

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

**CIVIL APPLICATION NO.3376 OF 2019
IN
FIRST APPEAL NO.451 OF 2009**

Shri Tukaram Moru Kadlak .. Applicant

vs.

Mumbai Building Repair &
Reconstruction Board And Ors. .. Respondents

Mr.J.S.Shukla i/b M/s.Vaibhav Mehta & Associates for the
applicant

Mr.G.B.Walawalkar i/b Mr.Shankar P. Thorat for the
Respondent no.1

Mr.Aashdin Chwalwalla a/w Ms.Karishma K i/b M/s.Argues
Partners for the Respondent no.2

**CORAM: K.K.TATED, J.
DATED : OCTOBER 16, 2019**

P.C.

1 Heard.

2 By this Civil Application, Applicant is seeking
restoration of First Appeal No.451 of 2009 with Civil
Application No.2024 of 2010 and 1483 of 2009 which stand
dismissed for non-prosecution by order dated 30.1.2017
passed by this court.

3 In the present proceeding Applicant original plaintiff filed S.C.Suit No.3241 of 2006 in Bombay City Civil Court at Mumbai for directing original defendant no.1 to transfer the name of plaintiff on the property record of new room in the newly constructed building in lieu of old Room no.38, first floor, Haji Kasam Chawl No.21(B), Balwant Dhodi Marg, Mazgaon, 400 010. Applicant also claimed other reliefs which are as under:

“a) For order and decree directing the Defendant No.1 to transfer the names of the Plaintiffs on the property records of the new room in the newly reconstructed building in lieu of old room No. 38, First Floor, Haji Kasam Chawl No.21 (B), Balwant Dhodi Marg, Mazgaon, Mumbai 400 010;

b) The Defendant No.1 their servants and agents be restrained from transferring/allotting the new room in the reconstructed building in lieu of old room no.38, First floor, Haji Kasam Chawl No.21(B), Balwant Dhodi Marg, Mazgaon, Mumbai 400 010 to some third person or persons save and except the Plaintiff otherwise than by due process of law;

bb) The Defendant Nos. 3 and 4 their servants and agents be permanently restrained from transferring/allotting the new room in the reconstructed building in lieu of old room No. 38, First floor, Haji Kasam Chawl No.21 (B), Balwant Dhodi Marg, Mazgaon, Mumbai-400 010 to some third person or persons;

c) For interim and ad-interim reliefs in terms

of prayer (b) and (c) as above be granted;

d) For cost of the present suit be granted;

e) For such other and further reliefs as this Hon'ble Court may deem fit and proper in nature and circumstances of the above case be granted to the Plaintiff.”

4 The said Suit was finally decided by the Trial Court by impugned judgment and decree 26.2.2009 dismissing Applicant's Suit. Hence, Applicant preferred the present First Appeal.

5 The learned counsel for the Applicant submits that First Appeal was on board before this court on 30.1.2017. On that date, concerned clerk was unwell and he was on leave. He submits that on that date, it remained on the part of Junior Advocate to notice the matter on board. Hence, no one appeared on behalf of them when the matter was called out. He submits that because of mistake on the part of Advocate, litigant should not suffer. He submits that Applicant has good chance of success in the present matter.

6 The learned counsel for the Applicant submits that when the Applicant contacted Advocate on record some time in the year 2019, at that time, the learned counsel for the Applicant searched on web-site of High Court and that time, learnt that matter stands dismissed in view of the order dated 30.1.2017. Therefore, Applicant filed present Civil Application immediately for restoration of matter for hearing on its own merits.

7 The learned counsel for the Applicant submits that because of mistake on the part of Advocate, litigant should not suffer. Therefore, present Civil Application be allowed.

8 On the other hand, the learned counsel for the Respondent nos.2 vehemently opposed the present Civil Application. He submits that Applicant failed to disclose sufficient cause for condonation of 2 years 34 days delay in filing First Appeal. He submits that limitation for filing Application for restoration of matter is only 30 days. As the Applicant failed to disclose sufficient cause, there is no question of allowing present Civil Application. He further submits that rights are already created in favour of Respondent no.2. The learned counsel for the Respondent no.2 relied on following judgments in support of this contention:

- a. Smt.Dev Bala Sehgal vs. Devinder Pal Sehgal, 2000 SCC Online P & H 1282
- b. Radhanath Pathak and another vs. Bihar State Board of Religious Trusts, Patna, AIR 1968 Patna 110
- c. Moddus Media Pvt.Ltd. vs.M/s.Scone Exhibition Pvt. Ltd., 2017 SCC Online Delhi 8491
- d. B.S.Lamba vs. M.A.Kanth and others, AIR 1990 J & K 79
- e. Nandkishor Kanhyalal Agrawal vs. Dhule Municipal Corporation and others, 2012 (1)

Mh. L.J. 918.

9 On the basis of these submissions and the authorities, the learned counsel for the Respondent submits that there is no substance in the present Civil Application and same is required to be dismissed with costs.

10 I have heard both the sides at length.

11 It is to be noted that in the present proceeding, First Appeal well as Civil Application stands dismissed by order dated 30.1.2017 when no one appeared on behalf of Applicant. Applicant specifically stated in paragraph 5 of the Civil Application that on that date, concerned clerk whose duty was to watch the board and inform the Advocate on record was unwell. Hence, board was watched by another Junior Advocate, but it remained on the part of another Junior Advocate to notice the matter on the board and hence, no one appeared on behalf of them when the matter was called out.

12 It is to be noted that because of mistake on the part of Advocate, litigant should not suffer. In the present matter, dispute is between family members about the suit property.

13 The submissions made by the learned counsel for the Respondent no.2 that rights are created in their favour is correct. There is no dispute that in view of dismissal of First Appeal, rights are created in their favour. But First Appeal is dismissed because of mistake on the part of Advocate. In

the matter of **Smt.Dev Bala Sehgal vs. Devinder Pal Sehgal** (Supra) held that limitation for filing Application is 30 days only and unless and until sufficient cause is shown, there is no question to condone the delay. Paragraph 11 and 12 of the said authority reads thus:

"11. In Ashish Kumar Hazra v. Rubi Park Cooperative Housing Society Ltd., (1997) 6 SCC 26 : AIR 1997 SC 2724, their lordships of the Supreme Court held as under:-

"...Unless proper explanation is given, the valuable right has been created in favour of the respondents under Section 3 of the Limitation Act, it is the duty of the Court to ensure that unless proper explanation is given the valuable right cannot be defeated..."

12. It is abundantly clear that the application in hand for restoration of the suit was not filed within 30 days from the date of dismissal of the suit in default. The Court could not extend the time of limitation by bringing it under the principle of "interest of justice" and bypassing the mandatory provisions of Article 122 of the Limitation Act, 1963. Article 122 of the Limitation Act 1963 does not provide that the application has to be filed within 30 days from the day of knowledge of the suit having been dismissed in default. In fact, it is very specific and clear that it has to be counted from the date of dismissal. The application having been filed beyond the prescribed period of limitation and the

limitation having not been condoned on a written application or an oral request of the plaintiffs, the Court cannot restore the suit while invoking the inherent jurisdiction under Section 151 CPC. It is well-established that the express provisions of law cannot be over-ridden by invoking inherent jurisdiction.”

14 Bare reading of paragraph 11 and 12 shows that if sufficient cause is not shown, then there is no question of condoning the delay. In the case in hand, Applicant specifically made averments in application that because of mistake on the part of advocate, applicant should not suffer.

15 In another Authority, **Radhanath Pathak and another vs. Bihar State Board of Religious Trusts, Patna,** (Supra) Patna High Court held that if sufficient cause is not shown, then there is no question of allowing the Application for restoration under section 151 of the Code of Civil Procedure. Paragraph 4 of the said authority reads thus:

“4. It is, however, not necessary in the present case to decide definitely as to whether the restoration application could be made under Section 151 of the CPC only. The law, however, remains that, for whatever reason the suit may have been dismissed, an application for restoration of the suit has to be filed, under Article 122 of the Limitation Act, within thirty days from the date of the dismissal of the suit. Even if the suit had been dismissed for want of prosecution,

as in the present case, the law of limitation is the same; and if the application is filed beyond thirty days of the date of the dismissal of the suit, the application has to be dismissed as being barred by time. In such a case, a Court cannot circumvent the law of limitation by exercising its inherent power under Section 151 of the CPC. As pointed out in the case of Kameshwar Singh v. Ram Prasad Shanna, ILR 31 Pat 737 (AIR 1952 Pat 478), a Court cannot override the express provisions of law by a resort to inherent powers under Section 151 of the CPC, 1908, nor can a Court ignore the specific provisions for dealing with a case by a resort to inherent jurisdiction either under Section 151 or Section 152 of the CPC is the present case, the suit was dismissed on the 14th November, 1964. Even on the own case of the plaintiff, it got knowledge of the dismissal of the suit on the 26th December, 1964. The application for restoration, having been filed on the 18th February, 1965, was much beyond thirty days from the date of dismissal, or even from the date of knowledge of the dismissal of the suit. This application was obviously barred this view with respect to this matter. But, after having taken that view, the Court below attempted to circumvent the law of limitation by exercising its inherent jurisdiction. The Court below was obviously wrong in invoking its inherent jurisdiction in a matter like the present one. True it is that if a Court, under its Own mistake, had passed an order, it could set aside that order under

Section 151 of the CPC in appropriate cases. In the present case, however, there was no mistake committed by the Court in passing an order calling upon the plaintiff to file process-fees etc., before fixing a date; and, therefore, there was no occasion for the Court to invoke its inherent Jurisdiction, after the remedy of the plaintiff of filing an application for restoration of the suit had become barred by time. It is, therefore, apparent that the order of the Court below setting aside the order of dismissal of the suit and restoring the suit is bad in law and the Court has committed an illegality in the exercise of its jurisdiction in passing such an order. For the reasons stated above, it is clear that the Case of Sripati Saran Prasad Singh, AIR 1939 Pat 160, was not correctly decided.”

16 It is to be noted that in the case in hand, as soon as the Applicant learnt about the dismissal of the matter, because of mistake on the part of Advocate, he immediately filed the present Civil Application. Not only that, he specifically disclosed in the Application that on that date, concerned clerk of the Applicant was not well. Hence, it remained on the part of Junior Advocate to notice the matter on board. In view of these facts, authority cited by the learned counsel for the Respondent is not applicable in the present matter.

17 In the matter of **Moddus Media Pvt.Ltd. vs.M/s.Scone Exhibition Pvt. Ltd., 2017**, (Supra) Delhi Hon'ble Court held that unless and until sufficient cause is shown, there is no question to condone the delay. In that matter, Applicant was limited company. Hence, Delhi High Court held that

Limited Company has their own staff and they can keep watch whereas in the, case in hand, Applicant is individual. Therefore, that authority is also not applicable. Paragraph 13 reads thus:

“13. The litigant owes a duty to be vigilant of his rights and is also expected to be equally vigilant about the judicial proceedings pending in the court of law against him or initiated at his instance. The litigant cannot be permitted to cast the entire blame on the Advocate. It appears that the blame is being attributed on the Advocate with a view to get the delay condoned and avoid the decree. After filing the civil suit or written statement, the litigant cannot go off to sleep and wake up from a deep slumber after passing a long time as if the court is storage of the suits filed by such negligent litigants. Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory put forth by the appellant/applicant/defendant company, which cannot be accepted and ought not to have been accepted. The appellant is not a simple or rustic illiterate person but a Private Limited Company managed by educated businessmen who know very well where their-interest lies. The litigant is to be vigilant and pursue his case diligently on all the hearings. If the litigant does not appear in the court and leaves the case at the mercy of his

counsel without caring as to what different frivolous pleas/defences being taken by his counsel for adjournments is bound to suffer. If the litigant does not turn up to obtain the copies of judgment and orders of the court so as to find out what orders are passed by the court is liable to bear the consequences.”

18 The learned counsel for the Respondent also relied on the judgment of J &K High Court in the matter of **B.S.Lamba vs. M.A.Kanth and others**, (Supra). In this authority also, same principle is decided that, unless and until sufficient cause is shown, there is no question of allowing the Civil Application for restoration. In that authority, Applicant filed second Application for restoration of Suit and that was dismissed by High Court on the ground that litigant failed to show sufficient cause. Paragraph 4 of the said authority reads thus:

“4. Accepting the plea of the learned counsel for the petitioner that no period of limitation is prescribed for such an application would defeat the ends of justice and may follow absurd results. Every litigant is supposed to be vigilant of his rights and avail of the remedy expeditiously in accordance with the provisions of law and within the time prescribed under the limitation Act. If the original application for restoration of the suit has to be filed within thirty days, an application under S. 151, C.P.C. for restoration of such application dismissed for default cannot be permitted to be filed at any time according to the whim

and choice of the plaintiff. The petitioner has also not given any cogent reason for not filing this C.M.P. within the time specified and has miserably failed to explain the delay. Accordingly this petition is held barred by time and is dismissed but without any order as to costs.”

19 In the case in hand, Applicant specifically shown sufficient cause in paragraph 5 and 6 of the Civil Application. Hence, that authority is also not applicable in the present proceeding.

20 The learned counsel for the Respondent no.2 also relied on judgment of this court in the matter of **Nandkishor Kanhyalal Agrawal vs. Dhule Municipal Corporation and others** (Supra). In this authority, our Hon'ble Court held that if sufficient cause is not shown as required under section 5 of the Limitation Act, there is no question of allowing the Application. Paragraph 15 of the said Authority reads thus:

“15. The third point which is taken in the application is that, the applicant No. 1 is a body corporate constituted under law regulated by its rules and Regulations and certain steps are to be taken before bringing any legal action in the Court of law which consumes some time. In fact, from perusal of the averments in the said application, No. any particulars are given why the Respondents herein could not take steps within time for

filing the appeal. Only general averments are made in the said application that, public interest is involved and also certain steps are required to be taken before bringing any legal action in the court of law which consumes time, but No. better particulars are provided in the application though there is inordinate delay of more than six years in filing the appeal.

It is true that, term "sufficient cause" under Section 5 of the Limitation Act should receive liberal construction, however, it is equally true that, it must comply with concept of reasonable time and proper conduct of concerned party. In the instant case, as stated earlier, No. any detail particulars are provided by the Respondents. The Supreme Court in the case of Balwant Singh (dead) v. Jagdish Singh and Ors. (supra) in para13 held thus:

"The purpose of introducing liberal construction normally is to introduce the concept of 'reasonableness' as it is understood in its general connotation. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right, as

accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly. The application filed by the applicants lack in details. Even the averments made are not correct and ex facie lack bona fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflect normal behavior of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal

construction cannot be equated with doing injustice to the other party. 2004 (5) ALL MR (SC) 110 Held per incurium."

The Supreme Court in the case of P.K.Ramchandran v. State of Kerala reported in JT (1997) 9 (SC) 189 held thus:

6. Law of Limitation may harshly effect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have No. power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the delay cannot be sustained. This appeal, therefore, succeeds and the impugned order is set aside.

The Supreme Court in the case of G. Ramegowda, Major etc. v. The Special Land Acquisition Officer Bangalore (supra) held in Para8 thus:

The law of limitation is, No. doubt, the same for a private citizen as for Governmental authorities. Government, like any other litigant must take responsibility for the acts or omissions of its officers. But a somewhat different complexion is imparted to the matter where Government makes out a case where

public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and where the officers were clearly at cross purposes with it. Therefore, in assessing what, in a particular case, constitutes 'sufficient cause' for purposes of Section 5 it might, perhaps, be somewhat unrealistic to exclude from the considerations that go into the judicial verdict, these factors which are peculiar to and characteristic of the functioning of the Government. Governmental decisions are proverbially slow encumbered, as they are, by a considerable degree of procedural redtape in the process of their making. A certain amount of latitude is, therefore, not impermissible.

(Emphasis supplied)”

21 In the case in hand, I have already held that Applicant has shown sufficient cause for condonation of delay. Hence, this authority is also not applicable in the present case.

22 Considering the above mentioned facts and the reason given by the Applicant in the present Civil Application , I am satisfied that Applicant has made out a case for allowing the present Civil Application but at the same time, Applicant has to pay cost of Rs.5,000/-.

23 Cost to be paid to the learned counsel for the Respondent no.2 on or before 16.11.2019 and place on record receipt to that effect, failing which the Civil Application shall stand dismissed without further reference to the court. Hence, following order is passed:

a. Order dated 30.1.2017 passed by this court is recalled.

b. First Appeal No.451 of 2009 with Civil Application No.2024 of 2010 and 1483 of 2009 is restored on file for hearing on its own merits.

c. Applicant to pay cost of Rs.5,000/- to the Respondent no.2.

d. Cost to be paid on or before 16.11.2019 either to Respondent no.2 or through Advocate and place on record receipt to that effect, failing which the Civil Application shall stand dismissed without further reference to the court.

e. The Civil Application stands disposed of accordingly. No order as to costs.

(K.K.TATED, J.)