

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

937 CIVIL APPLICATION NO.9705/2017 IN FA/214/1999

SAMADYARKHAN NAJIYARKHAN AND ANOTHER
VERSUS
PARVINBI W/O LATE SK.YOUNUS AND OTHERS
...

Advocate for Applicants : Shri R.S. Deshmukh with Shri Amol Joshi
Advocate for Respondent nos.1 to 7 : Shri P.G. Rodge
Advocate for Respondent no.8 in FA : Shri Jeevan R. Patil h/f Shri A.G. Kanade

CORAM: V.L. ACHLIYA, J.

DATE: 17.01.2020

PER COURT :

1] The applicants – appellants have moved this application seeking recall of order dated 5.1.2015 passed in First Appeal No.214/1999 and to restore the appeal on file with prayer to condone 542 days delay in filing application.

2] Heard learned counsel for the applicants – appellants, respondent nos.1 to 7 – claimants and insurance company. Perused the impugned order as well as record and proceedings.

3] In brief, it is the contention of learned counsel for the applicants – appellants that due to communication gap between the applicants and their Advocate, the applicants could not attend the

Court on 1.12.2014 which resulted into dismissal of the appeal in default of applicants – appellants to pay the costs and prosecute the appeal. It is submitted that after receipt of notice of Civil Application No.4416/2017 filed by the respondents – claimants seeking permission to withdraw the amount deposited in the Court, the applicants contacted the Advocate. It was revealed that the appeal was dismissed on 5.1.2015 in default of the applicants to pay the costs and prosecute the appeal. Immediately thereafter, present application was taken out for recall of the order of dismissal of appeal and restoration of appeal. It is submitted that the applicants – appellants have good case to succeed on merits. If the application is not allowed, it may result in causing serious prejudice to the applicants.

4] The respondent nos.1 to 7 – claimants have opposed the application by filing affidavit in reply. It is the contention of respondents that the reasons assigned are false, concocted and by way of afterthought. On account of death of 27 years old son of claimant no.3 and husband of claimant no.1, the claim petition was filed seeking compensation of Rs.3,00,000/-. The Tribunal after considering the overall facts of the case, the pleadings of parties and evidence adduced, was pleased to award compensation of Rs.1,43,000/- with interest at the rate of 12% p.a. from the date of

filing of petition till realization. The award was passed on 1.7.1999. The appeal was preferred in the year 1999. The appeal came to be dismissed on 11.7.2006 for want of prosecution on the part of the applicants – appellants. It was restored vide order dated 24.4.2008 and placed for admission on 3.6.2008. Thereafter, the matter was repeatedly adjourned for hearing. On 7.11.2014, the matter was kept for hearing. The applicants and their Advocate remained absent. It was adjourned to 13.11.2014 with specific observation that in case of non-appearance of applicants, the appeal would be dismissed. Thereafter the matter was again adjourned for hearing. On 29.11.2014, the matter was adjourned at the request of learned Advocate representing the appellants on payment of costs of Rs.1500/-. The matter was posted for hearing on 1.12.2014. On 1.12.2014, neither the applicants appeared before Court nor deposited the costs. Therefore, the matter was posted on 8.12.2014 for dismissal. It was adjourned and posted on 5.1.2015. On 5.1.2015, the Advocate representing the applicants appeared and made statement that in spite of making efforts, the applicants have not contacted him. On account of non-payment of costs and continuous absence of the applicants, the appeal came to be dismissed vide order dated 5.1.2015. In this background, it is contended that the reasons assigned for condonation of delay as

well as restoration of appeal are false and concocted. So also there is no merit in the appeal. The respondents – claimants are deprived of fruits of the litigation initiated way back in the year 1996. Due to pendency of appeal, they could not receive the amount of compensation awarded in their favour. In spite of dismissal of appeal way back in 2015, the application seeking withdrawal of the amount is pending.

5] I have carefully considered the submissions in the light of record and proceedings. On the face of record, it is apparent that the applicants have acted in a most negligent manner. Once the appeal was restored in the year 2006, still the applicants were not diligent in prosecuting the appeal. Perusal of the orders dated 7.11.2014; 13.11.2014; 1.12.2014 and 5.1.2015 reflects that the applicants have not contacted their Advocate in spite of efforts made. So also they have not deposited the costs imposed. The order dated 5.1.2015 reads as under:-

“ Heard.

2] Mr.Joshi, learned counsel h/f Mr.R.S. Deshmukh submits that though efforts were made to contact the appellants, nobody has turned to give the instructions and, therefore, the order to deposit the costs could not be complied with.

3] In the circumstances, the appeal is dismissed-in-default.”

6] In view of the facts apparent on the face of record, there is no justification seeking condonation of delay and recall of order of dismissal. The claimants are fighting for the cause from last more than 25 years. The award passed in the year 1999 is still to be executed. The claimants are deprived of the compensation awarded in their favour by judgment and award passed way back in the year 1999. The statement made by the Advocate representing the applicants that in spite of making efforts, the applicants have not contacted him itself sufficient to reflect the conduct and casual attitude on the part of applicants to prosecute the appeal. It is nowhere the case of the applicants that they have left the place of ordinary residence and residing somewhere else and, therefore, they could not receive communication from their Advocate. In that view, no case is made out to condone the delay and recall the order dismissing the appeal.

7] Apart from merit of the application, I am of the view that no case of serious prejudice has been made out to entertain the application. Perusal of judgment and award reveals that on account of accidental death of 27 years old son of claimant no.3 and husband of claimant no.1, the compensation of Rs.1,43,000/- has been awarded by the Tribunal. In appeal, the appellants have raised

contention that in out of court settlement the compensation is already paid to claimants, no other challenge is made. The plea raised by the applicants – appellants is not established before the Tribunal. In that view, no case of serious prejudice has been made out to entertain the application. I am, therefore, not inclined to entertain the application.

8] Accordingly, the application is rejected.

(V.L. ACHLIYA, J.)