

SGPunde

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO. 14201 OF 2019
IN
APPEAL FROM ORDER [ST] NO. 36192 OF 2019

Shri. Ganpati Devalaya Public Trust,
through its Managers,
Anand Nainsukhlal Katariya & Ors.

... Applicants

Versus

Mangal Bhausahab Galande & Ors.

... Respondents

...

Mr. Amol K. Gawali – Advocate for applicants

Mr. Ashwin V. Hon – Advocate for respondent no. 1

....

CORAM : GAURI GODSE, J.

DATE : 18TH JANUARY, 2023

PER COURT :

1. This civil application is filed for condonation of more than 2 years (868) days delay in filing the Appeal from Order. The appeal from order challenges an order of remand passed by the learned Ad-hoc District Judge-3, on 06th April, 2017 in Regular Civil Appeal No. 309 of 2009.
2. The present applicants are the original plaintiffs whose Regular Civil Suit No. 236 of 2006 was decreed on 29th October, 2009. Defendant nos. 1 and 2 had preferred the said appeal. By the

said order passed in appeal, the Regular Civil Suit No. 236 of 2006 filed by the present applicants was remanded under Order XLI Rule 23-A of the Code of Civil Procedure to the trial court for fresh hearing, after giving an opportunity to the original defendants to file written statement. The said order of remand was passed, as during the pendency of the appeal an application for amendment of the plaint filed by the present applicants was allowed. Hence for giving an opportunity to the defendants to file a written statement, there was an order of remand.

3. After the order of remand, the original defendants filed additional written statement and issues were also framed. The present applicants had filed an application for deleting issue nos. 1, 2 and 4 as framed by the trial court after the order of remand. The learned trial Judge by order dated 20th February, 2018 rejected the application filed for deletion of issues, hence the applicant filed Writ Petition No. 3729 of 2018 in this court. The learned counsel for the applicant submits that the said writ petition is still pending in this court. It is sought to be argued on behalf of the applicants that since the application for deleting issues was rejected, the applicants were advised to challenge the original order of remand.

4. The argument on behalf of the applicants is that, the reason for challenging the original order of remand was mainly to seek a clarification, with respect to the observations, as recorded by the learned District Judge in paragraph no. 15 of the order of remand. In the said paragraph, it was recorded that the original defendants in the appeal had challenged the findings on issue no. 1 which was recorded by the learned Trial Judge, however, at the time of hearing of the appeal, original defendants had given up the challenge to that issue. Thus, it is submitted on behalf of the applicants that in spite of the observations made by the learned District Judge in paragraph no. 15 of the order of remand, the same issues were framed after remand and hence the applicants were advised to challenge the order of remand at this stage.
5. It is thus submitted on behalf of the applicants that it was only due to lack of legal advice that the appeal was not preferred in time for challenging the order of remand and in view of the facts that unfolded as recorded above, the applicants were advised at the later stage to challenge the order of remand. Hence, there cannot be any negligence attributed towards the applicants and that applicants should be given a fair chance to challenge the order of remand at this stage.

6. This civil application was extensively heard on 02nd January, 2023 and the applicants were given an opportunity to amend the civil application for the purpose of raising grounds in support of the oral submissions that were made, that only due to lack of legal advice, the appeal was not preferred immediately after the order of remand was passed. The applicants have carried out an amendment and added certain new grounds in the application. Perusal of the amended grounds reveal facts with respect to what had transpired after the order of remand and with respect to the discussions and the findings recorded by the District Court at the time of passing order of remand, as well as findings recorded by the trial court. The applicants in addition to the ground of lack of legal advice, have also stated as to what was expressed by the court during the hearing of Writ Petition. Such a pleading made by the applicants, as a ground for condonation of delay is not appropriate. By way of amendment the applicants have also raised a vague additional ground that one of the trustees had expired in the intervening period. Present application is filed through three trustees. It appears that by way of afterthought this ground is added without any details. In view of original ground

of lack of advice, I do not find any substance in this freshly added ground.

7. The gist of the arguments on behalf of the applicants is that the only reason for filing the present appeal from order is with respect to the clarification that will be necessary with respect to the observations recorded by the learned District Judge in paragraph no. 15 of the order of the remand. Further it is argued that after remand order, trial court has framed issues and since the application for deletion of issues is rejected by the trial court, now it has become necessary to challenge the order of remand. Even with respect to the ground for condonation of delay, the same points are argued that as the issues are framed after remand which deals with the original issue no. 1 with respect to which the challenge was already given up by the defendants and thus, for the reason of clarification, it has become necessary, to challenge the order of remand.
8. In my view, the reason for requirement of certain clarification in the order of remand cannot be a ground for condonation of delay. The present applicants, have acted upon the order of remand, have participated in the proceedings after the remand and even the issues are framed. After framing of issues, the applicants have

also further applied for deletion of certain issues on the ground of observations in paragraph no. 15 of the order of remand. With respect to rejection of the application for deletion of the issues, the writ petition filed by the present applicants is pending in this court. Hence, there is no question of examining the reasons for framing and/or deletion of issues for the purpose of deciding the present application for condonation of delay.

9. Except for the reasons as to the legal advice received for the purpose of requirement of clarification, there is no other satisfactory reason given for condonation of delay. Once the party has already accepted the order and participated in the proceedings after the remand, the subsequent events with respect to framing of issues cannot be a ground for condonation of delay. Even otherwise, framing of issues is not any conclusive decision. It will always be open for the applicants to argue on merits with respect to the issues that are framed.
10. The learned counsel for the applicants has relied upon the decision of this court in the case of *Pratapchand Lakhamaji Jain vs. Smt. Lilabai Krishanath Surve*¹. The said decision is relied upon in support of the submission that the applicants proceeded as per legal advice and hence the applicant should not suffer due

¹ [1998(3) Mh.L.J. 706]

to lack of legal advice which was not received in time for the purpose of challenging the order of remand. The ratio as laid down in the said decision is in the context of the facts of that case and with respect to the parameters required to be applied for exercising the discretionary jurisdiction under section 5 of the Limitation Act for the purpose of condonation of delay. So far as the present case is concerned, the pleadings in the application as well as the submissions which are made, are with respect to certain clarification which are found necessary in the order of remand. Fact cannot be ignored that remand order was found necessary by the District Court, as the Applicants had amended the plaint during pendency of appeal. Hence for giving an opportunity to the defendants for filing additional written statement, there was an order of remand for fresh trial. In my view the same cannot be a ground to condone delay. Ground of lack of legal advice amounts to making allegations against the advocate. Such vague allegations cannot be made a ground for condonation of delay. The expression 'sufficient cause' in section 5 of Limitation Act receives liberal meaning for advancing substantial justice and generally delay is condoned in the interest of justice. However, it cannot be ignored that lot of time is

consumed at various stages of litigation and unnecessary delay can be prejudicial to the rights of the parties to the litigation. A party should not be allowed to unnecessarily prolong the litigation. In the present case, the order of remand which is sought to be challenged, is acted upon by the parties and the applicants have proceeded in the proceedings in the trial court after the order of remand. In such circumstances, I do not find any satisfactory reason to exercise discretionary jurisdiction to condone the delay. Hence, the application for condonation of delay is rejected. There will be no order as to costs.

[GAURI GODSE]
JUDGE