

IN THE HIGH COURT OF BOMBAY AT GOA.

MISCELLANEOUS CIVIL APPLICATION NO.468 OF 2018
IN
STAMP NUMBER MAIN NO. 1793 OF 2018

Francisco Milagres Colaco,
Rep. By POA, Mackvy Colaco
and anr.

.... Applicants.

Vs.

Mohandas Damodar Dhaimode and anr.

.... Respondents.

Mr. S. D. Lotlikar, Senior Advocate with Mr. P. S. Lotlikar, Advocate
for the applicants.

Mr. D. Lawande, Advocate with Mr. A. Prabhudessai, Advocate for the
respondents.

Coram:- PRITHVIRAJ K. CHAVAN,J.

Reserved on:- 3rd July, 2019.

Pronounced on:-30th July,2019.

ORDER

By this application, the applicants who are original
defendants have prayed for condonation of 532 days of delay occurred
in preferring the Second Appeal against the impugned judgment and
decree dated 14.9.2016 passed by the Court of Ad-hoc District Judge,
South Goa Margao in Regular Civil Appeal No.44/2015.

2. A Regular Civil Suit bearing No.153/2010/B filed by the respondents came to be decreed by the Civil Judge, Junior Division on 25.2.2015. The applicants challenged the said judgment and decree by filing the aforesaid Regular Civil Appeal in the Court of Ad-hoc District Judge, Margao Goa and the same was dismissed by judgment and order dated 14.9.2016.

3. It is the contention of the applicants that they were advised to file a review application against the said judgment and decree dated 14.9.2016. The applicants, accordingly preferred a review application on 10.11.2016. The same was dismissed by an order dated 14.3.2018.

4. It is contended on behalf of the applicants that the applicants were diligently and in a bonafide manner prosecuting the review proceedings, as the impugned judgment and decree of the Lower Appellate Court suffered from errors apparent on the face of the record. After dismissal of the review application, the applicants decided to file Second Appeal against the impugned judgment and

decree dated 14.9.2016.

5. It is further contended that after dismissal of the review application some time was consumed by the applicants to engage an advocate for the purpose of filing second appeal in this Court against the impugned judgment and decree dated 14.9.2016.

6. It is contended that some more time was consumed in obtaining certified copies of the judgment and decree of the trial Court as well as appeal memo of the Appellate Court. Finally, the applicants engaged the services of Advocate P. S. Lotlikar for the purpose of filing Second Appeal somewhere in the first week of May, 2018.

7. As such, according to the applicants, again some time was consumed for gathering the documents and for the purpose of presentation of appeal. In the said process, on account of intervening vacation, appeal could not be presented, however, on account of the fact of execution before the Trial Court which was fixed in the first week of June 2018, as per Advocate's advise matter was placed for

urgent hearing before the vacation Judge.

8. The sum and substance of the application is that the applicants have not been negligent in pursuing their remedy before this Court and aforementioned facts constitutes “sufficient cause” for condoning delay of 532 days. It is, *inter alia*, contended, that the applicants have a good case on merits.

9. While objecting the application, the respondents in their affidavit cum reply stated that there is no tenable explanation offered by the applicants for the gross delay and, therefore, same may not be accepted.

10. It is contended that Regular Civil Appeal was dismissed on 14.9.2016. The review application also came to be dismissed on 14.3.2018. There is no explanation offered as to what prevented the applicants from approaching this Court with a Second Appeal simultaneously.

11. It is the contention of the respondents that the entire *modus operandi* of the applicants in seeking condonation of delay is only to drag the matter which has commenced in the year 2010 only with a design to deprive the respondents/decreed holders from enjoying the fruits of the decree which has attained finality by concurrent findings of the two Courts below. It is contended that the respondents herein are aged about 80 and 75 years respectively, counting each day of their life, waiting to enjoy the fruits of the decree obtained and confirmed by the the First Appellate Court.

12. It is further contended that any condonation of delay would be an extra ordinary indulgence which will restart the entire cycle of litigation and would be contrary to the public policy, as the fundamental premise on which law of limitation rests is that there must be an end to litigation.

13. The entire exercise of the applicants of filing review was to protract the proceeding and defeat the judgment and decree obtained by the respondents/plaintiffs. No explanation is offered as to how

much time was consumed to engage an advocate by the applicants and, therefore, explanation offered is quite vague and cryptic. The Respondents, therefore, contend that the application deserves to be dismissed.

14. By way of an affidavit in rejoinder, the applicants have reiterated almost the same grounds, however, they added few grounds more about the illness of the applicant no.1 who is stated to have been suffering from arthritics and applicant no.2 from fluctuation of blood pressure. It is contended that due to their health issues they had to rely on their daughter for the purpose of traveling to Panaji for the purpose of engaging an advocate for filing Second Appeal.

15. Shri Lotlikar, learned Senior Counsel contended that after dismissal of the First Appeal by the Lower Appellate Court on 14.9.2016, the review application has been preferred bonafide as per the advice of the Counsel. There was no malafide or mischievous approach on the part of the applicants. He points out that if the days spent in obtaining certified copies and review are excluded, then the

appeal is within time. In support of his contentions Shri Lotlikar, learned Senior Counsel has placed reliance on the judgment of this Court in the case of *Pattherao Narsu Patil Vs Sou. Gangubai A. Lad and ors.*¹ It is contended that the applicants were prosecuting the remedy available in law and, as they were unsuccessful, period spent in prosecuting the remedy needs to be excluded in view of the Section 14 of the Limitation Act.

16. On the other hand, Shri Lawande, learned Counsel for the respondents, apart from the grounds raised in the reply, contends that the respondents are issueless and there would be nobody to pursue the matter after them. The whole game of the applicants is to cause delay and let one of the respondents die so that nobody would prosecute the matter further.

17. It is further contended by Shri Lawande, that it is not clear whether the application is under Section 5 or Section 14 of the Limitation Act. In the judgments cited by Shri Lotlikar, it is

¹ (2019) 2 Bom CR 436

contended that there was legal advise received to file review petition, however, no such legal advise has been annexed in this case. He has drawn my attention to the first page of the affidavit in rejoinder which indicates that power of attorney holder of the applicants viz. Mrs. Mackvy Colaco who is the daughter of the applicants herself is an advocate which speaks for itself.

18. Shri Lawande contends that Section 14 of the Limitation Act would be inapplicable as review was filed in the Court having jurisdiction. He has placed reliance in case of *M/s. Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh*². According to the learned Counsel, the applicants were not precluded from preferring an appeal only because review was pending. There was no bar to file an appeal. Despite concurrent findings of two Courts, the applicants preferred a review which was not bonafide.

19. Shri Lotlikar, learned Senior Counsel while countering the arguments of Shri Lawande submitted that ruling cited by the learned

² AIR 1984 SC 1372

counsel is not on the limitation and, therefore not an authority whether the delay should be condoned. He placed reliance on an authority of Supreme Court in the case of *M. P. Steel Corporation Vs. Commissioner of Central Excise*³.

20. Section 14 of the Limitation Act deals with exclusion of time period bonafide in a Court without jurisdiction. On analysis of the said Section it becomes evident that following conditions must be satisfied before Section 14 can be pressed into service:-

- (i) *Both the prior and subsequent proceedings are civil proceeding prosecuted by the same party;*
- (ii) *The prior proceedings had been prosecuted with due diligence and in good faith;*
- (iii) *The failure of the prior proceedings was due to defect of jurisdiction or other cause of like nature;*
- (iv) *The earlier proceeding and latter proceeding must relate to the same matter in issue; and*
- (v) *Both the proceedings are prosecuted in a Court.*

21. There is no dispute of jurisdiction that after the dismissal of the First Appeal on 14.9.2016 a review application was moved before the same Court on 10.11.2016 which came to be dismissed on 14.3.2018.

³ (2015)7 SCC 58

22. The only question which needs to be determined is as to whether review proceedings have been preferred with due diligence and in good faith.

23. In case of *Consolidated Engineering Enterprises vs. Principal Secretary Irrigation Department and others*⁴, the Hon'ble Supreme Court in paragraph 31 enunciated the principles about the applicability of Section 14. Paragraph 31 of the Judgment reads thus:-

“To attract the provisions of Section 14 of the Limitation Act, five conditions enumerated in the earlier part of this judgment have to co-exist. There is no manner of doubt that the section deserves to be construed liberally. Due diligence and caution are essential prerequisites for attracting Section 14. Due diligence cannot be measured by any absolute standards. Due diligence is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances. The time during which a court holds up a case while it is discovering that it ought to have been presented in another court, must be excluded, as the delay of the court cannot affect the due diligence of the party. Section 14 requires that the prior proceeding should have been prosecuted in good faith and*

⁴ (2008)7 SCC169

with due diligence. The definition of good faith as found in Section 2(h) of the Limitation Act would indicate that nothing shall be deemed to be in good faith which is not done with due care and attention. It is true that Section 14 will not help a party who is guilty of negligence, lapse or inaction. However, there can be no hard-and-fast rule as to what amounts to good faith. It is a matter to be decided on the facts of each case. It will, in almost every case be more or less a question of degree. The mere filing of an application in wrong court would not prima facie show want of good faith. There must be no pretended mistake intentionally made with a view to delaying the proceedings or harassing the opposite party. In the light of these principles, the question will have to be considered whether the appellant had prosecuted the matter in other courts with due diligence and in good faith.”

23. There is gross and inordinate delay of 532 days. There is no mention in the application as to when the applicants had applied for certified copies of the impugned judgment and order in Regular Civil Appeal no.44/2015 which came to be dismissed on 14.9.2016.

24. Neither the date nor any explanation in that regard is forthcoming. There is also no explanation as to how much time was consumed for applying for certified copies of the judgment and decree

of the trial Court as well as the Memo of Appeal. It is contention of the respondents that for obtaining certified copies of judgment and decree of trial Court an application was made on 12.4.2018, however, there is no explanation offered for the period between 14.3.2018 on which date review application was dismissed.

25. It seems that review itself was preferred after more than 55 days i.e on 10.11.2016 which, infact ought to have been preferred within the limitation period of 30 days. There is no explanation forthcoming about the said delay which is a clear indication of lapse on the part of the applicants.

26. Needless to state that while rejecting the Review Application the District Judge has made following observation:-

“There is no new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicants and was not produced by the applicants at the time when decree was passed or made; and neither “there is any mistake or error apparent on the face of the record” nor there is any other sufficient ground for review of the judgment and decree dated 14.9.2016 of the Court.”

27. It is the contention of the respondents that the applicants had applied for certified copies of the trial Courts judgment on 12.4.2018 for preferring an appeal. Certified copies were collected on 17.4.2018. Appeal memo of Regular Civil Appeal was applied on 4.4.2018. The date of taking delivery was 13.4.2018. It was collected on 16.4.2018. It is pointed out that appeal memo was obtained for the purpose of record and not for filing an appeal. This also is an indication of deliberate delay which cannot be said to be an act of due diligence on the part of the applicants.

28. The application does not reveal as to how much time was required for the applicants to engage services of an advocate. There is no specific period mentioned. Rather vague statement is made in the application that sometime was consumed to engage an Advocate for the purpose of filing Second Appeal. The application indicates that “some more time” was consumed in obtaining certified copy of the judgment and decree of the trial Court as well as appeal memo of the Appellate Court sans any specific date.

29. No details as to which documents were required to be obtained has been furnished. As a matter of fact the certified copy of all the relevant papers/documents were available with the applicants on 17.4.2018.

30. There is one more glaring aspect. The certified copy of the review application which is annexed reveals that the application for review was presented on 10.11.2016. However, it appears to have been registered on 31.12.2016 i.e almost after 50 days. Why it took 50 days for merely registering the application for review is also a mystery. No explanation for that is tendered.

31. The conduct, behavior and the attitude of the applicants relating to their inaction or negligence are relevant factors which needs to be taken into consideration. One has to weigh the scale of balance of justice in respect of both the parties. Such principles cannot be given a total go-by under the garb of liberal view. Looking to the inordinate delay of 532 days, the doctrine of prejudice is attracted which warrants a strict approach.

32. Shri Lotlikar, learned Senior Counsel has placed reliance on a judgment of Supreme Court in the case of ***M. P. Steel Corporation*** (supra). Paragraph 49 of the said judgment reads thus:-

“The language of Section 14, construed in the light of the object for which the provision has been made, lends itself to such an interpretation. The object of Section 14 is that if its conditions are otherwise met, the plaintiff/applicant should be put in the same position as he was when he started an abortive proceeding. What is necessary is the absence of negligence or inaction. So long as the plaintiff or applicant is bonafide pursuing a legal remedy which turns out to be abortive, the time beginning from the date of the cause of action of an appellate proceeding is to be excluded if such appellate proceeding is from an order in an original proceeding instituted without jurisdiction or which has not resulted in an order on the merits of the case. If this were not so, anomalous results would follow. Take the case of a plaintiff or applicant who has succeeded at the first stage of what turns out to be an abortive proceeding. Assume that, on a given state of facts, a defendant – appellant or other appellant takes six months more than the prescribed period for filing an appeal. The delay in filing the appeal is condoned. Under explanation (b) of Section 14, the plaintiff or the applicant resisting such an appeal shall be deemed to be prosecuting a proceeding. If the six month period together with the original period for filing the appeal is not to be excluded under Section 14, the plaintiff/applicant would not get a

hearing on merits for no fault of his, as he in the example given is not the appellant. Clearly therefore, in such a case, the entire period of nine months ought to be excluded. If this is so for an appellate proceeding, it ought to be so for an original proceeding as well with this difference that the time already taken to file the original proceeding, i.e. the time prior to institution of the original proceeding cannot be excluded. Take a case where the limitation period for the original proceeding is six months. The plaintiff/applicant files such a proceeding on the ninetieth day i.e. after three months are over. The said proceeding turns out to be abortive after it has gone through a chequered career in the appeal courts. The same plaintiff/applicant now files a fresh proceeding before a court of first instance having the necessary jurisdiction. So long as the said proceeding is filed within the remaining three month period, Section 14 will apply to exclude the entire time taken starting from the ninety first day till the final appeal is ultimately dismissed. This example also goes to show that the expression "the time during which the plaintiff has been prosecuting with due diligence another civil proceeding" needs to be construed in a manner which advances the object sought to be achieved, thereby advancing the cause of justice."

33. It is quite clear from the ratio laid down in the aforesaid judgment that the object of Section 14 of the Limitation Act is that if its conditions are otherwise met, what is necessary is the absence of

negligence or inaction. Here, in the case at hand, negligence and inaction of the applicants is apparent. It is quite clear that the applicants were not bonafide pursuing the legal remedy in the form of review, or they were not prosecuting the remedy before the Court without jurisdiction. There is no question of defect of jurisdiction.

34. There is even no question of being mislead by Advocate as already stated that their power of attorney herself is an advocate who is fully conversant with the fact of the case. I am afraid the ratio laid down by the Supreme Court in *M. P. Steel Corporation* (supra) would not be of any assistant to the applicants.

35. The learned Counsel for the applicants has placed reliance on the judgment of this Court in case of *Pattherao Narsu Patil* (supra). In the said case, the appellant, as per the legal advise received, filed review petition on 14.12.2012. It was dismissed on 6.11.2014 being not maintainable. Within two weeks thereafter, the appellant preferred First Appeal alongwith an application for condonation of delay of 4 years and 30 days. In that case, the appellant was old and

illiterate who did not receive proper information from his advocate and, therefore, there was a delay, which is not the case in hand as discussed herein above. This ratio will not be helpful to the applicants.

36. In the case of *M/s. Thungabhadra Industries Ltd* (supra) paragraph 8 of the judgment reads thus:-

“O. XLVII r. 1(1) of the Civil Procedure Code permits an application for review being filed "from a decree or order from which an appeal is allowed but from which no appeal has been preferred." In the present case, it would be seen, on the date when the application for review was filed the appellant had not filed an appeal to this Court and therefore the terms of O. XLVII r. 1(1) did not stand in the way of the petition for review being entertained. Learned Counsel for the respondent did not contest this position. Nor could we read the judgment of the High Court as rejecting the petition for review on that ground. The crucial date for determining whether or not the 'terms of O. XLVII. r.1 (1) are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the Court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the Court hearing the review petition would come to an end.”

37. Though this judgment is not directly on the point of limitation, yet it speaks about the scope of Order XLVII Rule 1.

38. Admittedly, in the case at hand, the review application came to be dismissed on 14.3.2018 and thereafter the applicants have filed the Second Appeal. During the pendency of the review application no appeal was pending before this Court. There is no question of disposing of Second Appeal before the final decision on the review application. This ratio can be distinguished accordingly.

39. Indisputably, the respondents are aged about 80 and 75 years respectively who have been fighting legal battle for nearly 10 years. There are no legal heirs to further prosecute the matter. That apart, they have been successful in both the trial Court as well as the First Appellate Court. Review application has been dismissed on merits. On the other hand, negligence, inaction and malafide on the part of the applicants is writ large. There appears to be a pretended mistake intentionally made to harass the respondents. The applicants

could have filed Second Appeal during the pendency of review petition as there is no legal bar.

40. Consequently, the application is devoid of merits and hence stands rejected.

PRITHVIRAJ K. CHAVAN, J.

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