

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****CIVIL APPLICATION NO. 3118 OF 2018****IN****FIRST APPEAL (ST) NO. 8948 OF 2017****Arvinder Pal Ahuja****..... Applicant/
Appellant****VERSUS****Jatinder Pal Singh Hundal,
Since deceased through his legal heirs
Mrs.Sukhwinder Kaur Hundal & Ors.****..... Respondents**

Mr.Piyush Raheja, a/w. Mr.Z.A.Jariwala, Mr.Ganesh Ambekar, i/b.
M/s.Thakore Jariwala & Associates for the Applicant.

Mr.Rampal Singh Kohli, a/w. Mr.Jatin Sahai, Ms.Ayesha K.,
Ms.Chandni Bhatt, Mr.Prasad Avad, Labdhi Parekh, i/b. M/s.C.K.Legal
for the Respondent nos. 2 and 3.

Mr.Vishwajeet Mohite for the Respondent no.5.

CORAM : R.D. DHANUKA, J.**DATE : 3rd DECEMBER, 2019****P.C.**

Learned counsel for the respondent no.5 tenders an unaffirmed copy of the affidavit in reply in this civil application and undertakes to get it affirmed within four weeks from today and to file an affirmed copy before this court within the same time. Undertaking is accepted. In view of the undertaking rendered by the learned counsel for the respondent no.5, I have permitted the respondent no.5 to proceed with the matter on the basis of the unaffirmed copy of the affidavit in reply.

2. By this civil application, the applicant seeks condonation of delay of 3330 days in filing first appeal.

3. It is the case of the applicant that the applicant is claiming his rights and claims through Smt.Harbans Kaur Gurbux Singh who was not made a party to the Suit No. 233 of 1995 in which the decree came to be passed in favour of the original plaintiff. The applicant claims his rights on the basis of the Will executed by the said Smt.Harbans Kaur Gurbux Singh dated 21st May, 2008. The said Will was probated on 22nd November,2017. The applicant thereafter applied for leave to file first appeal. By an order dated 14th June, 2017 passed by Shri G.S.Patel, J. in Civil Application (St) No.8950 of 2017, this court allowed the said civil application and granted leave to the applicant to file an appeal against the judgment and decree passed by the City Civil Court in respect of an immoveable property at Mahakali Caves Road, Andheri (East), Mumbai.

4. Mr.Raheja, learned counsel for the applicant invited my attention to the averments made in the civil application, some of the averments made in the affidavit in reply filed by the respondent nos.2 and 5 and also some of the averments made in the rejoinder filed by the applicant. It is submitted that though the original plaintiff was fully aware of the rights claimed by Smt.Harbans Kaur Gurbux Singh in respect of the suit property, the said Smt.Harbans Kaur Gurbux Singh was not made a

party to the suit. Insofar as the applicant is concerned, since the suit property was bequeathed in favour of the applicant by the said Smt.Harbans Kaur and the said Will was probated subsequently, the applicant applied for the copies of various documents to the Sher-e-Punjab Co-operative Housing Society Limited and only thereafter could file an appeal.

5. Learned counsel also invited my attention to the letter dated 5th August,2010 addressed by the said Smt.Harbans Kaur to the Senior Inspector, Meghwadi Police Station, Andheri East which letter is relied upon by the learned counsel for the respondent nos. 2 and 5 and would submit that the reliance placed on the said letter by the respondent nos. 2 and 5 is totally misplaced. He submits that the said letter was written by the said Smt.Harbans Kaur thereby making a complaint to the Senior Inspector, Meghwadi Police Station about the conduct of Mr.Pratapsingh Kohli and others. He submits that the said letter would clearly indicate that the said Smt.Harbans Kaur while making such complaint was 76 years old and was suffering from various ailments and was not in a position to herself take any steps against those parties.

6. Learned counsel also invited my attention to the various facts narrated in the first appeal in support of his submission that after grant of probate in favour of the applicant, the applicant applied for various documents to the society. No sooner the society furnished the copies of

those documents, the applicant filed this appeal after obtaining leave from this court. It is submitted by the learned counsel that though one of the party had filed Special Leave Petition against the order dated 14th June,2017 passed by Shri G.S.Patel, J. in Civil Application (St.) No.8950 of 2017, the said Special Leave Petition came to be withdrawn. It is submitted by the learned counsel that the delay has been sufficiently explained and thus this court shall condone the delay as prayed.

7. Learned counsel for the respondent no. 2 and respondent no. 5 on the other hand invited my attention to various averments made in the civil application and affidavit in reply filed by them. Both the learned counsel strongly placed reliance on the said complaint dated 5th August,2010 filed by Smt.Harbans Kaur to the Senior Inspector of Meghwadi Police Station and would submit that during her lifetime, though the said Smt.Harbans Kaur was aware of the suits and appeals pending in this court between Mr.Pratapsingh Kohli and his son Mr.Jaspal Singh and Mr.Jatinder Pal Singh Hundal, she did not bother to file any independent proceedings or to intervene in the suit filed by one of the party which came to be decreed by the City Civil Court.

8. Learned counsel also tendered across the bar two letters addressed by Smt.Harbans Kaur to the Sher-e-Punjab Co-operative Housing Society Limited in the year 2008 and would submit that since

she herself had engaged advocate to address various letters as far back as in the year 2008, it could not be said that she was suffering from any ailment and was not in a position to file any independent proceedings.

9. Learned counsel also placed reliance on the reply filed by the applicant to this civil application in Anticipatory Bail Application No.1660 of 2016 and would submit that even this applicant was fully aware of the decree passed by the City Civil Court and has not explained any gross delay in filing this first appeal.

10. Learned counsel for the respondent no.2 also strongly placed reliance on the judgment of Supreme Court in case of ***Brijesh Kumar and others vs. State of Haryana and others, (2014) 11 SCC 351*** and in particular paragraphs 6 and 7 in support of his submission that everyday's delay has to be explained. He submits that the gross delay of 3330 days however is not sufficiently explained in this civil application or in the affidavit in rejoinder.

11. Mr.Raheja, learned counsel for the applicant in rejoinder would submit that the reply filed by the applicant in Anticipatory Bail Application No.1660 of 2016 was filed on 18th October,2016 which is after the date of knowledge of the applicant about the decree obtained by the original plaintiff from the City Civil Court and about the first appeal filed in this court by the contesting defendant.

12. Insofar as the complaint dated 5th August,2010 filed by said

Smt.Harbans Kaur to the Senior Inspector of Police, Meghwadi Police Station is concerned, it is submitted that there is no reference to any specific proceedings filed in this court by and between Mr.Pratapsingh Kohli, Mr.Jaspal Singh and Mr.Jatinder Pal Singh Hundal in the said complaint.

13. Insofar as the correspondence addressed by the said Smt.Harbans Kaur through her advocate to the Sher-e-Punjab Co-operative Housing Society Limited in the year 2008 is concerned, it is submitted by the learned counsel that there was no reference to any pending suit or first appeal in those letters which would clearly indicate that the said Smt.Harbans Kaur was not aware of the proceedings filed by contesting parties.

14. There is no dispute between the parties that the applicant had filed an application for leave to file First Appeal i.e. Civil Application (St.)No.8950 of 2017. By an order dated 14th June, 2017, Shri G.S.Patel, J., after summarizing the facts and after having noticed that the dispute was in respect of the immovable property at Mahakali Caves Road, Andheri (East),Mumbai and that Smt.Harbans Kaur had suffered a tragedy in which her husband and children perished, she left Mumbai for Delhi where her parents lived and various other reasons recorded in the said order made Civil Application (St.) No.8950 of 2017 absolute in terms of prayer clause (a) thereby granting leave to the

applicant to file an appeal against the decree judgment rendered by the City Civil Court.

15. There is no dispute that one of the contesting party had filed Special Leave Petition against the said order dated 14th June, 2017 before the Hon'ble Supreme Court which came to be withdrawn. In view of the said leave granted by this court having attained finality, the applicant preferred a First Appeal and applied for condonation of delay in this civil application. This court thus cannot go into the merits of the order granting leave by this Court.

16. A perusal of the record further indicates that the said Smt.Harbans Kaur had executed a Will on 21st May, 2008 in respect of the property which was subject matter of the suit. By an order dated 22nd November,2017, this court has granted probate in respect of the Will in Petition No.1872 of 2012. Being a legatee under the said Will which is probated by this court, the applicant filed an application for leave and thereafter this first appeal. It is not in dispute that the said Will is probated only on 22nd November,2017.

17. A perusal of the averments made in the paragraph (2) of the civil application and various other averments made in the said civil application as well as in the rejoinder clearly indicates that the knowledge of the applicant about the suit and the impugned judgment and decree was derived only on 15th October,2016. The applicant has

setout in great detail as to when the applicant applied for various documents to the Sher-e-Punjab Co-operative Housing Society Limited in respect of the suit property in question and only after obtaining such document, could applied for leave to file an appeal. I am thus inclined to accept the explanation rendered in various paragraphs of the civil application as well as in rejoinder explaining delay of 3330 days in filing first appeal.

18. Insofar as the reliance placed by the respondent nos. 2 and 5 on the complaint dated 5th August,2010 to the Senior Inspector of Police, Meghwadi Police Station is concerned, a perusal of the said letter clearly indicates that said Smt.Harbans Kaur was 76 years old at the time of making such complaint and was suffering from diabetics and various other ailments. This court while granting leave in favour of the applicant by an order dated 14th June,2017 has also noticed the tragedy suffered by the applicant. It is not in dispute that within six months from the date of filing such complaint on 5th August,2010, the said Smt.Harbans Kaur expired.

19. Insofar as application filed by the applicant is concerned, merely on the basis of the Will executed by the said Smt.Harbans Kaur, the applicant could not have taken any further steps. During the pendency of the said probate proceedings, the applicant started correspondence with the society to find out the relevant documents to enable the

applicant to file proceedings.

20. In my view there is thus no substance in the submissions made by the learned counsel for the respondent nos. 2 and 5 that Smt.Harbans Kaur herself had not filed any independent proceedings in the year 2010 or prior thereto and thus the applicant cannot file First Appeal.

21. Insofar as the reliance on various correspondence addressed by Smt.Harbans Kaur through her advocate in the year 2008 with Sher-e-Punjab Co-operative Housing Society Limited is concerned, it is not in dispute that in those letters addressed by said Smt.Harbans Kaur to the society, there was no reference to any pending suit. There is thus no substance in the submission made by the learned counsel for the respondent nos. 2 and 5. The reference made to the suits or the appeal in the complaint dated 5th August,2010 is also not in respect of any specific proceedings in this court or any other court in respect of the property in question.

22. Insofar the submission of the learned counsel for the respondent no.2 that the independent suit filed by the applicant is stayed by the Supreme Court by an order dated 1st May,2017 in Special Leave to Appeal No.8389 of 2017 and thus the applicant cannot be allowed to file any appeal so as to nullify the effect of the order passed by the Supreme Court is concerned, a perusal of the said order dated 1st May,2017 indicates that the Supreme Court has issued notice to the

parties and has in the meantime stayed the further proceedings in S.C.Suit No.5485 of 1990. The said special leave to appeal is still pending. In my view, the said order passed by the Supreme Court does not prevent the applicant from filing an appeal against the decree passed by the City Civil Court. There is thus no merit in this submission of the learned counsel for the respondent no.2.

23. Insofar as judgment of Supreme Court in case of ***Brijesh Kumar and others*** (supra) relied upon by the learned counsel for the respondent no.2 is concerned, there is no dispute about the proposition of law laid down by the Supreme Court in the said judgment that the delay and laches have to be explained. Since this court is of the view that delay has been sufficiently explained by the applicant in this civil application as well as in the rejoinder, in my view, the judgment of Supreme Court in case of ***Brijesh Kumar and others*** (supra) would not assist the case of the respondent no.2.

24. I, therefore, pass the following order :-

- (a) Civil application is made absolute in terms of prayer clause (a).
- (b) There shall be no order as to costs.

[R.D.DHANUKA, J.]