

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****WRIT PETITION NO. 769 OF 2010****Mohammed Takki Mohamed Omar Ansari)****Age : 58 years, Occ. Business,)****R/at M.H. No.57, Temghar – 1,)****Bhiwandi, Dist. Thane)****..... Petitioner
(Org.Plaintiff)****VERSUS****Mohammad Juber Abdul Rahim Shaikh,)****Age : 48 years, Occ. Business,)****R/at : M.H.No. 81, Shanti Nagar,)****Temghar – 1, Bhiwandi, Dist. Thane)****..... Respondent
(Org.Defendant)**

Mr.Sandesh Patil, a/w. Ms. Anusha P.Amin for the Petitioner.

Mr.R.D.Suryawanshi, a/w. Mr.Suraj Naik for the Respondent.

CORAM : ROHIT B.DEO, J.**DATE : 8TH JUNE, 2022****ORAL JUDGMENT:-**

Exception is taken to the order dated 14th December, 2009 rendered by the District Judge – 4, Thane whereby the application preferred by the respondent seeking condonation of delay of 5 years and 107 days in preferring Regular Civil Appeal challenging the judgment and decree in Regular Civil Suit 697 of 1995, is allowed.

2. Facts, to the extent relevant, are thus :-
3. Petitioner is the original plaintiff in Regular Civil Suit 697 of 1995 which was brought for decree of perpetual injunction restraining the respondent from obstructing the peaceful possession qua Municipal House 57, Temghar – 1, Bhiwandi.
4. The respondent was duly served with the suit summons. He appeared and resisted the application for temporary injunction. However, the respondent did not file written statement. The learned Trial Court passed order dated 3rd November, 1998 proceeding without written statement.
5. The learned Trial Court decreed the suit vide judgment dated 26th June, 2000.
6. The respondent preferred Misc. Application 305 of 2005 seeking condonation of delay of 5 years and 107 days in preferring the appeal challenging the judgment and decree in Regular Civil Suit 697 of 1995.

7. The respondent averred that he engaged advocate Shri Mukhtar Momin Ahmed and was under the impression that the advocate shall inform him as to when his appearance would be necessary. The respondent contended that he is not educated and is not acquainted with court procedures. The respondent further averred that since he did not receive any intimation from the advocate, he went to his native place since his father was seriously ill. It is further averred that the respondent extended the stay at native place to look after his ailing father and further to sort out certain family disputes and issues and in the entire process, the respondent lost sight of Regular Civil Suit 697 of 1995.

8. It is further averred that the respondent returned to Mumbai in August 2005, contacted his advocate and enquired about the status of the civil suit and learnt that the judgment was passed on 26th June, 2000. The respondent then stated that even after receiving the certified copy of the judgment and decree, he could not file the appeal promptly since he had to rush back to his native place and reside there for three months. The respondent further stated that after he returned to Bhiwandi, he again contacted the counsel who advised him that an

application for condonation of delay will have to be filed.

9. The petitioner – original plaintiff vehemently resisted the application for condonation of delay. The petitioner generally denied each and every averment in the application for condonation of delay, and in particular submitted that other proceedings are pending between the parties. The petitioner referred to Special Civil Suit 44 of 1996 instituted against the respondent and Regular Civil Suit 697 of 1995 instituted against the respondent and Bhiwandi Nijampura Municipal Council. The petitioner further referred to Regular Civil Suit filed by the respondent against the said Municipal Council. The petitioner asserted that the respondent attended the proceedings in various courts during the period 26th June, 2000 to 23rd November, 2005 which falsifies the contention of the respondent that he was at his native place during the said period and did not contact the advocate. In paragraph (6) of the affidavit in response to the application seeking condonation of delay, the petitioner disclosed the details of the steps taken by the respondent in the pending proceedings, to buttress the submission that the application for condonation of delay is entirely founded on falsehood.

10. Evidence was led by the parties in which I did not delve deeper since the Appellate Court has recorded the fair submission of the learned counsel for the respondent thus :-

“ The applicant’s advocate has fairly admitted that the applicant has appeared and filed say or written statement or any application as contended by the learned counsel for the opponent is correct but the applicant/defendant is coming with the specific case that he has done mistake of law committed bonafide and in spite of due care and attention and therefore enormous delay of 5 years and 107 days is caused. ”

11. The learned Appellate Court was pleased to condone the delay of 5 years and 107 days on the premise that the delay can be condoned by imposing heavy cost. The learned Appellate Court concluded that the delay is caused by mistake and negligence and is not deliberate. The learned Judge imposed penalty of Rs.5,000/- and cost of Rs.2,000/- as pre-condition for registration of the appeal.

12. Ordinarily I would be loathe to interfere in an order condoning delay. More often than that, such orders are rendered in exercise of discretionary jurisdiction and on a reasonable view of the material on record. However, in the present case, I am impelled to interfere since the discretion is not exercised reasonably. It is indubitable that the respondent – defendant approached the Appellate Court seeking condonation of delay of 5 years and 107 days with tainted hands. The reason put forth in the application is proved to be false. Given the material on record, the learned counsel for the respondent who appeared in the Appellate Court had no option but to fairly admit that during the period in which the respondent claimed to be confined to his native place, he was as a fact attending several proceedings in Bhiwandi. Axiomatically, the assertion of the respondent that during the entire period of 5 years and 107 days, he could not or did not contact his counsel is equally false.

13. A litigant who is seeking relief in equity or in exercise of discretionary jurisdiction, can ill afford to suppress the facts much less to base the relief on palpably false averments. The submission of the learned counsel that a liberal approach must be adopted while

considering condonation of delay, is unexceptionable as a proposition of law. However, the concept or the principle that the approach of the Courts must be liberal cannot be over-stretched as would put premium on dishonesty. The Court must be conscious of the fact that in order to unsettle the judgment and decree and to put the clock back after 5 years and 107 days, the litigant seeking condonation of delay in preferring the appeal is expected to make out a near unimpeachable case of just and sufficient cause. While everyday's delay need not be explained, holistically considered the case put forth must appear to the Court, credible and honest.

14. Suffice it to refer to the following observation of the Apex Court in ***Binod Bihari Singh vs. Union of India (1993) 1 SCC 572***.

10. After giving our anxious consideration to the facts and circumstances of the case, we do not find any reason to interfere with the decision of the High Court. In our view, the High Court has rightly held that the application made by the appellant was an application for directing the arbitrator to file the award in Court so that such award is made a rule of Court. In this case,

there was no express authority given by the arbitrator to the applicant to file the award to make it a rule of Court although a signed copy of the award was sent to the applicant. The forwarding letter clearly indicates that the award was sent for information. Accordingly, the decision of this Court made in Kumbha Mauji's case (supra) is applicable. The High Court has given very cogent reasons which, we have indicated in some details, for not accepting the case of the appellant that he had received a signed copy of the award and the forwarding letter some time in May, 1965 and we do not find any reason to take a contrary view. The applicant has not produced the registered cover received by him which would have established the actual date of the receipt of the postal cover by the applicant convincingly. We are also not inclined to hold that the delay in presenting the application deserves to be condoned in the facts and circumstances of the case. The appellant has taken a very bold stand that he had received the signed copy of the award only

in May, 1965 and only within three weeks of such receipt, he had filed the application. On the face of such statement, the plea of ignorance of the change in the Limitation Act need not be considered and accepted. As the case sought to be made out by the appellant that he had received the signed copy of the award only in May, 1965 has not been accepted, and we may add, very rightly by the Court, the question of condonation of delay could not and did not arise. In our view, it is not at all a fit case where in the anxiety to render justice to a party so that a just cause is not defeated, a pragmatic view should be taken by the Court in considering the sufficient cause for condonation of delay under Section 5 of the Limitation Act. Coming to the contention of Mr. Ranjit Kumar that to defeat a just claim of the appellant, the ignoble plea of bar of limitation sought to be raised by the respondent should not be taken into consideration, we may indicate that it may not be desirable for the government or the public authority to take shelter

under the plea of limitation to defeat a just claim of a citizen. But if a claim is barred by limitation and such plea is raised specifically the court can not straightway dismiss the plea simply on the score that such plea is ignoble. A bar of limitation may be considered even if such plea has not been specifically raised. Limitation Act is a statute of repose and bar of a cause of action in a court of law, which is otherwise lawful and valid, because of undesirable lapse of time as contained in the Limitation Act, has been made on a well accepted principle of jurisprudence and public policy. That apart, the appellant, in this case, having taken a false stand on the question of receipt of the signed copy of the award to get rid of the bar of limitation, should not be encouraged to get any premium on the falsehood on his part by rejecting the plea of limitation raised by the Respondent. We may also indicate here that the High Court is justified in its finding that the objection petition has been filed within time by the respondent and the service of the copy of the application made by

the appellant on the counsel of the respondent who had appeared in an earlier proceeding did not constitute a notice as contemplated under Article 119(b) of the Limitation Act. In the aforesaid circumstances, the appeal must fail and is dismissed but we make no order as to costs.

15. Equally, relevant are the observations of the Appellate Court in ***Pundalik Jalam Patil (Dead) by legal heirs vs. Executive Engineer, Jalgaon Medium Project & Anr. (2008) 17 SCC 448.***

13. Whether the High Court properly exercised its discretion? The High Court in its order having noticed the relevant fact in categorical terms held that there was no substance in the plea that it was unaware about the judgment and award passed by the Reference Court since it was a party before the Reference Court and contested the matter. The High Court also found that the decision of the Joint Secretary to acquiesce was communicated to the beneficiary of the acquisition and therefore, its plea about the unawareness of the award

and decision taken by the Government cannot be accepted. The High Court in its order emphatically rejected the ground raised by the respondent in that regard. In such view of the matter can it be said that the High Court properly exercised its jurisdiction?

14. It is true that the power to condone the delay rests with the court in which the application was filed beyond time and decide whether there is sufficient cause for condoning the delay and ordinarily the superior court may not interfere with such discretion even if some error is to be found in the discretion so exercised by the court but where there is no sufficient cause for condoning the delay but the delay was condoned, it is a case of discretion not being exercised judicially and the order becomes vulnerable and susceptible for its correction by the superior court. The High Court having found that the respondent in its application made incorrect submission that it had no knowledge of the award passed by the Reference Court

ought to have refused to exercise its discretion. The High Court exercised its discretion on wrong principles. In that view of the matter we cannot sustain the exercise of discretion in the manner done by the High Court.

16. I am satisfied that the exercise of discretion by the Appellate Court is arbitrary and militates against well established principles of law.

17. The order impugned is set aside and the civil application for condonation of delay is rejected.

[ROHIT B.DEO, J.]

Note :- This order is corrected as per the speaking to the minutes orders dated 15th June, 2022 and 22nd July, 2022.