

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CAO No. 1067/2017
in
MCA (St) No. 16506/2017
in
First Appeal No.291/2008
(Narayan Nathuji Londe (dead) Naliti wd/o Narayan Londe and ors. .vs.
Prakash Leeladhar Patne)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders.

Mr. R.M. Sharma, Advocate for Applicants.
Mr. Masood Shareef, Advocate for Respondent.

CORAM : Manish Pitale, J.
DATED : February 07, 2018.

There are two applications for consideration filed on behalf of the legal representatives of the deceased appellant, one is application for restoration of appeal, which stood dismissed as per conditional order dated 03.07.2013 passed by this Court and the other is an application for condonation of delay of 1428 days in moving the application for restoration of appeal.

2. In order to explain the aforesaid huge delay in moving the application for restoration of appeal, the applicants have submitted that all the while after admission of this appeal they were under the impression that the appeal was pending with an interim order. It was submitted that upon the death of the appellant, application for bringing on record

the names of the legal representatives i.e. the applicants herein, was moved immediately and that the same was allowed by an order of the Registrar dated 12.10.2012, since the application was moved within time. All that remained to be done after the said application was allowed, was amendment of the cause title of the appeal to add the name of the aforesaid legal representatives who were brought on record by order dated 12.10.2012. It was because there was default in carrying out the said amendment that by a conditional order dated 03.07.2013, the appeal stood dismissed.

3. It is the case of the applicants that they were totally unaware about the aforesaid development and that they were throughout under the impression that the appeal with interim order was still pending before this Court. It is further submitted in the application for condonation of delay that some time in the first week of July, 2016, the applicants received notices from the executing Court for bringing on record their names in place of the deceased judgment debtor. On receiving the said notices, it is submitted in the application, that the applicants contacted their Advocate who was appearing in the appeal before this Court and they were informed that the appeal was pending and that there was nothing to worry about. It is then submitted that some time in the third week of June,

2017 when the applicant no.4 went to the suit property to look after agricultural operations, he was informed by a cultivator of nearby field that there was information in the village that the applicants had lost their case before this Court.

4. It is the case of the applicants that they immediately contacted their Advocate who was appearing in the appeal before the High court but he refused to respond. Upon this, the applicants claimed to have engaged another Advocate who collected information from the High Court and it is then that the applicants came to know about the dismissal of the appeal pursuant to conditional order dated 03.07.2013 passed by this Court. Thereafter the applicants applied for certified copies and then on 28.07.2017 the application for restoration of appeal along with the application for condonation of delay were filed. An affidavit of the Advocate, earlier appearing for the applicants, is also placed on record wherein the said Advocate has stated that miscommunication with the applicants had happened due to his attorney (Clerk) giving incorrect information to him. It is also stated by the said Advocate that he had returned the papers to the applicants some time in 2013 because the Advocate has lost his mother and he was in a state of shock.

5. On the basis of the averments made in the

application for condonation of delay and the contents of the affidavit of the Advocate who was earlier appearing for the applicants, it is submitted by Mr. Rohit Sharma, learned counsel appearing for the applicants that the delay in filing the application for restoration, although huge, is not deliberate and that no *mala fide* can be attributed to the applicants in approaching this Court for restoration of the appeal after such huge delay. It is pointed out that the instant appeal was admitted by this Court and the interim order passed in favour of the appellant was also confirmed and that even the application for bringing on record legal representatives of the deceased appellant was moved within time, which stood allowed by the order of the Registrar dated 12.10.2012. The learned counsel submitted that all these facts show that the applicants had been diligently pursuing the appeal before this Court and that the dismissal of the appeal by the conditional order dated 03.07.2013 passed by this Court, was only due to default on the part of the attorney (clerk) of their Advocate, who failed to carry out the amendment, pursuant to the order dated 12.10.2012 whereby the application for bringing their names on record as legal representatives of the deceased appellant had been allowed. It is submitted that the applicants ought not to suffer because of the fault attributable to the office of the Advocate, who was appearing for them. It is further submitted that the

affidavit filed by the Advocate also shows that the fact of dismissal of the appeal could not be communicated to the applicants due to reasons stated in the said affidavit and that all the facts placed on record demonstrate that the delay caused in moving the application for restoration of the appeal was not deliberate and that the applicants may not be allowed to suffer due to default of others. The learned counsel appearing for the applicants relied on judgments passed by this Court in the case of **Sk. Sayyed .vs. State of Maharashtra - 2009 (6) Mh.L.J. 851 and Taresh .vs. Ramesh- 2015 (2) Mh.L.J. 164.**

6. On the other hand, Mr. Masood Sharif, learned counsel appearing on behalf of the non-applicant/respondent strongly opposed the application for condonation of delay filed on behalf of the applicants. It was pointed out that the appeal had been earlier also dismissed for non-prosecution on 23.04.2008, although it was subsequently restored and admitted by this court. It was pointed out that the applicants were very well aware about the pendency of the execution proceedings and that in fact they had received notice from the executing Court for taking steps in respect of bringing on record their names in place of the deceased judgment debtor. It is pointed out that the executing court passed its order on 28.11.2016

directing that the applicants shall be proceeded *ex parte*. It was also submitted that the story about the applicants becoming aware about the dismissal of their appeal some time in June-July 2017, was not believable and that the applicants had not been diligent and that therefore, the application for condonation of delay deserved to be dismissed and consequently the application for restoration was also required to be dismissed.

7. I have considered the contentions raised on behalf of the rival parties and upon perusal of the application filed by the applicants for condonation of delay, reply filed on behalf of the non-applicant and the affidavit filed by the Advocate earlier appearing for the applicants, I am of the opinion that the delay, although of 1428 days, deserves to be condoned. This court has held in the case of **Taresh .vs. Ramesh** (supra) as follows:-

"9. As regards the second part of the argument that the negligence of the Advocate should not be considered as showing sufficient cause unless, it is also shown that the party had been pursuing the matter with the Advocate and could not succeed in his efforts for the reasons beyond his control, I must say that although this concept has been propounded in the judgment of Mr. Conception

Fernandes and another (supra), it would not have any application when it comes to exercise of discretion of the Court under [Section 5](#) of the Limitation Act. In the case of Mr. Conception, this Court had found that rigor of due diligence test prescribed under the proviso to Rule 17 Order 6 of C.P.C. would require due diligence to be exercised basically by the party himself and if the Advocate is negligent, it would amount to negligence of the party or otherwise, it may provide an effective tool to the lazy and indolent party to conveniently get over the barrier of provision of Rule 17 Order 6 of the C.P.C. While exercising discretion under [Section 5](#) of Limitation Act, the considerations of this Court, as can be seen from several precedents of the Hon'ble Apex Court, are wider and governed by desire of the Court of justice to advance the cause of substantial justice and to reject any resistance of the party on the ground of technicalities. Therefore, the principles settled by the Hon'ble Apex Court would require the Court to look for absence of any deliberate act or mala fides on the part of the litigant and also in convenience of other party, and if the Court is satisfied that the litigant himself was not negligent or was not sitting idle, and aspect of inconvenience can be taken care of, the Court can view negligence of the Advocate as different from

negligence of the party and thus being a sufficient cause for exercising its discretion under [Section 5](#) in favour of that party.

10. Having considered the settled legal position thus, I am of the view that the impugned order cannot be said to be inconsistent with the well settled principles of law. The learned Principal District Judge has found that there have been no mala fides nor any deliberate attempt on the part of the respondents to protract the matter and that when they had reposed implicit faith in their Counsel, they simply proceeded on the presumption that their Advocate must have taken appropriate action by filing the appeal, as instructed by them. But, unfortunately that was not to be and there was some negligence, may be gross negligence on the part of the concerned attorney of the Advocate. But, for that lapse of the Advocate's attorney, the respondents could not have been said to have acted with any mala fides on their part and, therefore, it cannot be said that no sufficient cause has been shown by them in this case. Of course, the respondents ought to have contacted their Advocate, but, if they did not do so, that appear to be a mere mistake on their part, as considered by the learned Principal District Judge. The view so taken by the learned Principal District Judge cannot be said to

be so impossible a view as would not logically arise from the facts and circumstances of this case and, therefore, it would not be open for this Court to substitute the view of the lower Court by its own view, simply because another view is possible. Consequently, neither any illegality nor any material irregularity could be found in the impugned order."

8. The law laid down by this Court in the above quoted judgment is in the line of the judgments passed by the Hon'ble Supreme Court wherein it has been held that the litigant ought not to suffer due to the negligence or mistake on the part of Advocate. In this case, the fault or mistake is clearly with the office of the Advocate who was earlier appearing on behalf of the applicants. The applicants did their duty by informing their Advocate about the death of the appellant and providing the details of the legal representatives and this is evident from the fact that the application for bringing on record the legal representatives was moved within time and it stood allowed by the order of the Registrar dated 12.10.2012. All that remained was carrying out of amendment of the appeal in terms of the order dated 12.10.2012. This was an action to be undertaken by the office of the Advocate and it was because of default in the same

that the appeal eventually stood dismissed by the conditional order dated 03.07.2013 passed by this Court. When this appeal had been admitted and interim order had been passed in favour of the appellant and thereafter when the legal representatives were also allowed to be brought on record by order dated 12.10.2012, it was but natural for the applicants to believe that the appeal with the interim order in their favour, was pending before this Court. As pointed out by the learned counsel appearing on behalf of the non-applicant/respondent, it is clear from the record that at least by November, 2016 the applicants became aware about the fact that the executing Court had proceeded *ex parte* against them and that they ought to have been alarmed about the situation. Therefore, the applicants can be held responsible for delay in moving the application for restoration in July, 2017, when they became aware about the fact that the non-applicant was pressing the executing proceedings some time in November, 2016.

9. Following the law laid down by the Hon'ble Supreme Court and this Court in such facts while considering the prayer for condonation of delay, I hold that the applicants are entitled for relief in terms of the prayers made in the applications. Although, this Court has noticed the fact that the delay of 1428 days cannot be entirely attributed to

the applicants herein but never the less what has come on record is that at least from November, 2016, there was delay on the part of the applicants to approach this Court for restoration of the appeal. It cannot be said that the applicants are illiterate persons, ignorant of the ways and the world and, therefore, in my opinion, while restoring this appeal, appropriate costs need to be imposed on the applicants. Accordingly the aforesaid applications are allowed and the appeal is restored subject to the applicants depositing costs of Rs.25,000/- to be paid to the non-applicant/respondent within a period of two weeks.

Civil Application No.4199 of 2017

1. This is an application filed on behalf of the non-applicant/respondent pointing out that in view of the amendment in the Maharashtra Civil Courts Act, the pecuniary jurisdiction of the District Court has been enhanced and that in terms of valuation of the suit, now post amendment, which has come into force from 29.07.2015, the instant appeal needs to be transferred to the file of the Court of the District Judge, Nagpur for disposal in accordance with law.

2. The learned counsel appearing on behalf of the applicants/appellants does not dispute this fact. Accordingly, this application is disposed of with

direction that the instant appeal bearing First Appeal No. 291 of 2008 shall stand transferred to the Court of District Judge, Nagpur, for disposal in accordance with the law.

3. Considering the fact that this appeal has been pending in this Court since 2008, it is in the interest of justice that it is disposed of expeditiously. Therefore, upon transfer of the papers of this appeal to the Court of District Judge, Nagpur, which shall be done within a period of two weeks from today, the transferred appeal shall be disposed of by the Court of the District Judge, Nagpur, expeditiously and in any case within a period of six months from today. The formality of filing of paper book is dispensed with, so that the disposal of the appeal by the Court of District Judge, Nagpur, is expedited.

Civil Application No. 1602/2017.

In the light of the orders passed above, no orders need to be passed on this civil application for stay. Accordingly, civil application is disposed of.

JUDGE