

IN THE HIGH COURT OF BOMBAY AT GOA
MISC. CIVIL APPLICATION NO.64 OF 2021
IN
FIRST APPEAL NO.743 OF 2021 (Filing No.)

BABAI KANKONKAR AND ANR ... Applicants
VS
SANTOSH DAHIYA AND ANR ... Respondents

Mr. Arjun F. Naik, Advocate for the Applicants.

Mr. Prateek Dahiya, Advocate for the Respondents.

Coram:- M. S. SONAK &
SMT. M. S. JAWALKAR, JJ.
Date:- 17th March 2021

P.C.

Heard Mr. Arjun Naik, learned counsel for the Applicants,
and Mr. Prateek Dahiya learned counsel for the Respondents.

2. This is an application seeking condonation of delay in filing the First Appeal to challenge the judgment and decree made by the Civil Judge Senior Division at Mapusa, directing the Applicants to jointly and/or severally pay a sum of ₹6,88,40,400/- plus interest at the rate of 18% per annum pendent lite and also till realization of the decretal amount to the Respondents.

3. The impugned judgment and decree was made on 17th August 2019 and this appeal along with the application for condonation of delay has been instituted on 5th March 2021. Therefore, after

excluding the period of limitation of 90 days and the period for obtaining a certified copy, there is a delay of 466 days in instituting this appeal.

4. A detailed application has been filed showing the cause as to why the appeal could not be instituted within the prescribed period of limitation. In the application, it is stated that Applicant No.1 is a heart patient who has already undergone angioplasty. In the application, it is further stated that in September/October 2019, the health of the Applicant No.1 was adversely affected due to a backbone problem that restricted his movements. It is pleaded that the ailment which Applicant No.1 suffered was aggravated and this further hindered the institution of the appeal. The Applicants state that thereafter COVID-19 Pandemic hit the State and the Applicants were advised to restrict their movements on account of their poor health conditions.

5. Along with the application for condonation of delay, the Applicants have appended medical case papers which support their case that Applicant No.1 had undergone coronary angioplasty and was admitted at Manipal Hospital for quite some time. There are also some statements in the application seeking condonation of delay which concern the issue of service upon the Applicants as well as the merits of the impugned judgment and decree. According to us, these matters are not so relevant for deciding the application for condonation of delay.

6. Mr. Dahiya, learned counsel for the Respondents at the outset relies on the decision of the Hon'ble Supreme Court in *Balwant Singh (Dead) Vs Jagdish Singh and others*¹ and the decision of the learned single Judge of this Court in *Victor Albuquerque Vs Saraswat Co-Operative Bank Ltd.*² to submit that unless sufficient cause is shown the delay in institution of the appeal cannot be condoned. He points out that the proof is required to be shown in support of the cause shown and in the absence of proof the delay cannot be condoned.

7. Mr. Dahiya submits that in this case, the heart ailment and the proof about angioplasty relate to the period of February 2019 when even the suit was not instituted against the Applicants. He points out that there is no medical proof regards further ailment referred to in the application seeking condonation of delay. He submits that the period of limitation expired even before Pandemic and therefore, the Applicants cannot take advantage of the orders passed by the Hon'ble Supreme Court extending the period of limitation. He submits that since no sufficient cause has been shown or in any case since there is no proof in support of cause shown, this application should be dismissed with costs.

8. We have considered the rival contentions and also perused the material on record.

9. From the perusal of the application seeking condonation of

1 Civil Appeal No.1166 of 2006 decided on 8th July 2010

2 1998(3) BomCR 93

delay, it is difficult to agree with Mr. Dahiya that no sufficient cause has been made out for condonation of delay. True, the medical certificates about the heart ailment of Applicant No.1 (husband) relate to February 2019 wherein in fact the impugned judgment and decree was made in August 2019. However, these documents indicate in some detail the ailment suffered by Applicant No.1 and the fact that he was a heart patient. These documents establish that Applicant No.1 was indeed a heart patient who had undergone surgical procedures. This is relevant in the context of averments made in the application that the mobility of the Applicant No.1 was severely restricted before and during the COVID-19 Pandemic.

10. In the application there are clear averments that in September/October 2019, Applicant No.1 suffered from further ailment involving his backbone. Such averments are to be found in paragraph 13 of the application seeking condonation of delay. This application is supported by an affidavit filed by Applicant No.1. There is no affidavit filed by the Respondents to contest these pleadings. Even no leave was ever sought before us to file an affidavit to contest the pleadings in the application. In any case, there is no good reason to simply disbelieve these pleadings in the facts of the present case. The Applicants have suffered a decree in an amount of almost ₹6.88 crores which together with interest is bound to exceed ₹7 crores or thereabouts. Accordingly, it cannot be said that the Applicants have malafide delayed the institution

of this appeal or gained anything by delaying the institution of the appeal. The Applicants had nothing to gain by delaying the institution of this appeal. No doubt, some prejudice is bound to occasion the Respondents in whose favour certain rights can be said to have been accrued post expiry of the period of limitation. However, this is a prejudice that can be compensated in terms of costs. Mr. A. Naik, learned counsel for the Applicants, on instructions, volunteered to pay costs of ₹50,000/- to the Respondents, should, the delay be condoned.

11. *Balwant Singh* (supra) and *Victor Albuquerque* (supra), no doubt, lay down the proposition that the delay cannot be condoned unless sufficient cause is shown. In this case, we are satisfied that sufficient cause has been shown and there is proof in support of the cause shown. Therefore, even though it is true that the Applicants will not be entitled to the benefit of orders made by the Hon'ble Supreme Court as also the Full Bench of this Court extending the period of limitation since the period of limitation had expired even before COVID-19 Pandemic actually set in. Nevertheless, sufficient cause has been shown by the Applicants to extend the period or to condone the delay. The fact that the Applicants were not in a position to move out during the COVID-19 Pandemic also constitutes sufficient cause in the facts and circumstances of the present case. Therefore, even after following the principles laid down in *Balwant Singh* (supra) and *Victor Albuquerque* (supra), a case has been made out for condonation of

delay.

12. In *N. Balakrishnan Vs M. Krishnamurthy*³, the Hon'ble Supreme Court has held that as long as the conduct of the applicant does not, on the whole, warrant to castigate him as an irresponsible litigant, generally, the delay can be condoned. The Hon'ble Supreme Court has observed that during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities and to visit him with drastic consequences.

13. The Hon'ble Supreme Court has also held that it is axiomatic that the condonation of delay is a matter of discretion and Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. The length of the delay is no matter, acceptability of the explanation is the only criterion.

14. The Hon'ble Supreme Court has reasoned that the primary function of the Court is to adjudicate the dispute between the parties and to advance substantial justice. The time limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. Rules of limitation are not meant to destroy the right of parties but they are meant to see that parties do not resort to dilatory tactics. The Hon'ble Supreme

3 (1998) 7 SCC 123

Court has also held that in every case of delay there can be some lapse on the part of the litigant concerned. However, that alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of malafides or it is not put forth as part of a dilatory strategy the Court must show utmost consideration to the suitor.

15. The Hon'ble Supreme Court has also held that while condoning the delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when Courts condone the delay due to laches on the part of the applicant, the Court shall compensate the opposite party for his loss.

16. Therefore, applying the aforesaid principles to the facts of the present case, we condone the delay in the institution of the appeal subject to the Applicants paying costs of ₹50,000/- to the Respondents within two weeks from today. The costs can be deposited in this Court, in case there is any difficulty in handing over the costs to the Respondents within two weeks from today.

17. If the costs are deposited then, the Registry, to place this appeal for admission and grant of interim relief on 7th April 2021. However, if no costs are paid or deposited within two weeks from today

then, this application for condonation of delay to stand dismissed without any further reference to this Court.

18. The application for condonation of delay is disposed of in the aforesaid terms.

19. At the request of Mr. Dahiya, learned counsel for the Respondents, issue authenticated copy of this order.

SMT. M. S. JAWALKAR, J.

M. S. SONAK, J.

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TARI AMRUT
NAGESH

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