

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 2820 OF 2021

IN

FIRST APPEAL NO. 13 OF 2007

The Municipal Corporation of Greater
Mumbai And Anr. ...Applicants

IN THE MATTER OF :-

The Municipal Corporation of Greater
Mumbai And Anr. ...Appellants

Versus

Mahendra Jaichand Kapoor And Ors. ...Respondents

Mr. Bhaven Manik a/w Ms. Shilpa Redkar, for the Appellants/
Applicants/Appellants – MCGM.

Mr. Sandeep V. Marne, for the Respondents.

CORAM : N. J. JAMADAR, J.

DATE : 23rd NOVEMBER, 2021

P.C.:

1. This application is taken out by the applicants-original respondents to condone the delay of 5 years, 7 months and 2 days in taking out this application for restoration and also to restore the First Appeal No. 13 of 2017 to the file of this Court after setting aside the order dated 26th September, 2014, passed by the Registrar, (Judicial) of this Court, whereby the appeal came to be dismissed against unserved respondent Nos. 1 to 4 for default in taking steps

to serve the unserved respondent Nos. 1 to 4 within the stipulated period.

2. In the application, it is averred that the appeal could not have been dismissed for the alleged default in service of the notice on the respondent Nos.1 to 4 as the applicants had already served the respondents. Therefore, there was no occasion to dismiss the appeal for the failure to serve the respondents. The applicants have placed on record letter dated 13th February, 2006, whereby the respondent No.1 to 4 were served.

3. An affidavit-in-reply is filed on behalf of the respondent Nos. 3 & 4. The Respondents contend that the claim of the applicants that the respondents were served under the letter dated 13th February, 2006 is factually incorrect. None of the four respondents had been personally served with the notice on or before 13th February, 2006. The respondent No.1 to 4 have denied the signatures of respondent No.1 on the said acknowledgment. The said communication is shown to have been acknowledged by one "Mr. Daji." According to Respondent Nos.1 to 4, in fact, they are not residing at the address mentioned in the said letter. Thus, there was no legal and valid service on the respondent Nos. 1 to 4. On these, amongst other grounds, the respondents have prayed for the rejection of the application.

4. I have heard the learned counsel for the applicants and the learned counsel for the respondent Nos. 1 to 4. Evidently, the appeal came to be dismissed by order dated 26th September, 2014 on the premise that the appellants failed to serve the unserved respondent Nos.1 to 4. The question that crops up for consideration is whether the learned Registrar was justified in dismissing the appeal.

5. The learned counsel for the applicants would urge that, the applicants have a very strong case on merits. The instant appeal was part of the group of appeals being First Appeal Nos. 82 of 2007, 85 of 2007 and 84 of 2007. In the event, the applicants are not allowed to agitate the lis on merits, the applicants would suffer irreparable loss. Inviting the attention of the Court to the letter dated 13th February, 2006, shown to have been served on respondent Nos.1 to 4, it was urged that the very dismissal of the appeal was unwarranted.

6. Per contra, it was submitted on behalf of the respondents that, no case to condone the delay and restore the First Appeal to file is made out. Taking the Court through averments in para No.4 to 6 of the affidavit-in-reply, Mr. Marne, the learned counsel for respondent Nos. 3 & 4, made an endeavour to demonstrate that the notices were in fact not served on the

respondent Nos. 1 to 4.

7. The learned counsel for the applicants, joined the issue by inviting the attention of the Court to the affidavit of service filed on 16th March, 2006, affirming that the respondent Nos. 1 to 4 were duly served.

8. In the backdrop of the nature of controversy, at this juncture, it would be rather difficult to record a definitive finding as to whether acknowledgments which appear on the office copies of the covering letter, under which the respondent Nos.1 to 4 were allegedly served, were, in fact, those of the respondent Nos. 1 to 4. However, what assumes significance is the existence of material to demonstrate that, the applicants did make an effort to serve the respondent Nos.1 to 4 and an affidavit of service was also placed on the record. In the circumstances, in the least, lack of bonafide cannot be attributed to the applicants.

9. It is trite that the Courts lean in favour of the condonation of delay and the disposition of the matter on merits so as to advance the cause of substantive justice. This approach is based on an overarching principle that the procedure, which is handmade of justice, should not be allowed to score a march over substantive justice. In the case at hand, at this stage, it may not be apposite to delve into the merits of the matter. It would be suffice to

note that, the applicants deserve an efficacious opportunity to agitate the legality, propriety and correctness of the impugned Judgment and order passed by the Court of Small Causes. In the event, the appeal is not restored, there is a real likelihood of the applicants suffering a serious prejudice. In contrast, the delay and inconvenience caused to the respondents, can be taken care of by awarding appropriate costs.

10. Hence to advance the cause of substantive justice, I am inclined to allow the application. Thus, the following order :-

ORDER

- 1) Application stands allowed subject to payment of costs of Rs.10,000/- each to respondent Nos.3 & 4 by the applicants within a period of three weeks.
- 2) The delay in taking out the application for restoration stands condoned.
- 3) The order dated 26th September, 2014 passed by the Registrar (Judicial) stands set aside.
- 4) First Appeal No.13 of 2007 stands restored to file.
- 5) Interim Application stands disposed of accordingly.
- 6) Upon the payment of the costs and restoration of the appeal, it be listed along with Appeal Nos.2075 of 2005, 2076 of 2005, 2077 of 2005, 2078 of 2005.

(N. J. JAMADAR, J.)