

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

35 SECOND APPEAL NO.385 OF 2012
WITH CA/6688/2012 IN SA/385/2012

SK. YUSUB SK. HABIB
VERSUS
SATWA DAGDU KALANE AND ANR

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Mr.A.A.Mukhedkar, Advocate for appellant.
Mr.Y.K.Delmade h/f Mr. G.P.Shinde,
Advocate for R-1.

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**CORAM : V.L. ACHLIYA,J.
DATE : 24/02/2020**

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ORAL ORDER:

1. Being aggrieved by the Order dated 05/05/2012 passed by learned District Judge-3, Nanded in Misc.Civil Appeal R.J.E. No. 65/2011 and Judgment and Order dated 16/06/2007 passed by learned Civil Judge [J.D.], Kinwat, District Nanded in R.C.S. No. 54/2007, the appellant/original defendant has preferred this Second Appeal u/s 100 of Code of Civil Procedure.

2. By the Judgment and Order dated 16/06/2007, the trial Court has decreed the Suit filed by plaintiff. By Order dated 05/05/2012, the first appellate Court rejected the application seeking condonation of 2

years 10 months and 15 days delay in filing appeal. In consequence, the appeal preferred by the appellant came to be dismissed. Being aggrieved the appellant/original defendant has preferred this appeal.

3. Heard learned counsel for appellant and respondent. Perused the impugned Judgment and Order passed by the Courts below.

4. Learned counsel for appellant assail the impugned order dated 05/05/2012 with contention that the appellate Court has adopted too technical and narrow approach while dealing with the application seeking condonation of delay. The cause assigned for condonation of delay has not been considered in its proper perspective. The first appellate Court erred in ignoring the settled principles of law that while dealing with an application seeking condonation of delay, the Court should adopt liberal approach and attempt be made to allow the matter to be decided on merit rather than to throw it on technicality. In support of submission, the learned counsel has referred and relied upon the decision of the Apex Court in the case of ***Perumon Bhagvathy Devaswom Perinadu Village V/s Bhargavi Amma (Dead) by L.Rs. and others reported in AIR 2009 SC***

(Supp) 886 .

5. On the other hand, the learned counsel for respondent/original plaintiff supported the Judgment and Order passed by trial Court as well as the order passed by first appellate Court to refuse to condone the delay. It is pointed out that in the Suit filed by plaintiff, though the defendant served with suit summons and appeared through Advocate, failed to file Written Statement. The suit proceeded 'without W.S.'. The suit was filed in the year 2007. It was decreed in 2008. Considering the unchallenged uncontroverted pleadings and oral and documentary evidence adduced in the case, the trial Court decreed the suit in favour of plaintiff. After the period of more than 2 ½ years the appellant/defendant preferred appeal with application seeking condonation of 2 years 10 months and 15 days delay in filing appeal by assigning the reason that he was suffering from Typhoidal Malaria and Tuberculosis. The appellant has not stepped into witness box in support of the cause assigned for condonation of delay. In the application filed the appellant has not stated that he was suffering such disability to unable to file appeal within limit. No evidence adduced in support of cause assigned to condone the delay. The certificate of illness claimed to be issued by Medical Officer,

Primary Health Centre not proved by examining the Medical Officer. The information obtained by respondent under the Right to Information Act, it was revealed that appellant was never treated as an out-door patient and taken treatment on 10/08/2008. Considering the overall facts of the case and appellant failed to make out case to condone the delay, the first appellate Court has rejected the application seeking condonation of delay.

6. It is submitted that the appellant has no case to succeed on merit. Under the pretext of filing such false and frivolous proceeding, the appellant has stalled the execution of decree for more than 12 years. It is further submitted that the appeal raises no substantial question of law and urged to dismiss the appeal.

7. I have carefully considered the submissions advanced in the light of Judgment and Order passed by trial Court and the Order dated 05/05/2012 passed by first appellate Court. In my view, the appeal preferred by appellant is devoid of merit. It raises no substantial question of law. The appeal has been preferred just to stall the execution of decree. The respondents/plaintiffs are owners of suit property. The suit seeking possession of suit property was filed

in the year 2007. In spite of service of suit summons and appearance through Advocate, the appellant/defendant failed to file Written Statement. So also, the witness for the plaintiff examined in the case also not cross examined. The trial Court has passed reasoned Judgment and Order. The trial Court decreed the suit vide Judgment and order dated 16/06/2008. No appeal preferred against the said Judgment and Order for more than 34 months. Only after the respondent tried to execute the decree, the appellant preferred appeal with application seeking condonation of 2 years 10 months and 15 days delay in filing appeal. The appellant claimed that as he was suffering from Typhoidal Malaria and Tuberculosis he could not contact Advocate and filed appeal within limit.

8. The relevant contents of application assigning cause for condonation of delay mentioned in para Nos. 3 and 4 of application reads as under.

"3. That the appellant is suffering from Typhiodal Malaria and T.B. and due to which from he is taking bed rest and therefore he could not contact his counsel in lower Court and therefore there is delay of 2 years 10 months 15 days in filing appeal.

4. That the delay of 2 years 10 months 15 days is caused mainly due to

the illness of appellant. The delay is not intentional one but bonafide one. The appellant has every hop of success in the appeal. ”

The first appellate Court has found the above quoted reason assigned not sufficient to condone the delay. The first appellate Court has observed that the respondent has obtained information under Right to Information Act which reflect that the name of appellant not enter in the O.P.D. register dated 10/08/2008 to accept that on 10/08/2008 he was examined and treated as a out-door patient in Primary Health Centre for the ailment mentioned in the certificate produced in support of the application. In short, the medical certificate produced by appellant found to be not reliable and genuine. So also the Medical Officer who alleged to have issued certificate not examined by appellant. The Court has observed that there is inordinate delay in filing appeal. Thus, the explanation as put-forth by appellant seeking condonation of delay found to be neither reasonable nor satisfactory to condone the delay of 2 years 10 months and 15 days in filing appeal.

9. In my view, the reasons assigned by the first appellate Court to reject the application quite consistent with the facts apparent from the face of

record. It is difficult to believe that appellant was suffering from Typhoidal Malaria and Tuberculosis for more than 2 ½ years and unable to move out of his house. The reasons assigned appears to be false and concocted and put-forth just to any-how get the delay condoned in filing appeal. The appellant has not stepped into witness box in support of the application. He has also not examined the Medical Officer to prove that he was suffering from such illness and confined to bed. In that view, the exercise of judicial discretion by the first appellate Court is based upon sound principles of law. There is absolutely no illegality and perversity on the part of first appellate Court in refusing to condone the delay.

10. The decision in the case of ***Perumon Bhagvathy Devaswom Perinadu Village V/s Bhargavi Amma (Dead) by L.Rs. and others*** [supra] referred and relied by the learned counsel for appellant provides no assistance to the case of appellant. In fact in the ruling cited, the Apex Court has observed that lack of bonafides, deliberate inaction and negligence on the part of applicant also to be taken into account while the case for condonation of delay. It is observed that sufficiency of satisfactory explanation is a decisive factor to be borne in mind while dealing with an application seeking condonation of delay.

11. In the case of ***Balwant Singh (Dead) V/s Jagdish Singh and others*** reported in AIR 2010 SCC 3043 the Apex Court dealt the aspect of meaning to be provided to expression "liberal construction" while dealing with an application seeking condonation of delay. It is observed that while interpreting words "sufficient cause" the liberal construction to be adopted does not mean of doing injustice to the opposite party. The factors like reasonableness, conduct of party, bonafides, sufficiency and satisfaction as to the cause assigned are always the determining factors while exercising the judicial discretion to condone the delay. In para No. 13, the Apex Court has observed as under.

"13. 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 behaviour 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. In the case of [State of Bihar v. Kameshwar Prasad Singh](#) [(2000) 9 SCC 94], this Court had taken a liberal approach for condoning the delay in cases of the Government, to do substantial justice. Facts of that case were entirely different as that was the case of fixation of seniority of 400 officers and the facts were required to be verified. But what we are impressing upon is that delay should be condoned to do substantial justice without resulting in injustice to the other party. This balance has to be kept in

mind by the Court while deciding such applications. 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;..."

12. Thus, the order passed by first appellate Court suffers from no perversity so as to call for interference in exercise of appellate jurisdiction of this Court. So also the appeal preferred raises no substantial question of law to entertain the appeal. The appeal preferred by appellant is devoid of merit. I am, therefore, not inclined to entertain the appeal. The appeal is dismissed with no order as to cost. In view of dismissal of appeal, civil application seeking stay stands dismissed.

[V.L.ACHLIYA]
JUDGE

KNP