

4. Issue No. 1 and 4 related to the factum of encroachment and the correctness of measurement by the Surveyor. The record shows that the defendants were absent at the time of trial. The plaintiff examined his witness and the defendants' advocate cross examined him and the suit came to be decreed in absence of evidence of defendant No. 2. The judgment was delivered on 14th July, 2011. Defendant No. 2 filed appeal with application for condonation of delay on 27th August, 2012. She claimed that she had filed application for measurement and the measurement was conducted and no encroachment was shown therein. The aggrieved plaintiff had filed appeal before the superior officers of DLR for fresh measurement. Her advocate informed her that when she would receive notice of fresh measurement then, she should attend the court till then her presence would not be required. She was suffering from diabetes and it was difficult for her to attend the court. She was under treatment of Dr.

Kulkarni. As she was under impression that her matter would not proceed in the court, she remained absent and the suit was decided ex-parte against her. She came to know about it on 11th July, 2012 when she received notice of execution proceedings. Thus, she has explained the cause for delay of 13 months.

5. The learned Trial Court observed that there were no documents to show that the defendant was indoor patient in any hospital. She has not produced documents of medical treatment. The absence of instructions from the advocate was not the sufficient cause. She should have made inquiry with her advocate about the progress of the case. He therefore, held that there was no sufficient cause and rejected the application.

6. Learned advocate for the appellant argued that the appellant was suffering from diabetes and she was not informed about the necessity of her presence in the Court and therefore, she did not attend the matter. The matter was referred for measurement and was likely to be remeasured. Hence, she was informed that she need not attend the court till she would receive notice for re-measurement. There is sufficient cause. She was bonafidely contesting the matter. Therefore, the delay should not have been condoned.

7. Per contra. Learned advocate for respondent Shri Gujar

submitted that there was huge delay of more than one year and one month. The appellant cannot put the entire blame on her advocate so as to make out the sufficient cause. It was her duty to make inquiry and attend the matter. In this regard, he relied on **Salil Dutta Vs. T. M. and M.C. Private Ltd.**¹

Point No. (i) :-

8. In **Ratansingh Vs. Vijaysingh**² It was held that definition of decree will not include dismissal of appeal, as time barred.

9. In **Shyam Sundar Sarma Vs. Pannalal Jaiswal**³ Larger Bench of the Apex Court relying on the judgments in (i) **Mela Ram & Sons Vs. CIT**⁴, and (ii) **Sheldon Singh Vs. Daryao Kunwar**,⁵ both of Larger Benches, observed that in *Sheldon Singh*, it was held:

“We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of appeal.”

The dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against.

1 (1993)2 Supreme Court Cases 185.

2 (2001) 1 Supreme Court Cases, 469

3 (2005) 1 Supreme Court Cases, 436

4 AIR 1956 SC 367

5 AIR 1966 SC 1332

10. In para 12 of the said judgment, referring to the judgment in *Ratansingh Vs. Vijaysingh*, It was observed:

“We must point out with respect that the decisions of this Court in *Mela Ram & sons (supra)*, and that stated in *Sheldon Singh (supra)* was, thus, not noticed and the view expressed by the two-Judge Bench, cannot be accepted as laying down the correct law on the question.”

11. In view of this judgment, dismissal of appeal on the ground of bar of limitation as the delay was not condoned, amounts to decision on merits and the second appeal would lie against the said order. Thus, substantial question No. (i) is answered in the affirmative.

Point No. (ii) :

12. I agree that the clients should not keep every thing for the advocate to do and they should make inquiry and attend the matter as and when required. If they are not attending the matter, there should be sufficient reason for the same.

13. In *Salil Dutta Vs. T.M. & M.C. Pvt. Ltd., (supra)* the defendant was a private limited company having its registered office in the same city and being managed by educated businessman. The Apex Court noticed that the defendant's conduct was not co-operative with the Court. They were indulging in delaying tactics. They had refused to appear before the Court. In the context of these facts, the

Apex Court held that the defendant cannot put the entire blame on their advocate for their non-appearance.

14. In the present case, the facts are different. In the present case defendant No. 2 was residing at Post Vangal, Tal. and District Satara while the case was going on in Satara. She was bonafidely contesting the petition. She had applied for measurement which was decided in her favour. The judgment of the Trial Court shows that there was re-measurement, as claimed by defendant No. 2. The record shows that defendant 2 had engaged advocate and apparently he has not given any instructions to defendant No. 2 to attend the Court. He did not attend the matter. He did not withdraw his Vakalatnama, he did not cross examine the plaintiff and his witness. If defendant No. 2 was not co-operating, then he should have issued a notice and intimated her about the stage of final hearing and thereafter, withdrawn his appearance. When this is not done, the affidavit of defendant No. 2 that, there was measurement which was in her favour and she was informed by her advocate that there will be re-measurement and she will get notice, till then, she need not bother to come to court gets support. It is true that the suit was filed in 2003 and it was heard after eight years in 2011. It is equally true that the defendant No. 2 ought to have remained in touch with her advocate and should have made

inquiry from time to time, but her bonafides are clear. She wanted to contest the matter and when the measurement report was in her favour, she got relaxed. It is apparent that her advocate has not informed her next date and the necessity to attend the Court. In the light of these facts, there was a sufficient cause and such cause should be considered liberally in the interest of justice. When the cause is found to be genuine, the Appellate Court should have considered that, it was obligation on him to deliver substantial justice and justice should not be defeated on technical ground unless there is gross negligence on the part of the defendant. I rely on judgment in **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Ors.**¹ Wherein the Apex Court after taking resume of the entire case law on the subject of condonation of delay has laid down guiding principles. I rely on the following guidelines

- (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.

1 (2013) 12 SCC 649.

- (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 bona fides 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 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.

I hold that this was a case for condonation of delay and legal principles laid down in this judgment are not followed by the learned first appellate court.

15. Hence, the said order deserves to be set aside. Thus, the substantial question No. (ii) is answered in the affirmative. In the circumstances, I find that the application for condonation of delay should have been allowed. Hence, I pass the following order.

ORDER

- I) The impugned order passed by learned Ad hoc District Judge-2, Satara dated 10th April, 2014 in Misc. Civil Appeal No. 177 of 2012 is hereby set aside.

- II) The delay has been condoned on payment of costs of Rs.5,000/- to be paid to Respondent No. 1.
- III) Parties are directed to appear before the learned first appellate court on 20th September, 2018. The hearing of the appeal before the first appellate court is expedited.
- iv) Second appeal is disposed of in the aforesaid terms.
- v) Pending Civil Application No. 308 of 2016 filed in the appeal does not survive and is accordingly disposed of.

Sd/-
[A. M. DHAVAL, J.]