

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO. 2931 OF 2019

Ramdas Shamrao Kasbe	]	Petitioner
Vs.		
Pramod Narayan Birbahadur Rai	]	Respondent

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Mr. Shailesh Somnath Amin, Advocate for the Petitioner.
Mr. Pankaj Dwivedi, Advocate for the Respondent.

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CORAM : R.G. KETKAR, J.

DATE : 24th APRIL, 2019.

P.C.

Heard Mr. Amin, learned Counsel for the petitioner and Mr. Dwiwedi, learned Counsel for the respondent, at length.

2. This Petition takes exception to the order dated 11th February, 2019 passed by the Appellate Bench of the Small Causes Court, Mumbai in MARJI Application No.109 of 2018. By that order, the Appellate Court rejected the application made by the petitioner under section 5 of The Limitation Act, 1963 for condonation of delay of 273 days caused in filing the substantive appeal against the judgment and decree dated 5th December, 2017 passed by the learned trial Judge in R.A.E. & R Suit No.376/624 of 2012.

3. The respondent, hereinafter referred to as 'plaintiff' instituted suit against the petitioner, hereinafter referred to as 'defendant' for recovery of possession of Room No.11 admeasuring 100 square feet having length 10 feet and width 10 feet and height of 14 feet situate in Birbahadur Old Chawl No.3,

Birbahadur Compound, Shankar Wadi, Jogeshwari (East), Mumbai 400 060 (for short 'suit premises'), *inter alia*, invoking grounds under sections 15 and 16 (1) (g) of the Maharashtra Rent Control Act, 1999 (for short 'Act'). The defendant filed written statement at Exhibit 10 and denied the contentions raised by the plaintiff. On the basis of the pleadings of the parties, the learned trial Judge framed the necessary issues. The plaintiff filed his affidavit of examination-in-chief at Exhibit 22 and list of documents at Exhibit 23 in support of his case. The defendant did not cross-examine the plaintiff's witness. The defendant did not adduce his evidence. On 9th October, 2017, the learned trial Judge passed order closing evidence of the defendant. Ultimately, by order dated 5th December, 2017, the learned trial Judge decreed the suit. Aggrieved by this order, the defendant filed appeal. As there was delay in filing the appeal, he took out MARJI Application No.109 of 2018 for condoning delay of 273 days caused in filing the appeal. The plaintiff filed affidavit in reply dated 18th December, 2018 opposing the application. By the impugned order, the Appellate Court rejected the application and refused to condone the delay. With the result, the substantive appeal preferred by the defendant stands dismissed. It is against this order, the defendant has instituted the present Petition.

4. In support of this Petition, Mr. Amin has invited my attention to paragraphs 4, 5 and 7 of the application for condonation of delay to contend that the reasons given in these paras constitute sufficient cause. He also relied on the decision in **State of Bihar Vs. Arjun Prasad Rajak,(2009) 13 SCC 775** to contend that the Apex Court condoned delay of one year and eighteen days. He submitted that the Apex Court held that the High Court should have condoned the delay in filing the appeal and should have decided the appeal on merits. In the present case, as delay is of 273 days, this is a fit case to condone the delay. He submitted that while considering the application for condonation

of delay, liberal approach is required to be adopted. He submitted that the petitioner may be put to terms of payment of costs as also the Appellate Court may be directed to dispose of the appeal within three months. The petitioner is ready and willing to extend full co-operation for early disposal of the appeal.

5. On the other hand, Mr. Dwivedi submitted that after considering the reasons given in paragraphs 4,5,7 of the application, the Appellate Court has held that the defendant did not produce single document on record to substantiate the averments made in the application. The assertions made in the application are vague. The petitioner has not produced any material for substantiating his old age ailments as also that his wife suffered paralytic attack. He, therefore, submitted that no case is made out for interfering with the impugned order.

6. The Petition was heard from time to time and was adjourned so as to enable the learned Counsel for the petitioner to take instructions as to whether the defendant is ready and willing to hand over possession of the suit premises to the plaintiff and if yes, the Court was inclined to set aside the trial Court's decree. The Court was inclined to permit the defendant to cross-examine the plaintiff's witness as also adduce his evidence. The Court also indicated that the plaintiff will be restrained from creating third party interest and parting with possession of the suit premises. The plaintiff will abide by the outcome of the suit subject to his right to challenge that order.

7. Mr. Amin states that son and Constituted Attorney of the defendant is present in the Court. He has tendered photo copy of his "Driving Licence" which is taken on record and marked 'X' for identification. Upon taking instructions from him, he states that the defendant is not agreeable to this suggestion.

8. In view thereof, it is necessary to decide the Petition on merits. As mentioned earlier, the defendant has filed MARJI Application for condonation of delay. Paragraphs 4, 5 and 7 of the application read thus;

- “4. The Applicant submits that the Applicant is a senior citizen and suffering from multiple old age ailments. The wife of the applicant also had a paralysis attack whereby her body is partially paralyzed. I say and hence was taken to her native at Ahmednagar for her ayurvedic treatment.
5. I say that on many occasions I had to travel to my native place alongwith my wife for her paralytic treatment. I say that due to frequent travelling to native place and her constant medications and treatment I had lost the track of the case and could not give necessary instructions to my lawyer to file the aforesaid appeal.
7. I say that I am not financially sound and I have been doing odd jobs to earn my bread and butter. I say that the suit premises is the only place of residence I have and I do not have any other residence and my source of income is also not certain”.

9. The plaintiff filed affidavit in reply. Paragraphs 3, 4 and 5 of the reply read thus;

- “3. With reference to para 4 I deny that the applicant is suffering from multiple old age ailments. The applicant is not residing in the suit premises but he resides at Kalwa. The applicant had not annexed any medical certificate with Marji application showing that the wife of applicant is suffering from paralysis attack and the applicant is also suffering from Multiple old age ailment as falsely alleged. I put the applicant to the strict proof thereof.
4. With reference to para 5 I deny that the applicant had to travel to his native place along with his wife. The applicant had not produced any ticket or any certificate of doctor of his native place. Therefore bare words of applicant cannot be relied upon. I deny the rest of the paragraph in toto.
5. Without prejudice to what is stated hereinabove and at the further outset, the delay in filing the appeal cannot be

condoned for asking, but the applicant has to make out a case showing justifiable grounds for not approaching the court at earlier point of time or within the limitation. In the instant case, the applicant has stated that due to paralytic treatment of his wife, he could not attend the Court, which cannot be believed”.

10. A perusal of paragraphs 4,5 and 7 of the application shows that though the defendant contended that he is a senior citizen and suffering from multiple old age ailments and his wife had suffered paralytic attack, no material was produced for substantiating the averments. The averments in paragraph 4 need to be appreciated in view of paragraph 3 of the reply filed by the plaintiff. The plaintiff specifically asserted that the defendant is not residing in the suit premises but he resides at Kalwa. The defendant has not denied said fact by filing rejoinder. He has also not filed any material to substantiate that he is residing in the suit premises. The defendant has not produced any medical certificate along with MARJI Application showing that the defendant is suffering from multiple old age ailments. He has also not produced any medical paper to substantiate that his wife is suffering from paralytic attack.

11. In paragraph 5, the defendant contended that on many occasions he had to travel to his native place along with his wife for her paralytic treatment. Due to frequent travelling to native place and her constant medications and treatment, he had lost the track of the case and could not give necessary instructions to his lawyer to file the appeal. The plaintiff denied these contentions in paragraph 4 of his reply and submitted that bare words of the defendant cannot be relied upon. The defendant did not substantiate the assertions made in paragraph 5 of the application. In paragraph 5 of the reply, the plaintiff contended that delay can be condoned subject to the defendant making out a sufficient cause.

12. Mr. Amin relied on the decision of **State of Bihar** (supra). In paragraph 4, the Apex Court has observed thus;

“We have carefully perused the order passed by the High Court and the explanation offered by the appellants in the affidavit filed for condonation of delay in filing the appeal belatedly. In the facts and circumstances of the case, we are of the opinion, the High Court should have condoned the delay in filing the appeal and should have decided the appeal on merits. Furthermore, this Court has consistently held, that, if, for the reason, the appeal is dismissed on the ground of delay, the Court need not express its opinion on the merits of the appeal. In the instant case, the High Court while declining to entertain the appeal on the ground of delay, has also made passing observation on the merits of the appeal, which, in our opinion ought not to have been done by the High Court”.

13. A perusal of paragraph 4 extracted hereinabove shows that in the facts and circumstances of the case, the Apex Court was of the view that the High Court should have condoned the delay caused in filing the appeal and should have decided the appeal on merits. It is also evident that while dismissing the application for condonation of delay, the High Court expressed opinion on merits of the appeal. The Apex Court, therefore, observed that High Court ought not have expressed opinion on merits of the appeal when it was not inclined to condone the delay.

14. In the present case, for the reasons set out in the application, I am satisfied that no sufficient cause is made out for condoning the delay. It is settled principle of law that delay can be condoned subject to the party making out a sufficient cause. In the present case, no sufficient cause is made out.

15. Mr. Amin submitted the plaintiff can be compensated by costs. I do not find any merit in this submission. The plaintiff has filed suit for recovery of possession of the suit premises and not for recovery of money. That apart, for the negligence of the defendant, the plaintiff should not suffer.

16. Though the suggestion was given to the defendant that subject to his handing over possession to the plaintiff and thereafter restraining the plaintiff from creating third party interest or parting with possession, the Court is inclined to set aside the trial Court's decree and permit him to cross-examine the plaintiff's witness as also adduce his evidence, the said suggestion was not accepted by the defendant.

17. In view thereof, no case is made out for interfering with the impugned order. The Petition fails and the same is dismissed.

18. At this stage, Mr. Amin orally applies for continuation of interim relief granted on 8th March, 2019 by a period of three months. He assures that within three weeks from today, the defendant and all the adult family members residing with him will file usual undertaking in this Court, after giving advance copy to the other side incorporating therein that;

- [a] they are possession and nobody else is in possession of the suit premises;
- [b] they have neither created third party interest nor parted with possession of the suit premises;
- [c] they will hereafter neither create third party interest nor part with possession of the suit premises;
- [d] the petitioner will deposit arrears of rent, if any, in this Court under intimation in writing to the learned Counsel for the respondent within 3 weeks from today.

[e] in case the petitioner is unable to obtain suitable orders from the higher Court within three months from today, they will hand over vacant and peaceful possession of the suit premises to the respondent/plaintiff.

19. In view thereof, notwithstanding dismissal of the Petition, subject to the petitioner filing undertaking in the aforesaid terms within three weeks from today, ad-interim order granted on 8th March, 2019 shall remain in force for a period of three months from today. It is expressly made clear that in case the undertaking is not filed in the aforesaid terms within three weeks from today and/or in case, the petitioner commits breach of any of the conditions of the undertaking, ad-interim order shall stand vacated without further reference of the Court.

20. **List the Petition for reporting compliance on 7th June, 2019.**

[R.G. KETKAR, J.]