

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO. 5604 OF 2016
IN
SECOND APPEAL NO. 197 OF 1991

Dadarao Limbaji Patil (Deceased) & Anr. .. Applicants

Versus

Babu s/o. Pandurang Shelke & Anr. .. Respondents

Ms. Madhaveshwari S. Mhase, Advocate for the applicants.
Mr. S.G. Chapalgaonkar, Advocate for the respondents.

CORAM : S.M.GAVHANE, J.
RESERVED ON : 17.01.2020
PRONOUNCED ON : 21.02.2020

O R D E R :-

. The applicants/appellants, who are original defendants, have made following prayers in this application:

"B] By an appropriate order condone the delay of 2578 days caused in filing the present application and for that purpose issue necessary orders.

C] By an appropriate order quash and set aside the order dated 12.12.2008 passed by Honourable High Court thereby dismissing the appeal for want of prosecution and restore the appeal to its original file and position and for that purpose issue necessary orders."

2. The applicants had filed Second Appeal No.197 of 1991 aggrieved by dismissal of their appeal bearing Regular Civil Appeal No.192 of 1984 against the

respondents/original plaintiffs by the Additional District Judge, Latur, confirming the decree passed against them in Regular Civil Suit No.227 of 1979 by the Civil Judge, Junior Division, Nilanga on 09.08.1984 for recovery of possession of land Survey No.4/A situated at village Masalga, Tal. Nilanga. Said Second Appeal was admitted by order dated 09.10.1991. Thereafter, it was dismissed on 12.12.2008 and the order passed was "*None for the parties. Dismissed*". Therefore, this application for the reliefs mentioned earlier.

3. Applicant No.1 died during pendency of appeal. As this application is only by the applicant No.2, he is hereinafter referred to as the "applicant".

4. Learned counsel appearing for the applicant submitted that as the applicants (applicant and his father) made out *prima facie* case and the substantial question of law is involved in the appeal, the second appeal was admitted by this Court. Deceased Applicant

No.1/appellant No.1, who was father of the applicant, was looking after proceeding. The advocate then representing the appellants had informed that he will communicate date of hearing as and when the appeal will be listed for hearing. In the meantime, appellant No.1 and advocate on record of the appellants, both expired. The matter/appeal was listed for final hearing on 12.12.2008, however, as no one appeared for the appellants, the appeal came to be dismissed on said date. It is submitted that thereafter when the applicant received notice in the execution proceeding and when he enquired, he came to know that the engaged lawyer died during pendency of the appeal. Thereafter, on 10.09.2015 immediately applicant filed application for certified copy of order dated 12.12.2008 and it was received on 30.09.2015. At that time, the applicant came to know that record of Second Appeal is destroyed by the office. Thereafter, the applicant applied for all the documents in the suit and appeal referred earlier and received copies of documents on 30.11.2015. Thereafter, the applicant approached

immediately to the lawyer at Aurangabad and filed this application on 03.02.2016. However, the delay of 2578 days has been caused in filing this appeal. According to learned counsel for the applicant, the circumstances in which the delay has been caused were beyond control of the applicant and thus the delay caused is unintentional. It is also submitted that after the Second Appeal was admitted, there was no reason for the applicant to come to this Court, as it was already told by the advocate engaged that he would communicate the date of hearing of the appeal.

5. Learned counsel further submitted that as the appeal was admitted and if delay is not condoned and appeal is not heard on merits, the applicant would suffer irreparable loss. On the contrary, no prejudice would be caused to the respondents, if appeal is heard on merits by allowing this application. It is submitted that the applicant is ready to pay costs to the respondents, if the Court directs. It is submitted that, if the delay is

not condoned and the application is not allowed, meritorious matter would not be considered on merits. Learned counsel submitted that the appellant is ready to workout the matter immediately for final hearing of the Second Appeal. Thus, it is submitted that the application be allowed in the interest of justice.

6. Mr. Chapalgaonkar, learned counsel appearing for the respondents referring to the affidavit-in-reply submitted on behalf of the respondents, submitted that there is huge delay of 2578 days in filing application to restore the appeal, which was dismissed on 12.12.2008. The grounds for condonation of delay are not sufficient to make out any case, more particularly sufficient cause to entertain the prayer. It is a matter of record that Dadarao Patil was appellant No.1. He died in the year 2000. The appeal was abated against him by order dated 01.03.2000 of the Additional Registrar. Present applicant No.2 is appellant No.2 and he is independently prosecuting the appeal. The order of abatement of appeal

in respect of appellant No.1 is never challenged. Thus, at least from March, 2000, the applicant is independently prosecuting the appeal for himself. As applicant and his advocate remained absent, the appeal was dismissed. It is submitted that if record of Second Appeal is perused, it can be seen that from March, 2000, the applicant himself was prosecuting the appeal. His Advocate Mr. B.A. Agrawal expired in the year 1999. Thereafter, the applicant filed Vakalatnama of another advocate. Therefore, the facts stated in paragraph Nos.2 and 3 of the application in this respect are incorrect. It is submitted that the applicant has not approached his advocate since 2008 till 10.09.2015. Even after obtaining certified copy of order of dismissal of appeal on 30.09.2015 the applicant has not filed this application immediately. Thus, the delay of more than seven years from the date of dismissal of appeal has been caused due to negligence of applicant. The litigation is pending since 1979 and when the execution of the decree proceeded up to the stage of issuance of possession warrant,

present application is filed with intention to delay the delivery of possession and therefore as no sufficient cause for condoning delay has been shown by the applicant, it is submitted that the application may be dismissed with costs.

7. Learned counsel for the respondents to support his submissions relied upon decision of the Apex Court in the case of Lanka Venkateswarlu (D) by Lrs. Vs. State of A.P. & Ors., 2011 AIR(SC) 1199 and particularly the observations in paragraph No.22, which is as under :-

"22. The concepts of liberal approach and reasonableness in exercise of the discretion by the Courts in condoning delay, have been again stated by this Court in the case of Balwant Singh (supra), as follows:-

25. We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of 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 has 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."

8. I have carefully considered the submissions made by the learned counsel for the applicant and the respondents. Perused the application and reply-affidavit filed on behalf of the respondents. So also I have perused the record in the Second Appeal and the order of dismissal of the appeal dated 12.12.2008.

9. Before considering the grounds of delay caused in filing this application and the aspect whether the said grounds are sufficient to condone the delay as per section 5 of the Limitation Act, I would like to refer to the decisions of the Apex Court on the approach in the matter of condonation of delay in the case of Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji and Ors., (1987) 2 SCC 107 and Esha Bhattacharjee Vs. Managing Committee of Rathunathpur Nafar Academy & Ors.,

2013 AIR SCW 6158. In the case of Collector, Land Acquisition, Anantnag (Supra) in paragraph No.3, the Apex Court has observed thus :-

"3. The legislature has conferred the power to condone delay by enacting Section 51 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is con- doned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice

and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State' which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even handed manner. There is no warrant for according a step-motherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The Courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides.

. In Esha Bhattacharjee (Supra) the principles carved out from binding principles about the condonation of delay are as under :-

- i) There should be a liberal, pragmatic, justice-oriented, non- pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
- ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be

applied in proper perspective to the obtaining fact-situation.

iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

original plaintiffs filed Regular Civil Suit No.227 of 1979 against applicant Govindrao and his father Dadarao, who died during pendency of the Second Appeal, for recovery of possession of land Survey No.4/A admeasuring 33R, total admeasuring 23 Acres 16 Gunthas and it was belonging to Ganapati and Prabhu Chame and northern side 11 Acres 28 Gunthas portion is numbered as Survey No. 4/AA, situated at village Masalga, Tq. Nilanga, on the basis of title. Said suit was contested by the applicant and his father the defendants on the ground that suit land was allotted by the father of the plaintiffs to the brother of defendant Baburao on 01.06.1958 by mortgage by conditional sale and on other grounds. Said suit was decreed on 09.01.1984 and the defendants were directed to handover possession of the suit-land to the plaintiffs. The defendants filed appeal bearing Regular Civil Appeal No.192 of 1984 against said decree and said appeal was dismissed on 30.06.1990. Aggrieved by dismissal of their appeal, defendants Govindrao – present applicant and his father Dadarao

filed Second Appeal No.197 of 1991 on 28.08.1990. Said appeal was admitted on 09.10.1991 and Advocate Mr. B.M. Agrawal was representing the applicant and his father Dadarao, the appellants. Thereafter, Dadarao died during pendency of the Second Appeal and Advocate Mr.Agrawal representing the appellants also died in 1999.

11. The first contention of the applicant is that the appeal was admitted on 09.10.1991. His father Dadarao was looking after the proceeding. The advocate representing the appellants i.e. applicant and his father had informed that he will communicate the date of hearing as and when the matter will be listed for hearing. In the meantime, father of the applicant and advocate representing the appellant Mr.B.A. Agrawal expired. The appeal was listed for final hearing on 12.12.2008. But, as the applicant was not aware of death of his advocate and date of hearing of appeal, the appeal was dismissed. The applicant has raised all these contentions in the application duly verified by him. It is usual practice

that after the appeal is admitted, till it is not fixed for final hearing, the parties are generally unaware about the dates given in the appeal in the meanwhile and it is also usual practice that the advocate representing the parties particularly the appellant is informing the date to the appellant if required to attend the date of hearing, generally to take instructions etc. As the applicant is son of deceased Dadarao, appellant No.1 in the appeal, the contention of the applicant that his father was looking after the proceeding is also appearing probable and acceptable. As said earlier after appeal was admitted, father of the applicant and Advocate Mr. Agrawal, representing the appellants expired and admittedly, Advocate Mr. Agrawal died in the year 1999. In such circumstances, the contention of the applicant that as his father and Advocate Mr. Agrawal died, after appeal was admitted and as no date of hearing of appeal was communicated to him, on 12.12.2008 nobody appeared for the appellants and hence the appeal was dismissed is also acceptable, because when father and son are parties

to the proceeding in the Court, there is every possibility that father looks after such litigation and son may not be having knowledge of all updates of the proceeding or litigation. Therefore, above explanation of delay given by the applicant is acceptable.

12. The second contention of the applicant is that he was not aware of dismissal of appeal on 12.12.2008 and he came to know about dismissal of appeal only after receipt of notice of execution proceeding filed by the respondents/plaintiffs and thereafter immediately on 10.09.2015, he filed application for certified copy of order of dismissal of appeal on 12.12.2008 and same was received on 30.09.2015. This contention is also made by the applicant in the application, which is duly verified by him. The respondents have, of course, denied this contention and it is submitted on behalf of the respondents that if the proceeding of Second Appeal is perused, it would reveal that the applicant was represented by another Advocate after death of Advocate

Mr.B.M. Agrawal and applicant was attending the proceeding in the Second Appeal and therefore it cannot be said that in September, 2015, only after receipt of notice of execution proceeding, the applicant came to know about dismissal of Second Appeal. There is no dispute that except limited papers in the Second Appeal, other papers were destroyed as per the relevant rules of High Court. On perusal of original available papers, it appears that as per order dated 18.01.2006, print and paper book was dispensed with and all the matters pending for that purpose were directed to be listed for final hearing as per chronological order and there is nothing to show that on the said date till 12.12.2008 when the appeal was dismissed, the applicant or his advocate who was engaged subsequent to death of Advocate Mr. Agrawal or both of them, as per submission made on behalf of respondents, were present. Therefore, there is no reason to disbelieve statement on oath made by the applicant that he came to know about dismissal of appeal on 12.12.2008, when he received notice of execution

proceeding. For these reasons I am of the view that the applicant has explained the delay caused right from dismissal of appeal on 12.12.2008 till he made application on 10.09.2015 for certified copy of said order and till receipt of said order on 30.09.2015.

13. The third contention of the applicant as regards delay is that after receipt of copy of order on 30.09.2015 of dismissal of appeal on 12.12.2008, the applicant came to know that the record of Second Appeal has been destroyed by the office and therefore he applied for all the documents in the suit and Regular Civil Appeal and he received the documents on 30.11.2015 and then they were referred to lawyer at Aurangabad and this application was filed on 03.02.2016. Thus, according to applicant from 30.09.2015 till 30.11.2015 time was spent in collecting documents as above as record of Second Appeal was destroyed. This contention of the applicant is supported by letter dated 25.02.2016 written to the Registrar of this High Court by Advocate of the applicant

to grant permission to reconstruct the record and proceedings of the lower Courts. This is supported by order passed by this Court on 29.04.2016 directing the Counsel representing the applicant to produce copies of record on the basis of which record can be constructed as the original record was destroyed. Thus, it appears that before filing this application on 03.02.2016, the applicant was required to spend time for collecting the documents and in making efforts to allow him to reconstruct the record of proceedings of the lower Courts. Therefore, I am of the view that the applicant has explained the delay caused between 30.09.2015 i.e. the date of receiving certified copy of order of dismissal of appeal to the date of filing of this application on 03.02.2016 and said explanation is acceptable.

14. It must be mentioned that the applicant and his father who is now dead are claiming right in the suit immovable property. After the decree in the suit on

09.08.1984, they had immediately filed Regular Civil Appeal No.192 of 1984 in the Appellate Court and even after dismissal of said appeal on 30.06.1990, without delay they had filed Second Appeal No.197 of 1991 and this Second Appeal was admitted on 09.10.1991, as there substantial questions of law are involved between the parties as noted in the said order. Naturally, therefore, if the applicant had knowledge of dismissal of this appeal on 12.12.2008, he would not be benefited by making delay in filing this application. Considering the fact that dispute is in respect of immovable property and the appeal was admitted for substantial questions of law to be decided by this Court, if the delay caused in moving application to set aside order of dismissal of appeal is not condoned and order of dismissal of appeal is not set aside, the same may result in meritorious matter being thrown out at the very threshold and cause of justice being defeated. On the contrary, if delay is condoned, the highest that can happen is that the cause would be decided on merits, after hearing the parties.

15. For all the reasons discussed above, I am of the opinion that the applicant has shown sufficient cause to condone delay caused in filing application. Thus, the delay needs to be condoned and order of dismissal of Second Appeal needs to be set aside. There is, of course, inordinate delay caused in filing application. Considering the same, while condoning the same, some costs can be awarded to the respondents. In these circumstances, the decision in the case of Lanka (Supra) relied upon by learned counsel appearing for the respondents cannot be suitably made applicable to the present case to state that there is totally inaction or negligence on the part of the applicant as submitted by the learned counsel appearing for the respondents and to state that it is not fit case to condone the delay.

16. For the foregoing reasons and keeping in mind principles to be considered in the matter of condonation of delay laid down by the Apex Court in the case of Esha

Bhattarji (Supra) and Collector, Land Acquisition, Anantnag (Supra), the delay caused in filing application needs to be condoned and order of dismissal of appeal is to be set aside/recalled and appeal needs to be restored. Hence, following order is passed :-

(i) The application is allowed in terms of prayer clauses (B) and (C) subject to costs of Rs.5000/- (Rupees Five Thousand) to be deposited by the applicant in this Court within two weeks from today, payable to the respondents, failing which the application shall stand dismissed.

(ii) It is expected that there will be no further delay from the parties for hearing the appeal finally after it is restored.

[S.M.GAVHANE, J.]