

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

**CIVIL APPLICATION NO.7801 OF 2021
IN
REVIEW APPLICATION STAMP NO.31014 OF 2019
IN
SECOND APPEAL NO.623 OF 2003**

Arjun Rau Pawar

**...APPLICANT
(Appellant in Second Appeal)**

VERSUS

- 1) Janardhan Waman Sarode,
- 2) Gulab Nimba Badgujar,
- 3) Raghunath Ramchandra Badgujar,
- 4) Smt. Shashikala Ananda Chaudhari

**...RESPONDENTS
(Respondents in Second Appeal)**

...
Mr.Subodh P. Shah Advocate for Applicant.
Mr.A.S. Bajaj Advocate for Respondent Nos.1 to 4.
...

CORAM: SMT. VIBHA KANKANWADI, J.

DATE OF RESERVING ORDER : 26th NOVEMBER 2021

DATE OF PRONOUNCING ORDER : 8th JUNE 2022

ORDER :

1. The present Application has been filed for getting the delay of 5811 days condoned in filing review application. The applicant is the appellant in Second Appeal No.623 of 2003. The respondents are the respondents in Second Appeal No.623 of 2003. The said Second Appeal No.623 of 2003 was disposed of by this Court by Judgment and order dated 30th September 2003. The applicant states that Second Appeal No.297 of 2003 and Second Appeal No.623 of 2003 both were arising out of the Judgment and decree passed in Regular Civil Suit No.614 of 1989. Both the Second Appeals were dismissed by this Court. Though the orders were separate, the orders together form only one common order. Thereafter the original plaintiffs preferred Civil Appeal No.5265 of 2012 before the Hon'ble Supreme Court challenging the Judgment and order passed by this Court in Second Appeal No.297 of 2003. The Hon'ble Supreme Court pleased to remand the matter to this Court by order dated 17th January 2018 and thus the Second Appeal No.297 of 2003 has been restored. Applicant states that he suffered paralytic attack and was bed ridden since last four years. When the communication from the Advocate from the Hon'ble Supreme

Court regarding decision of the Hon'ble Supreme Court was received at the address of the applicant, his son contacted the local Lawyer to understand the effect of the order. The local Lawyer then advised the son of the applicant to contact an Advocate who was engaged before this Court, but no requisite information was supplied. Thereafter the son had tried to search the record at their residence, still he could not find the record and ultimately again the Advocate at the Supreme Court was contacted. The concerned Advocate then supplied certain record by post. After receiving that record, the said record was handed over by the son of the applicant to the Advocate at Aurangabad. The applicant then states that while preparing for hearing on application for adducing additional evidence that has been filed by the respondents in the Second Appeal filed them, it was noticed by the Advocate for the applicant that it is necessary to take steps for restoration of the Second Appeal No.623 of 2003. Again the record was searched and the present Application for review has been filed. The delay caused in filing Review Application is not intentional but it arose due to paralytic attack and bed ridden condition of the applicant. He, therefore, seeks condonation of the delay to file the Review Application.

2. Affidavit-in-reply has been filed by respondent No.1 and it is stated that there is huge delay that has occurred. No documentary evidence has been annexed to show that since last about four years there is any kind of illness to the applicant. The order about disposal of the Second Appeal was passed on 30th September 2003 and there is absolutely no explanation as to why the Review Application could not be filed since 2003 till the date of illness of the applicant.

3. Heard learned Advocate for the applicant and learned Advocate for the respondents.

4. The learned Advocate for the applicant has taken this Court through various documents including the order passed by this Court while disposing Second Appeal No.623 of 2003 on 30th September 2003. It has been stated that since the counter Second Appeal i.e. Second Appeal No.297 of 2003 has been restored by the Hon'ble Supreme Court, the Second Appeal filed by the present applicant i.e. Second Appeal No.623 of 2003 also needs to be restored. He also submitted that while restoring the Second Appeal No.297 of 2003, it was observed by the Hon'ble Supreme Court that, this Court before deciding the Second

Appeal, had not decided the application that was filed by the appellant therein under Order XLI Rule 27 of the Code of Civil Procedure (for short "CPC"). In fact that application itself is not maintainable. There was every opportunity to those applicants / appellants (present respondents) to produce the documents which they want now to be produced, at the stage of Second Appeal. There were no such circumstances shown by them which could attract and give liberty to them to move an application under Order XLI Rule 27 of the CPC. The learned Advocate for the applicant made submissions on the said application under Order XLI Rule 27 of the CPC also i.e. Civil Application No.3001 of 2003 in Second Appeal No.297 of 2003.

5. The learned Advocate for the applicant has relied on the decision in ***Kapra Mazdoor Ekta Union vs. Birla Cotton Spinning and Weaving Mills Ltd. and another, (2005) 13 S.C.C. 777***, wherein it has been held that:-

"Where a Court or quasi-judicial authority having jurisdiction to adjudicate on merit proceeds to do so, its judgment or order can be reviewed on merit only if the Court, or the quasi-judicial authority is vested with power of review by express provision or by necessary implication. Procedural review, however, belongs to a different category. In such a review, the Court or quasi-

judicial authority having jurisdiction to adjudicate, proceeds to do so, but in doing so ascertains whether it has committed a procedural illegality which goes to the root of the matter and invalidates the proceeding itself, and consequently the order passed therein. Cases where a decision is rendered by the Court or quasi-judicial authority without notice to the opposite party or under a mistaken impression that the notice had been served upon the opposite party, or where a matter is taken up for hearing and decision on a date other than the date fixed for its hearing, are some illustrative cases in which the power of procedural review may be invoked. In such a case, the party seeking review or recall of the order does not have to substantiate the ground that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. He has to establish that the procedure followed by the Court or the quasi-judicial authority suffered from such illegality that it vitiated the proceeding and invalidated the order made therein, inasmuch the opposite party concerned was not heard for no fault of his, or that the matter was heard and decided on a date other than the one fixed for hearing of the matter which he could not attend for no fault of his. In such cases, therefore, the matter has to be re-heard in accordance with law without going into the merit of the order passed. The order passed is liable to be recalled and reviewed not because it is found to be erroneous, but because it was passed in a proceeding which was itself vitiated by an error of procedure or mistake which went to the root of the matter and invalidated the entire proceeding. Again to illustrate, once it is established that the respondents

were prevented from appearing at the hearing due to sufficient cause, it follows that the matter must be re-heard and decided again.”

6. Further, reliance has been placed on the decision in **N. Balakrishnan vs. M. Krishnamurthy, (1998) 7 S.C.C. 123**, wherein it has been held that:

“The primary function of a 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 rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered.....
Condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes, delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. In every case of delay, there can be some lapse on the part of the litigant concerned. That alone is

not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor."

7. Learned Advocate for the applicant relied on the decision in ***Jasumatiben Hakimchand Jhatakia and others vs. Narendra B. Mantri, 2016 SCC OnLine Bom. 9701, Ashabai W/o Ramchandra Kotecha and others vs. Mohanlal S/o Bhika Badone (died) through his L.Rs. Smt. Munnabai w/o Mohanlal and others, 2012(6) Mh.L.J. 176*** and ***Oriental Fire and General Insurance Company Ltd. vs. Hemlata wd/o Lakshmanan and others, 1993 Mh.L.J. 1549*** on the point of application under Order XLI Rule 27 of the CPC. It was submitted that though the applicant had not challenged the dismissal of Second Appeal No.623 of 2003 by this Court by order dated 30th September 2003 before the Hon'ble Supreme Court, yet when the counter case is restored, the applicant should also get a chance to agitate his rights and therefore, the review of the order passed by this Court is necessary.

8. The learned Advocate for the respondents had vehemently submitted that the applicant cannot take disadvantage of the order passed by the Hon'ble Supreme Court because he had the

independent right to approach the Hon'ble Supreme Court challenging the dismissal of his own Second Appeal No.623 of 2003. He has not given an explanation as to why he had not approached the Hon'ble Supreme Court. He had not filed any application under Order XLI Rule 27 of the CPC which was not considered at all by this Court while passing order dated 30th September 2003. The two Second Appeals were disposed of by two separate orders. The orders might be practically same but when two separate orders have been passed by this Court, it gave an independent right to each appellant to approach the Hon'ble Supreme Court. No documentary evidence has been produced to show the illness of the applicant and since when he was ill, and even if we consider that he is ill since four years prior to the filing of the Application which came to be filed on 20th September 2019, it would go back at the most 2015. There is no explanation for the period from 30th September 2003 to 2015. At that time the applicant was in good health and he could have filed Review Application if he wanted. He never tried to agitate the same before the Hon'ble Supreme Court also. He was represented by the learned Advocate before the Hon'ble Supreme Court. In Civil Appeal No.5265 of 2012 before the Hon'ble Apex Court, only the order that was passed by this Court

in Second Appeal No.297 of 2003 dated 30th September 2003 was under challenge. Thereafter on various occasions when the opportunity was available to the applicant either to file application or even appeal, he has not utilized the same. Therefore, the inordinate delay that has been caused by applicant cannot be said to have been explained properly and therefore, the Application deserves to be rejected. Learned Advocate for the respondents has relied on the decision in ***North Eastern Railway Administration, Gorakhpur vs. Bhagwan Das (Dead) by L.Rs., (2208) 8 S.C.C. 511***, and ***Iridium India Telecom Ltd., vs. Motorola Inc. and others, 2003 SCC OnLine Bom. 1089*** on the point of additional evidence i.e. under Order XLI Rule 27 of the CPC and decision in ***Maria Margarida Sequeira Fernandes and others vs. Erasmo Jack De Sequeira (Dead) Through L.Rs., (2012) 5 S.C.C. 370***, for the observation that the truth is the foundation of justice and what are the parameters to be seen by the Civil Courts while dealing with the suit for injunction.

9. At present, we are considering the application for condonation of delay only and the delay that has been caused for filing Application for Review is 5811 days. Unless the cogent

explanation for the said delay is given, such application cannot be entertained or the discretion cannot be used by any Court of law for condoning the delay. The observations in **N. Balakrishnan vs. M. Krishnamurthy**, (supra), would be applicable, but we are required to see whether those observations can be made applicable to the facts of the present case also. Here, along with the Application, there is absolutely no documentary evidence produced by the applicant to show that he has suffered paralytic attack and was bed ridden since last four years. There is absolutely no explanation for the period between 30th September 2003 to 2015. The present respondents – appellants in Second Appeal No.297 of 2003 had approached the Hon'ble Supreme Court in 2012. It appears that it was also after condonation of delay, taking into consideration the date of registration of the case. The decision of the Hon'ble Apex Court was also on 17th January 2018 and still the present Application has been filed on 20th September 2019. An explanation has been tried to be given that after the communication was received from the Advocate at Hon'ble Supreme Court, the son of the applicant made research for the documents. It is hard to believe the same, because a diligent litigant would keep every record with him and it is also now available online, as to which proceeding was filed

by him. The Application is also not appended by the affidavit of the son of the applicant, as to which efforts he had made. All the contentions in the Application are vague.

10. Another fact is that, how the restoration of the Second Appeal No.297 of 2003 in view of the order passed by the Hon'ble Supreme Court on 17th January 2018 would give right to the present applicant to file application for review of dismissal of his Second Appeal, is a question. It was decided separately by this Court, though it was arising out of the original same decree of the trial Court as well as First Appellate Court. The applicant had not filed any cross objection in Second Appeal No.297 of 2003 but he preferred to file a separate Second Appeal. Further, even after receiving the notice in respect of proceedings before the Hon'ble Apex Court, he has not taken steps to challenge the order passed in his Second Appeal before the Hon'ble Apex Court, and therefore, merely because now the cross Second Appeal has been restored, it will not give right to the applicant to have review of dismissal of his Second Appeal.

11. The delay caused in present Application is huge and inordinate. It has not been explained properly and therefore the Application deserves to be dismissed.

12. Accordingly, the Application stands dismissed.

[SMT. VIBHA KANKANWADI , J.]

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