

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.128 OF 2022

Kuttubdin Hasanali Ramzanali Legal .. Appellants
heir of Hananali Ramzanali & Anr

Versus

Nirmalaben Shambhuprasad Patel, .. Respondents
deceased, thru LRs and ors

...

Mr. Amit Gharte for the appellants.

Ms. Anjana Patel for respondent no.1 A present in person.

CORAM: BHARATI DANGRE, J.

DATED : 4th APRIL, 2022

P.C:-

1 Heard the learned counsel for the Appellant and Smt. Anjana Patel, respondent no.1A, in the Appeal, who appear in person. The Appeal seek intervention of this Court in the order passed by the District Judge, Kalyan in Civil Miscellaneous Application No.56 of 2017, which refused restoration of the Regular Civil Appeal No.42/2010, which was dismissed for want of prosecution on 11/04/2017.

2 It is trite position of law that the Courts must attain to do substantial justice to both the parties, and Justice Vivian Bose in Sangram Vs. Election Tribunal, Kotah, Bhurey, Lal Baya,

1955 AIR 1915 425, in paragraph 16 and 17 has made relevant observations to that effect, which read thus :-

“16 *A code of procedure must be regarded as such. It is procedure something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.*

17 *Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”*

There cannot be any doubt that the said position of law still holds good. However, one also cannot lose sight of the fact that the Code of Civil Procedure was required to be amended and several time bound schedules came to be inserted, in order to do

substantial justice between the parties, keeping in mind that it is not interest of one of the party which should be focused upon, but with an intention that the Court shall not permit any particular party to take advantage of its own fault and prolong the civil proceedings so as to keep the other party out of reach of justice.

3 This principle particularly applies to the case, on perusal of the impugned orders.

Pertinent to note that the Civil Appeal No.42/2010 filed by the appellant came to be dismissed on 11/4/2017 by invoking Order 41 Rule 18-A of the CPC (Bombay Amendment) which reads thus:-

18-A. Dismissal for want of prosecution.— Where after the admission of an appeal the rules or the special directions of the Court require the appellant to take any steps in the prosecution of the appeal before a fixed date, and where after due notice intimating the steps to be taken the appellant fails to take such steps within the time prescribed by the rules or allowed by the Court, the Court may direct the appeal to be dismissed for Want of prosecution or may pass such other order as it thinks fit.

4 A detailed order reflect the callous and lackadaisical approach adopted by the Appellant when on a particular date, Appeal was called out on 11/4/2017 and respondent no.2 Anjana Patel submitted her oral arguments. The appellant nos.1, 2 and 3

were absent on the said date, whereas appellant no.4 was present in the Court along with respondent no.5. The learned Judge repeatedly kept on asking the appellant no.4 about the presence of his Advocate, but it was responded to by stating that he has met with an accident. When asked, that if this particular fact was known to them, why the application was not moved, no application was moved till 5.00 p.m, but orally adjournment was sought for.

As against this, the respondent no.2 appearing in person (original plaintiff) pressed for the hearing of the proceedings, particularly in the background of the order passed below Exhibit-74 on 25/1/2016, when the Appeal was specifically directed to be listed for dismissal.

5 The learned Judge specifically gone through the dates of events of the proceedings, by referring to various adjournment application i.e. Exhibits 72, 75, 76, 79 and 81. He visualized these applications and the indulgence granted by the Court from time to time in the backdrop of a direction issued by the High Court to make the Court arrear free and clear the suits pending on the docket of the respective Courts for five years or so. Referring to the conduct of the appellants and giving them a leeway on all those dates, when the learned Judge was not Presiding Officer, he drew a balance sheet of their conduct and arrived at a conclusion that another adjournment is nothing but an attempt to protract the proceedings.

The earlier order dated 4/4/2015 vide Exhibit-72 itself had directed filing of written arguments but no steps were taken to comply the said order. This constrained the learned Judge to dismiss the Appeal on 11/4/2017.

6 Being aggrieved by the said dismissal, the Civil Miscellaneous Application No. 56/2017 was taken out by the appellant for setting aside the order and seeking it's restoration. The ground projected was, that after dismissal of the Appeal when the applicants met their Advocate on 11/4/2017, it was revealed to them that their lawyer had met with an accident on 9/3/2017 and was diagnosed with tibia fracture in his left knee and, therefore, he was unable to attend the court proceedings as his movements were restricted. Pertinent to note that neither the counsel filed an affidavit nor the medical certificate to that effect was brought on record along with the application.

7 The said application also met with the same fate, at the hands of the District Judge, Kalyan on 25/10/2021, when he examined the application specifically in the backdrop of an attempt made by the appellants to depict diligence in prosecuting the Appeal, and therefore, he determined as to whether the appellant nos.2 to 4 have shown due diligence in prosecuting the Appeal.

The learned Appellate Judge also followed the same course of action, which was followed on an earlier occasion by the

Joint Civil Judge, Sr. Division, Kalyan, while dismissing the Appeal by invoking Order 41 Rule 18A. The detailed order highlight the lapses on part of the appellants and by making reference to various dates, in sequence, when indulgence was shown and even costs was imposed, last opportunity being afforded, but still the appellants did not mend their way and on the particular date, there was no compliance of the earlier directions and therefore, the Appeal came to be dismissed. The Appellate Court reiterated the findings rendered by the District Court and while dismissing the Appeal and particularly by taking recourse to Order 41 Rule 18A, refused to restore the Appeal.

8 Learned counsel for the appellant has placed reliance upon the various authoritative pronouncements by the Apex Court for recalling under Order 41 Rule 19. He place reliance upon the decision in case of Commissioner, Mysore Urban Development Authority Vs. S.S. Sarvesh (2019) 5 SCC 144, where, by referring to the decision of Justice Vivian Bose, in case of Sangram Singh (supra) which I had referred to in the primorial paragraph of the order, indulgence was shown, based on the fact that it is the duty of the Court to do substantial justice to both the parties. He also placed reliance upon the decision of the Apex Court in case of Satpal Singh Vs. Chunni Lal, 2009 (6) SCC, 607, where the principle that, restoration of Appeal, which is dismissed in default, on showing 'sufficient cause' for non-appearance has been reiterated.

Another decision in case of *Shiv Kumar Vs. Darshan Kumar, 2009 (2) SCC 116* is also on the same lines, where Their Lordships of the Apex Court had granted indulgence by considering the particular cause to be shown.

9 The aforesaid pronouncements from the Apex, no doubt, guide the Courts below, that whenever a restoration is sought for in respect of the appeal which is dismissed in default, the Court should be liberal, and at times, by imposing the costs, the valuable rights of preferring an Appeal shall not be forfeited.

I am in complete agreement with the aforesaid legal position, but each case will have to be decided on its own facts.

As far as the present case is concerned, since the Courts below have specifically referred to various dates, on which the appellants have chosen to remain absent and failed to prosecute the remedy of Appeal, which was available to them, one fine day when the lawyer did not remain present and failed to adhere to the earlier directions issued by the Court, the Appeal came to be dismissed in default, particularly invoking Order 41 Rule 18-A, an amendment of the Bombay High Court.

The conduct of the appellants, as recorded by both courts, disentitle them of relief of restoration of their proceedings, though at the cost of losing a right of Appeal available. If a party fail to adopt due diligence in prosecuting the remedy available to him, I do not think that in the wake of the two impugned orders,

the appellants deserve any indulgence. Furthermore, when one speak of justice, it has to be understood as justice to both the parties.

It should not be a case where one party tries to take advantage of the rights vested in, resulting into denial of justice to the other.

10 The respondent no.1A Smt.Anjana Patel, who is present in the Court in person, specifically state that on 26/10/2021 the possession has been delivered and this fact has been conceded in the application. On her statement, when the Appeal Memo, is perused which is filed on 29/11/2021, I find her statement to be correct, since there is no whisper of the fact that the possession is already delivered.

In the wake of the above, the appellant do not deserve any indulgence. The Appeal is therefore, dismissed.

The learned counsel for the appellant is directed to make over the cost of Rs.5,000/- to the Respondent, which was imposed for condonation of delay within a period of two weeks.

(SMT. BHARATI DANGRE, J.)