

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

**APPEAL FROM ORDER NO.216 OF 2022
WITH
INTERIM APPLICATION NO.1477 OF 2022
IN
APPEAL FROM ORDER NO.216 OF 2022**

Baban Damodar Ghule deceased
through legal heirs-
1A-Dilip Baban Ghule and Ors.

...Appellants

Versus

Chandrabhaga Damodar Ghule
and Ors.

...Respondents

...

Mr. O.P. Soni for the Appellants.

Mr. Sanjeev Kadam with Mr. Omkar A. Wakle for the Respondents.

CORAM: SMT. ANUJA PRABHUDESSAI, J.

DATED : 29th JUNE, 2022.

P. C. :-

1. By consent of the parties, heard finally at the stage of admission.

2. The challenge in this appeal is to the order dated dated 02/12/2021 in Notice of Motion No.1473 of 2021 filed in S.C. Suit No.109131 of 1993, City Civil Court, Greater Mumbai. By the impugned order, the learned Judge condoned the delay of seven years and restored the Suit which was dismissed for non-prosecution.

3. Heard Mr. O.P. Soni, learned counsel for the Defendants and Mr. Sanjeev Kadam, learned counsel for the Respondents-Plaintiffs. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

4. The facts of the case in brief are as under:

The Respondents, hereinafter referred to as the Plaintiffs, had filed a suit for partition (Suit No.2494 of 1993), which was transferred to the City Civil Court in the year 2012, in view of change in pecuniary jurisdiction. The said Suit was dismissed for non-prosecution on 21/12/2013. The Plaintiffs filed a notice of motion for condonation of delay of 7 years and restoration of Suit on the grounds that :-

- (i) the Plaintiff No.2, who used to co-ordinate with Advocate-Gulabrao Shelke, died in July-2011 and there was no communication between the Plaintiffs and their lawyer;
- (ii) Advocate-Gulabrao Shelke, who was representing them in the Suit, expired on 26/07/2016;
- (iii) The Plaintiffs learnt through Advocate Wable that the Suit was transferred to City Civil Court and that it was

dismissed on 21/12/2013;

(iv) The Plaintiffs were not aware that the Suit was transferred to the City Civil Court and dismissed for default;

(v) The Plaintiff Nos.3 and 4 are senior citizens and have several health issues;

(vi) Plaintiff No.4 was admitted in hospital at Hadapsar from 08/09/2015 to 19/09/2015 and Plaintiff No.3 was hospitalised from 16/11/2016 to 21/11/2016;

(vii) Lockdown was declared from 15/03/2020 due to outbreak of Covid Pandemic.

5. The Defendants claimed that the Plaintiffs had earlier filed a notice of motion No.219 of 1993 for restoration of Suit, which was dismissed on 18/12/2014 for non-prosecution. The Plaintiffs have suppressed this fact and have filed a second notice of motion, instead of seeking restoration of the previous notice of motion. The Defendants have disputed the statement that the Plaintiffs were not aware of the pendency of the Suit before the City Civil Court. The Defendants also claimed that the Plaintiffs have not made out sufficient cause to explain the inordinate delay of seven years, on the contrary, the records would

reveal that the Plaintiffs have been negligent in prosecuting the Suit.

6. While allowing the notice of motion, learned Judge observed that no notice was issued to the Plaintiffs after the Suit was transferred to the City Civil Court. Yet, the learned Judge has noted that the Plaintiffs had filed a previous notice of motion and held that the Plaintiffs were aware of the dismissal of the Suit. The learned Judge further records that despite being aware of the death of Plaintiff Nos.1 and 2, no steps were taken to bring on record the legal representatives of the deceased Plaintiffs. Learned Judge also acknowledged the fact that the delay is inordinate. Notwithstanding these observations the learned Judge condoned the delay of seven years and restored the Suit by taking an undertaking from the Plaintiff No.3 that he will prosecute the Suit vigilantly. By invoking the rule of *audi alteram partem*, the learned Judge held that both the parties should be heard and the matter should be decided on merits particularly considering the age of health and Plaintiff Nos.3 and 4. Being aggrieved by this order the Defendants have filed this appeal.

7. The only question for consideration is whether the Plaintiffs have made out sufficient cause to condone inordinate delay of seven

years in restoring the Suit.

8. The records reveal that the Plaintiffs had filed a Suit for partition before this Court, which was transferred to the City Civil Court in the year 2012 in view of change in pecuniary jurisdiction. The Plaintiff No.1-Chandrabhaga Ghule died on 13/11/2008 i.e. even prior to the transfer of the suit to the City Civil Court. The legal representatives of the deceased Plaintiff No.1 were not brought on record. It is also not in dispute that Plaintiff No.2 Dattatraya died on 03/07/2011. The legal representatives of the deceased Plaintiff No.2 were also not brought on record.

9. The records reveal that the son of Plaintiff No.2 had appeared before the City Civil Court on 04/07/2013 and filed an application for adjournment. He was directed to file written statement to the counter claim. Learned counsel for the Defendant had brought to the notice of the Court that the Plaintiff Nos.1 and 2 were dead. Therefore, the Plaintiffs were directed to take necessary steps. Despite which, no steps were taken to bring on record the legal representatives of the deceased Plaintiff Nos.1 and 2. Plaintiff Nos.3 and 4 failed to remain present before the City Civil Court on the subsequent dates and

they were not represented by any Advocate. Hence, on 21/12/2013 City Civil Court dismissed the Suit for default.

10. It is not in dispute on 21/01/2014 that the Plaintiffs filed Notice of Motion No.219 of 2014 through Advocate Uday Shelke for restoration of the Suit. The Notice of Motion was listed for reply on 03/03/2014, on which date Plaintiff No.3 was present before the Court. On subsequent date i.e. on 03/04/2014 the Plaintiffs were represented by Advocate Shelke. The notice of motion was dismissed for default on 18/10/2014.

11. It is pertinent to note that Plaintiff No.3 suppressed the fact that he as well as the son of Plaintiff No.2 had personally appeared before the City Civil Court. They were not only aware that the Suit was transferred to the City Civil Court but were well aware that the Suit was dismissed for default on 21/12/2013. Hence, the explanation that they were not aware of the transfer of suit and were informed about the same by Advocate Mr. Wable, is a patently false statement.

12. The Plaintiffs have not assigned any reasons for not seeking restoration of the earlier notice of motion. The affidavit in support of

motion also does not refer to the previous notice of motion. Suppression of this relevant fact and filing of the second notice of motion without seeking recall of the earlier order of dismissal, on the basis of false statements reflects total lack of bonafides.

13. It is also to be noted that the delay sought to be condoned is inordinate. In *Majji Sanemma @ Sanyasirao Vs. Reddy Sridevi and Ors. 2022 (2) Mah.L.J. 9* the Hon'ble Supreme Court has reiterated the principles laid down in the previous decisions that in the absence of reasonable, satisfactory or appropriate explanation, the delay is not to be condoned lightly. The expression 'sufficient cause' cannot be liberally interpreted if negligence, inaction or lack of bonafides is attributed to the party and that the Courts cannot enquire into belated and stale claims on the ground of equity.

14. In the instant case the Plaintiffs have not only failed to make out sufficient cause but have tried to obtain relief by suppressing material facts and by making misleading nay false statement. This is nothing but sheer abuse of process of law. The learned Judge has given totally go bye to the statutory provisions as well as the procedure prescribed under the Code. The impugned order is perverse and

unsustainable being against the settled principles of law. Hence, the impugned order cannot be sustained and is accordingly set aside. All pending applications stand dismissed.

(SMT. ANUJA PRABHUDESSAI, J.)

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