

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION 621/2018

Prakash Pandurang Mashelkar ... Applicant

V/s.

Peter Francis Pimenta & Ors. ... Respondents

Ms. Neeta Karnik for the Applicant

Mr. Anil D'souza for Respondent Nos.1 and 2.

CORAM: K.K. TATED, J.

DATED : MARCH 4, 2019

P.C. :

1 Heard. The learned counsel for the Applicant submits that in the present proceedings, Respondent Nos.1 and 2 are only contesting parties who preferred an appeal before the appellate court. Hence she received instructions from her client to delete the names of Respondent Nos.3 to 5 from the Civil Revision Application. Same is permitted at the costs and consequences of the Applicant.

2 The amendment to be carried out during the course of the day.

3 By consent of the parties, the matter is taken up for final hearing at the stage of admission itself.

4 By this Civil Revision Application, the Applicant - Plaintiff challenges the order dated 24.09.2018 passed by the District

Judge 1, Vasai in Civil Misc. Application No.35/2017 condoning more than 9 months and 22 days delay in preferring the appeal by Defendant Nos.1 and 5 against the judgment and decree passed in Special Civil Suit No. 644/2007 dated 19.01.2017 by Civil Judge, Senior Division,, Vasai.

5 For the sake of convenience, the parties will be referred to as per their nomenclature in the suit, i.e. Petitioner – Plaintiff and Respondents - Defendant Nos.1 to 5.

6 The Plaintiff filed Special Civil Suit No. 644/2007 for specific performance of agreements for sale dated 19.07.2001, 27.08.2003 and 30.08.2003 for executing the registered sale deed in his favour and in the alternative, for damages to the tune of Rs. 6 lacs and order of perpetual injunction restraining the Defendant from creating any encumbrances or third party right in the suit property. The disputed suit property is a land bearing Sy.No.31/8(P), CTS No.3091 admeasuring H 00.00.8 Rs, Sy.No.31/28 CTS No.3097 admeasuring H 00.00.2 Rs, Sy.No.31/29, CTS No.3098 admeasuring H 00-02-0 Rs situate at village Dhovali, Tq. Vasai including house property No.64.

7 In that suit after the service of summons, Defendant No.1 appeared but failed to file written statement. Hence, the suit proceeded against him without written statement. The said suit was decreed by the Jt. Civil Judge, Senior Division, Vasai by order dated 19.01.2017 directing Defendant No.1, 4 and 5 to execute the registered sale deed in respect of their shares in the suit property in favour of the Plaintiff within one month after

deposit of balance consideration by the Plaintiff in the court.

8 Pursuant to the said judgment and decree the Plaintiff deposited a sum of Rs.2,52,000/- in the Trial Court on 07.04.2017. In spite of the said judgment and decree, as the Defendants have failed and neglected to execute the sale deed, the Plaintiff filed the Execution Application, which was duly served on the Defendants. Thereafter, Defendant Nos.1 and 5 preferred an appeal along with an Application for condonation of delay. There was delay of 9 months and 22 days in preferring the appeal.

9 Defendant Nos.1 and 5 in their Application for condonation of delay stated that Defendant No.2 had assured them that he will look-after the entire matter and amicably settle the dispute with the Plaintiff and hence their presence is not required. Defendant Nos.1 and 5 acted on the basis of the assurance given by Defendant No.2 and none appeared before the Trial Court. On the basis of these submissions, Defendant Nos.1 and 5 made Misc. Civil Application No.35/2017 under order 41 Rule 3A of the Code of Civil Procedure, 1908 read with section 5 of the Limitation Act, 1963 for condonation of delay, which was allowed by the appellate court. Hence, the Plaintiff filed the present Civil Revision Application.

10 The learned counsel for the Plaintiff submits that the appellate court erred in coming to the conclusion that Defendant Nos.1 and 5 shown sufficient cause for condonation of more than 9 months and 22 days delay in filing the appeal. She submits that the appellate court has failed to consider the relevant facts of the

matter. She submits that in spite of service of summons in the said suit, Defendant No.1 appeared but failed to file his written statement. Hence, the suit proceeded against him without written statement. Similarly, Defendant No.5 has failed to appear and contest the suit despite service of summons. These facts were not considered by the appellate court while deciding the Application for condonation of delay in filing the appeal.

11 The learned counsel for the Plaintiff submits that bare reading of the Application dated 04.09.2017 filed by Defendant Nos.1 and 5 shows that they failed and neglected to show sufficient cause for condonation of delay. She submits that the main contention of Defendant Nos.1 and 5 in Application for condonation of delay was that the Defendant No.2 assured them, that he will look after the entire matter and amicably settle the dispute with the Plaintiff. At his assurance, Defendant Nos.1 and 5 failed to appear before the court and take appropriate steps in the matter. She submits that these reasons are given by Defendant Nos.1 and 5 in para 26 of their Application dated 04.09.2017, which read thus:

“26 That the Appellants respectfully state and submit that they came to know the impugned order dated 19.01.2017 and subsequent decree dated 19.01.2017 only when they received a copy of notice dated 08.6.2017 issued by the learned Civil Judge (SD), Vasai in respect of Special Darkhast No.07/2017 filed by the Respondent No.1 for executing the impugned order dated 19.01.2017. They have appeared in the said darkhast on 03.07.2017 and were terribly shocked to see the impugned order dated 19.01.2017 directing them to execute registered sale deed with Respondent No.1 in respect of their share in the suit property. During the suit period, the Appellant No.1 was

working abroad and the Appellant No.2 was married working woman burdened with her family responsibilities. Further, they None for the Applicant. Dismissed for want of prosecution. not appear in the civil suit No.644/2007 as the Respondent / Defendant No.2 had assured them that he will look after the entire matter and amicably settle the dispute with Respondent No.1 and hence their presence is not required. Therefore, in good faith on Respondent No.2 the Appellant No.1 None for the Applicant. Dismissed for want of prosecution. not even attend the proceedings of Special Civil Suit No. 644/2007 in spite of giving his appearance through his Power of Attorney and the Appellant No.1 did not appear in the said case after having received the summons for the same. It is then they came to know that they have been utterly cheated by the Respondent No.1 and the Respondent No.2 by filing collusive suit and keeping the Appellants in darkness about the proceedings of SCS No.644/2007 and also by decreeing the suit behind their back without affording any opportunity to the Appellants to adduce their evidence and cross examining the Plaintiff's witnesses."

12 The learned counsel for the Plaintiff submits that the appellate court erred in coming to the conclusion that the impugned judgment and decree passed by the Trial Court was exparte. She submits that in spite of service, Defendant Nos.1 and 5 failed to appear before the court. Therefore, there is no question of treating the same as exparte decree.

13 The learned counsel for the Plaintiff submits that the appellate court has failed to consider the fact that Defendant Nos.1 and 5 failed to show sufficient cause for condonation of inordinate delay of 9 months 22 days in filing the appeal. She submits that if sufficient cause is not shown, there is no question of condoning the delay. In support of this contention, the learned counsel for the Plaintiff relies on the judgment of the apex court

in the matter of *Balwant Singh (Dead) Vs. Jagdish Singh & Ors. (2010) 8 SCC 685*. Paragraph 19, 26 and 29 read thus:

19. In P.K. Ramachandran v. State of Kerala, [(1997) 7 SCC 556] where there was delay of 565 days in filing the first appeal by the State, and the High Court had observed, "taking into consideration the averments contained in the affidavit filed in support of the petition to condone the delay, we are inclined to allow the petition". While setting aside this order, this Court found that the explanation rendered for condonation of delay was neither reasonable nor satisfactory and held as under:

"3. It would be noticed from a perusal of the impugned order that the court has not recorded any satisfaction that the explanation for delay was either reasonable or satisfactory, which is an essential prerequisite to condonation of delay.

4. That apart, we find that in the application filed by the respondent seeking condonation of delay, the thrust in explaining the delay after 12.5.1995 is:

".....at that time the Advocate General's office was fed up with so many arbitration matters (sic) equally important to this case were pending for consideration as per the directions of the Advocate General on 2.9.1995."

5. This can hardly be said to be a reasonable, satisfactory or even a proper explanation for seeking condonation of delay. In the reply filed to the application seeking condonation of delay by the appellant in the High Court, it is asserted that after the judgment and decree was pronounced by the learned Sub-Judge, Kollam on 30-10-1993, the scope for filing of the appeal was examined by the District Government Pleader, Special Law Officer, Law Secretary and the Advocate General and in accordance with their opinion, it was decided that

there was no scope for filing the appeal but later on, despite the opinion referred to above, the appeal was filed as late as on 18.1.1996 without disclosing why it was being filed. The High Court does not appear to have examined the reply filed by the appellant as reference to the same is conspicuous by its absence from the order. We are not satisfied that in the facts and circumstances of this case, any explanation, much less a reasonable or satisfactory one had been offered by the respondent-State for condonation of the inordinate delay of 565 days.

6. Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribed 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. Consequently, the application for condonation of delay filed in the High Court would stand rejected and the miscellaneous first appeal shall stand dismissed as barred by time. No costs."

(emphasis in original)

26. 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.

29 In the case of Ramlal and Others v. Rewa Coalfields Ltd., [AIR 1962 SC 361] this Court took the view:

"7. In construing Section 5 it is relevant to bear in mind two important considerations.

The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree holder by lapse of time should not be lightly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in Krishna v. Chathappan, ILR 13 Mad 269.

It is however, necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence

of the party or its bona fides may fall for consideration;..."

14 On the basis of these submissions and the law declared by the apex court in the matter of Balwant Singh (Supra), the learned counsel for the Plaintiff submits that the impugned order dated 24.09.2018 passed by the District Judge in Misc. Civil Application No.35/2017 deserves to be set aside. She submits that if the present Civil Revision Application is not allowed, irreparable loss will be caused to the Plaintiff.

15 On the other hand, the learned counsel for Defendant Nos.1 and 5 vehemently opposed the Civil Revision Application. He submits that the lower appellate court, after considering the facts on record, rightly held that Defendant Nos.1 and 5 shown sufficient cause for condonation of delay in filing the appeal. He submits that it remained on the part of Defendant Nos.1 and 5 to appear before the Trial Court because of assurance given by Defendant No.2. He submits that Defendant No.2 had assured Defendant Nos.1 and 5 that he would take care of the entire litigation in the interest of all the parties. Therefore, none appeared on behalf of Defendant Nos.1 and 5 when the matter was called out before the Trial Court.

16 The learned counsel for Defendant Nos.1 and 5 submits that in fact, the delay is not more than of 8 months in filing the appeal. He submits that as soon as Defendant Nos.1 and 5 learnt about the decree passed by the Trial Court, they took steps to protect their interest by filing the appeal. He submits that

Defendant Nos.1 to 5 received a copy of notice dated 08.06.2017 issued by the Civil Judge, Senior Division, Vasai in Special Darkhast No.7/2017 filed by the Plaintiff for execution of the impugned judgment and decree dated 19.01.2017. Pursuant to the said notice, they appeared before the executing court on 03.07.2017. At that time, they learnt that Defendant No.2 has failed and neglected to take any steps to protect their interest and because of that the decree came to be passed by the Trial Court against them. Hence, they immediately applied for certified copy and preferred the appeal. There was delay on their part to prefer the appeal. Hence, they made an Application for condonation of delay which was decided by the court below on 24.09.2018.

17 The learned counsel for Defendant Nos.1 and 5 submits that the court below has rightly considered the sufficient cause shown by Defendant Nos.1 and 2 and condoned the delay. He submits that sufficient cause explained by the apex court in the matter of ***Collector, Land Acquisition, Anantnag & Anr. Vs. MST Katiji & Ors. (1987) 2 SCC 107***. He submits that in that authority the apex court held that the court should adopt a liberal and justice oriented approach at the time of deciding the Application for condonation of delay. He submits that even the apex court in the matter of ***N. Balakrishnan Vs. M. Krishnamurthy (1998) 7 SCC 123*** held that in absence of anything showing mala fide or deliberate delay as a dilatory tactics, the court should normally condone the delay. He submits that in this authority, the apex court held that the court should take liberal view while deciding the Application for condonation of delay. He submits that the

apex court has specifically held in this authority that the court should not interfere with an order passed by the Trial Court condoning the delay unless and until some law point involves. He relies on para 9 of this authority which reads thus:

“9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in reversional jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.”

Therefore, there is no question of allowing the Civil Revision Application filed by the Plaintiff impugning the order passed by the court below condoning the delay in filing the appeal.

18 The learned counsel for Defendant Nos.1 and 5 submits that even the apex court in the matter of ***State of Bihar & Ors. Vs. Kameshwar Prasad Singh & Anr. (2000) 9 SCC 94*** held that the power to condone the delay in approaching the court has been conferred upon the courts to enable them to do substantial

justice to the parties by disposing of the matters on merits. He submits that in the case in hand, the appellate court has condoned the delay after considering the sufficient cause and also held that the matter is required to be decided on merits in the interest of justice.

19 The learned counsel for Defendant Nos.1 and 5 submits that power of the High Court u/s.115 of the Code of Civil Procedure, 1908 to be exercised when the court has committed any jurisdictional error or illegality by passing the impugned order. In support of this contention, he relies on the judgment of the apex court dated 04.02.2019 in the matter of ***TekSingh Vs. Shashi Verma and Anr. in Civil Appeal No.1416/2019***. He relies on para 7 which reads thus:

“7. Even otherwise, it is well settled that the revisional jurisdiction under Section 115 CPC is to be exercised to5 correct jurisdictional errors only. This is well settled. In D.L.F. Housing & Construction Company Private Ltd., New Delhi vs. Sarup Singh and Others(1970) 2 SCR 368 this Court held:

“The position thus seems to be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. Clauses (a) and (b) of this section on their plain reading quite clearly do not cover the present case. It was not contended, as indeed it was not possible to contend, that the learned Additional District Judge had either exercised a jurisdiction not vested in him by law or had failed to exercise a jurisdiction so vested in him, in recording the order that the proceedings under reference be stayed till the decision of the appeal by the High Court

in the proceedings for specific performance of the agreement in question. Clause (c) also does not seem to apply to the case in hand. The words "illegally" and "with material irregularity" as used in this clause do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. The High Court does not seem to have adverted to the limitation imposed on its power under Section 115 of the Code. Merely because the High Court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under Section 115 of the Code when there was no illegality or material irregularity committed by the learned Additional District Judge in his manner of dealing with this question. It seems to us that in this matter the High Court treated the revision virtually as if it was an appeal." at Pg.373."

20 On the basis of the above mentioned submission and the authorities, the learned counsel for Defendant No.1 and 5 submits that there is no substance in the Civil Revision Application and same is liable to be dismissed with costs.

21 Heard both sides at length. It is to be noted that in the present proceedings the Trial Court has passed the judgment and decree dated 19.01.2017. Paragraph 6 of the said judgment reads thus:

"6. After service of suit summons, the Defendant No.1 appeared, but failed to file written statement, hence, suit

proceeded against him without written statement. Defendant No.5 failed to appear and contest the suit despite service of suit summons. Hence, suit proceeded against him exparte.”

22 It is crystal clear that though Defendant No.1 was duly served and appeared before the Trial Court, failed to file written statement. Hence, the suit proceeded against him without written statement. Defendant No.5, in spite of service, failed to appear and contest the suit. This itself shows that both the Defendants have taken this litigation in casual manner.

23 For execution of the judgment and decree dated 19.01.2017 in Special Civil Suit No. 644/2007, the Plaintiff has filed the execution Application. In that execution Application, notices were served on Defendant Nos.1 and 5 on 08.06.2017. Pursuant to the said notice, both the Defendants appeared before the executing court on 03.07.2017. Though they had knowledge on 03.07.2017 about the decree passed against them, they applied for certified copies after one and a half month i.e. on 21.08.2017 and thereafter filed the present proceedings for condonation of delay. This itself shows that Defendant Nos.1 and 5 have taken this litigation in casual manner.

24 The reason given by Defendant Nos.1 and 5 for non appearance before the Trial Court in para 26 of the Application dated 04.09.2017 is that, Defendant No.2 had assured them, that he is going to take care of the entire litigation. Except bare words of Defendant Nos.1 and 5, there is not a single piece of evidence on record to show that Defendant No.2 had assured them, that he

would take care of the entire litigation, nor there is any affidavit in this behalf. Apart from that, there is no letter from Defendant Nos.1 and 5 calling upon any explanation from Defendant No.2, as to why he failed and neglected to take steps to protect their interest in the litigation. Therefore, it is very difficult to believe on the statement made by Defendant Nos.1 and 5 in their Application for condonation of delay that they relied on the assurance given by Defendant No.2.

25 Bare reading of the copy of order dated 24.09.2018 passed by the appellate court shows that the said order was passed ignoring the fact that Defendant Nos.1 and 5 failed to show sufficient cause for condonation of delay. The appellate court has recorded that in the interest of justice, delay can be condoned on payment of costs of Rs.5000/-. That is not permissible in law. It is specifically stated by the apex court in the matter of Balwant Singh (supra) that unless and until sufficient cause is shown, the court should not condone the delay. Apart from that, the apex court, in the matter of ***Maniben Devraj Shah vs. Municipal Corporation of Brihan Mumbai 2012 5 SCC 157*** held that substantive rights of the parties should not be ignored because of delay. Even the apex court in the matter of ***Basawraj & Anr. Vs. Special Land Acquisition Officer 2013 (10) SCALE 391*** held as under in paragraph 13 of the said judgments :

“13. The Statute of Limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale.

According to Halsbury's Laws of England, Vol. 24, p. 181:

"330. Policy of Limitation Acts. The courts have expressed at least three differing reasons supporting the existence of statutes of limitations namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence".

An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence' or laches.

(See:Popat and Kotecha Property v. State Bank of India Staff Assn. (2005) 7 SCC 510; Rajendar Singh & Ors. v. Santa Singh & Ors., AIR 1973 SC 2537; and Pundlik Jalam Patil v. Executive Engineer, Jalgaon Medium Project, (2008) 17 SCC 448)."

26 The authorities cited by Defendant Nos.1 and 5 are not applicable in the facts and circumstances of the present case. In the case in hand, though Defendant Nos.1 and 5 were duly served, they failed and neglected to appear before the Trial Court. Not only that, they failed to file any affidavit of Defendant No.2 showing that he had assured them that he would take care of the present litigation on behalf of them. Apart from that when the Defendants learnt about the exparte decree on 08.06.2017, when they received notice from the executing court, they failed and neglected to take immediate steps to protect their interest. They filed the Application for certified copies of the judgment and decree on 21.08.2017 i.e. after more than two and half months. All these facts show that Defendant Nos.1 and 5 have taken present litigation in a very casual manner. Hence, I am of the

opinion that the Applicant has made out a case for allowing this Civil Revision Application.

27 Hence, the following order is passed:

- a. Order dated 24.09.2018 passed by District Judge 1, Vasai in Civil Misc. Application No.35/2017 is set aside.
- b. Civil Misc. Application No.35/2017 filed by Defendant Nos.1 and 5 for condonation of delay is dismissed.
- c. At the request of the learned counsel for Defendant Nos.1 and 5, the operation and implementation of this order is stayed till 29.04.2019.
- d. No order as to costs.

(K. K. TATED, J.)