

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO. 427 OF 2019
IN
CIVIL REVISION APPLICATION NO. 232 of 2007**

M/S. Polyvin Industries & Ors.

.....Applicants

Vs.

M/s. Ram & Company & Ors.

....Respondents

Mr. Abhay Khandeparkar a/w. Adv. Zerick Dastur, Adv. Ami Parekh,
Adv. Jennifer Sanjana i/b. Adv. Ami Parekh for the applicants in
CAC/427/2019 & CRA

Mr. R. D. Soni i/by Ram & Co. for Respondent No.1, 2A to 2D in
CRA/232/2007.

CORAM : NITIN W. SAMBRE, J.

DATED : 23rd AUGUST, 2022

P.C.:

1. This application is taken out by the applicants/judgment debtors with the following prayer:

"(a) The delay of 4 years and 272 days in filing this Application be condoned and the above CRA with all the order passed therein be restored by setting aside the orders passed by this Hon'ble Court of dismissal of CRA dated 20.02.2013 and another order dated 19.09.2014."

2. The brief history necessary for deciding the application is as under.

3. Based on the leave and license agreement which subsequently claimed to have been taken a shape of regular tenancy by the present applicants, the non-applicants initiated the

eviction proceedings against the applicants. The said proceedings being L.E. & C. Suit No. 14/16 of 1994 came to be decided on 01/10/2003 by the Small Causes Court, Bombay. The said decree was confirmed against the applicants in Appeal being Appeal No. 852 of 2003 by the Appellate Court of Small Causes Court at Bombay. Both these orders were questioned in Civil Revision Application being CRA No. 232 of 2007. The said revision preferred by the applicants/judgment debtors came to be admitted on 28/06/2007.

4. It appears that the present applicants have taken out Civil Application being CA No. 728 of 2012 for impleadment as it is claimed that the suit property was purchased by the applicants. The said prayer was allowed vide order dated 13/09/2012. It appears that the said order was not complied with. As a sequel the Registrar, Judicial-II has passed conditional order directing the present applicants to carry out the amendment failing which the revision was to be dismissed.

5. The applicants pursuant to the said order of the Registrar, Judicial-II and order of this Court granting amendment on 13/09/2012 has failed to carry out the amendment almost for a period of six months. As sequel of above, the revision came to be

dismissed for non-prosecution on 20.02.2013.

6. Subsequent thereto the applicant has taken out Application being Application No. 49 of 2014 for restoration of the revision. The said application came to be disposed of on 19/09/2014 with following observations:

" Heard Mr. Ghadge, learned Counsel for applicants and Mr. Soni, learned Counsel for respondents No.2 and 3.

2. This is an application for setting aside the order dated 20.02.2013 passed by the Registrar, Appellate Side after condoning the delay of 280 days in filing the Petition.

3. In the orders dated 07.02.2014 and 05.09.2014, the statement made by Mr. Soni that decree is already executed on 08.08.2013 was recorded. Time was sought on behalf of the petitioners to confirm the said statement. Mr. Ghadge states that applicants are not responding to him. He is, therefore, not in a position to make the statement either way.

4. Having regard to the statement made by Mr. Soni as recorded in the orders dated 07.02.2014 and 05.09.2014 that the decree is already executed on 08.08.2013 and the possession of the premises in question is taken by respondents No.2 and 3, nothing survives in this application and the same is disposed of as infructuous."

7. In the aforesaid background, the present application is taken out with a prayer for setting aside the order of Registrar passed on

20/02/2013 and order of this Court dated 19/09/2014 reproduced hereinabove.

8. The contentions of Mr. Khandeparkar, learned counsel for the applicants are, after this Court passed a judicial orders consequent thereto amendment of cause title and insertion of the party is an administrative act. Even if the party to the proceedings have failed to carry out the amendment, it is always open for the Registry on its own to take orders of the Court granting amendment to the cause title to its logical end by carrying out amendment. In view of above, the revision ought not to have been ordered to be dismissed by the Registrar vide order dated 20/02/2013.

9. Drawing support from the judgment of this Court in the matter of *Rukmini Dattatraya Naik (Smt.) & Others vs. Paramanand Lalchand Joshi & Others* reported in 2001(2) Bom.C.R. 141 particularly paragraph no. 5, he would urge that the order dated 20/02/2013 passed by the Registrar is not sustainable and liable to be quashed and set aside.

10. His next contentions are the statement made by the counsel for the respondents which led to passing of the order dated 19/09/2014 is disputed. According to him, the decree passed

against the applicants was in two parts - (a) eviction and (b) mense profit. He would claim that even if the possession is received by the non-applicants/decreed holders, the decree is not satisfied particularly when the issue of payment of mense profit is still under active consideration of this Court. According to him, the statement of the counsel for non-applicants/decreed holders is misread by the Court, which has led to passing of the order dated 19/09/2014.

11. According to Mr. Khandeparkar, in case if the revision application is restored to the file by condoning the delay and setting aside the orders, the applicants on merits can always seek relief under section 144 of the Code of Civil Procedure seeking restoration of possession even if the decree is executed. He would draw support from the judgment of the High Court of Karnataka in *Sanjeevamma and Ors vs. G. Krishna & Ors.* reported in *AIR (2004) Kant 338* particularly paragraph nos. 8 & 9.

12. In addition, his contentions are the orders of 2013 and 2014 referred supra are sought to be set aside after the delay of 4 years and 272 days. To support the aforesaid delay, he has invited my attentions to certain factual matrix - (a) that the lawyer who was representing the interest of the Applicants has failed to give

proper/appropriate professional advice, (b) the Applicant no. 2- Jitendra Ghiya to the application who used to attend the Court proceedings has suffered from spine and neurotic severe ailment. As such, for a period from 2013 to 2014 he was unable to attend the Court proceedings. As a sequel of which the aforesaid orders were not brought to the notice of the applicants and were not questioned. Mr. Khandeparkar would seek to rely on the medical documents of the said applicant so as to justify the aforesaid claim.

13. While countering the aforesaid submissions Mr. Soni would urge that the delay of 4 years and 272 day is not at all explained. According to him, the remedy that was available to the applicants to question the order of this Court disposing of the application for restoration vide order dated 19/09/2014 was before the appropriate forum and not in the present application.

14. He would urge that the issue of mense profit will be looked into and appreciated in an independent proceedings, if any, brought by the applicants. He would further urge that there were repeated failures on the part of the applicants in the matter of prosecuting the rights in the revision so also in the restoration application of which this Court must take judicial note.

15. I have appreciated the aforesaid submissions.

16. The contentions in support of prayer for condonation of delay of 4 years and 272 days is required to be appreciated. The applicants in paragraph no 13 in support of prayer for condonation of delay of 4 years and 272 days has come out with following pleadings:

13. The applicants submit, since 2013 they had appointed one Mr. M. L. Naik as their advocate to act, appear and plead on their behalf in their above suit in the appeal and in above CRA. The partners of the Applicants are senior citizens and because of their old aged, the concerned Advocate used to inform that the cases are being handled properly. The Applicants relied upon the said assurances of their advocates. In the meantime, Mr. Jitendra Ghiya, the Applicant No. 2 who alone used to attend the court and deal with the advocate on behalf of all the Applicants had suffered from spine and neurotic severe ailments. He has undergone surgery and was not in a position to pursue the advocate between the period from 2013 to 2014. The Applicant will rely upon all his detailed medical reports and documents, as and when produced. Because of doctor's advise he was not active for the above said period and required to take rest to recover from his said illness and surgery. Since it is Mr. Jitendra Ghiya, who alone was conversant with the facts of the case, because of his illness and inability no steps could be taken. They remained and relied upon their Advocate on record."

17. Upon reading of the aforesaid pleadings what can be noticed is, the applicant has tried to blame his lawyer on one hand and on the other hand claimed that his partner applicant no. 2-Jitendra

Ghiya was regularly attending the proceedings except for a period between 2013 to 2014.

18. It is very easy for the litigant to blame the lawyer who is not in a position to answer such accusation before the Court. No communication was made with the said lawyer on the above issue. However, we need to appreciate the very conduct of the applicant no. 2 from his own pleadings. He has accepted that he was attending proceedings for a period upto 2013 and post 2014 he was in a position to attend or pursue the proceedings.

19. The applicant no. 1 informed to be a partnership firm and it is not that the applicant no. 2 is the only partner of the firm. The firm was very much in operation and existence during the aforesaid period. As such, the claim that the applicant no. 2 was indisposed due to his health for a period between 2013 to 2014 will hardly be of any assistance in the matter of making out a case / bonafide cause in support of prayer for condonation of delay.

20. Even if we appreciate that during 2013 and 2014 applicant no. 2 was indisposed and was unable to attend the proceedings, however, the Court is required to be sensitive to the fact that post 2014 no convincing explanation is coming forth in support of condonation of delay of 4 years and 272 days as the present

application is moved in 2019.

21. As such, what can be noticed is, there is hardly any bonafide cause cited in the application to support the prayer for condonation of delay which warrants this Court to pass the order for condoning the delay in favour of the applicants.

22. This Court is also required to be sensitive to the very conduct of the applicants. Initially the present applicants against both the judgments of eviction preferred writ petition which was permitted to be converted into revision and was admitted on 28/06/2007. Thereafter, the revision appears to have been dismissed on 12/12/2011 which was subsequently restored to the file vide order dated 17/01/2012.

23. The records further shows that the applicants were granted time and again adjournments before the Registrar to carry out amendments and the failure of the applicants to carry out amendments has led to passing of the order of dismissal of the revision.

24. The revision was dismissed on the ground that the impleadment of subsequent purchaser though was permitted by this Court vide judicial order, the Applicants have failed to carry out the amendments.

25. No Doubt Mr. Kandeparkar, learned counsel for the applicants is justified in claiming that bringing of legal heirs by amending the cause title is an administrative act, as it has been held in the matter of *Rukmini (cites supra)*. However, the case in hand which has been permitted is impleadment of the subsequent purchaser and not legal heirs. Such impleadment is not governed by the Order XXII but the provisions of Order I Rule 10 of CPC. As such, the reliance placed on the judgment of *Rukmini (cited supra)* is misplaced. As such, the said contentions are rejected.

26. Apart from above, the order of disposal of the revision application by holding the same as rendered infructuous ought to have been challenged by the applicants before the appropriate forum and not by second application for restoration.

27. While the order of disposal of the revision was passed as infructuous on 19/09/2014, the matter was adjourned time and again at the behest of the present applicants for seeking their response while deciding the said Restoration Application No. 49 of 2014.

28. The applicants have failed to give instructions or communicate with their lawyers in spite of there being repeated adjournments. As such, the learned counsel for the applicants at

the relevant time by the conduct of the applicants was made handicapped to assist the Court in deciding the proceedings.

29. In view of the above conduct of the applicants, it cannot be said that the applicants had made out sufficient cause for grant of relief claimed. If the contentions of the applicants are accepted, then the said will amount to permitting the applicants to take benefit of their own default committed during the pendency of the main proceedings.

30. For the aforesaid reasons, in my opinion no case for grant of relief claimed in the application is made out. The application as such fails and same stands dismissed.

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(NITIN W. SAMBRE, J.)