



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.50 OF 2023
WITH
INTERIM APPLICATION NO.577 OF 2023**

Shalen D'Mello	...	Appellant
versus		
Ruby Victoria Ferreira and Ors.	...	Respondents

Mr. Sanskar Marathe, for Appellant.
Mr. C.J.Joveson, for Respondents.

CORAM	:	N.J.JAMADAR, J.
RESERVED ON	:	7 JUNE 2023
PRONOUNCED ON	:	26 JULY 2023

JUDGMENT :

1. This appeal is directed against an order dated 9 November 2022 passed by the learned Judge, City Civil Court in Notice of Motion No.931 of 2021 in S.C.Suit No.3513 of 2010, whereby the said Notice of Motion taken out by the Appellant-original Defendant No.1(d) for setting aside the decree under the provisions of Order IX Rule 13 of the Code of Civil Procedure, 1908 came to be dismissed.

2. The background facts can be stated, in brief, as under :

2.1 For the sake of convenience, the parties are hereinafter referred to in the capacity in which they were arrayed before the trial Court. Suit No.3513 of 2010 was instituted for partition and separate possession of land admeasuring 359.4 sq. mtrs. out of CTS No.262, Sahar Village, Andheri (E), Mumbai (suit plot). The original Plaintiff – deceased Respondent No.1 claimed to be the only daughter of late Joseph D'Souza.

The Plaintiff asserted that late Joseph and his brother Philip D'Souza were the holders of the ancestral properties including the suit plot. Both Joseph and Philip passed away. The Defendants were the successors in interest of late Philip D'Souza. Joseph had $\frac{1}{2}$ share in the suit plot. Defendant Nos.1 to 4 started to carry out extensive alterations in the suit plot without obtaining permission from the planning authority. Initially, the Plaintiff had instituted Suit No.627 of 2008 to restrain the Defendants from developing the suit plot. Later on, as the Defendants declined to give Plaintiff's $\frac{1}{2}$ share in the suit plot, the Plaintiff was constrained to institute a suit for declaration and partition of the suit plot by metes and bounds.

2.2 Defendant Nos.1 and 3 resisted the suit by filing written statement. It was contended, inter alia, that the Plaintiff had sold the joint family property situated at Survey No.27, Hissa No.6, CTS No.199 admeasuring 675 sq. mtrs., and appropriated the entire consideration and that the father of the Plaintiff had sold an area admeasuring 166 sq.mtrs. out of the plot CTS No.262 which fell to his share and, therefore, the Plaintiff's claim of $\frac{1}{2}$ share in the suit plot, was untenable. By a separate written statement, Defendant Nos.2, 4 to 6 and 8 also resisted the suit by raising identical grounds of defence.

2.3 It seems that after the issues were framed, the Defendants did not participate in the trial. Eventually, the suit came to be decreed by judgment and order dated 15 June 2008 holding that the Plaintiff has 50% share in the suit plot and she was

entitled to partition and separate possession of the said share. A preliminary decree was ordered to be drawn up.

2.4 The Plaintiff filed an Execution Application, being Application No.128 of 2019. It seems, upon being served with the notice of the execution application, the Appellant-Defendant No.1(d) took out a Notice of Motion No.931 of 2021 to set aside the decree.

2.5 The substance of the Notice of Motion was that initially the Advocate, who was appointed by the Defendants, kept them apprised of the proceedings in the suit and sought instructions. The Defendants bona fide believed that the Advocate would diligently pursue the matter and protect their interest. However, slowly and gradually the Advocate refused to take their calls. They became aware of the passing of the decree only when Defendant No.4 was served with the notice of the execution application on 27 November 2019. Hence, the application for setting aside the decree, under Order IX Rule 13 of the Code, 1908.

2.6 The Notice of Motion was resisted by the Plaintiff contending, inter alia, that the Defendants were making wild allegations against their Advocate mala fide. They were not diligent in defending the suit. There was no explanation for the huge delay in filing the application for setting aside the decree even after one of the Defendants was served with the notice of the execution application. The Plaintiff, thus, asserted that the Defendants have not made out a sufficient cause for

condonation of delay, nor there was any justifiable ground to set aside the decree.

2.7 After appraising the affidavit in support of the Notice of Motion, reply thereto, material on record and the submissions canvassed across the bar, the learned Judge, City Civil Court was persuaded to dismiss the Notice of Motion opining, inter alia, that the reasons assigned by the Defendants of negligence or remissness on the part of their Advocate, in the circumstances of the case, did not constitute sufficient cause for either condonation of delay or for setting aside the decree. The learned Judge was of the view that the contention of the Defendants that their erstwhile Advocate was refusing to take their calls was, in itself, sufficient to cause alarm to them and rush to the Court to defend the suit. Secondly, since the Defendants had not proceeded against the learned Advocate for the deficiency in the services before the Consumer Forum, mere lodging of the complaint of professional misconduct against the erstwhile Advocate was not sufficient to bolster up the claim of the Defendants. Thirdly, the delay in filing the Notice of Motion since the date of the service of the Notice of execution application remained unexplained. Therefore, the Notice of Motion did not deserve to be entertained.

2.8 Being aggrieved, Defendant No.1(d) is in Appeal.

3. I have heard Mr. Sanskar Marathe, learned Counsel for the Appellant and Mr. Joveson, learned Counsel for the Respondents at some length. The learned Counsel took the Court through the pleadings, the impugned order and the judgment

passed by the learned Judge in Suit No.3513 of 2010. Copy of the roznama of the proceeding in Suit No.3513 of 2010 was also tendered for the perusal of the Court.

4. The learned Counsel for the Appellant strenuously submitted that the approach of the learned Judge, City Civil Court in dismissing the Notice of Motion by doubting the correctness of the reason of remissness on the part of the Defendants' erstwhile Advocate for not filing the complaint before the Consumer Forum, is wholly unsustainable. The learned Judge lost sight of the fact that no sooner the Defendants realized the professional misconduct on the part of their erstwhile Advocate, a complaint was lodged with the disciplinary committee of the Bar Council of Maharashtra and Goa. This factor was unjustifiably discarded by the learned Judge on an incorrect premise that the Defendants ought to have proceeded against the Advocate before the consumer forum.

5. Secondly Mr. Marathe would urge, the aspect of delay in filing the Notice of Motion was not properly appreciated by the City Civil Court in the light of the well recognized position in law. The learned Judge, City Civil Court, lost sight of the fact that the refusal to condone delay and set aside the ex-parte decree would render the Defendants remediless. The object of providing limitation is not to destroy the rights of the parties. Therefore, the prayer to condone the delay in taking out the Notice of Motion ought to have been liberally construed. To bolster up this submission, Mr. Marathe placed a strong reliance on the decision of the Supreme

Court in the case of **N. Balakrishnan Murthy V/s. M. Krishnamurthy**¹.

6. Mr. Marathe would further submit that having noted the statement made by the erstwhile Advocate of the Defendants (as recorded in the Roznama dated 2 December 2018) that the learned Advocate had not received instructions from the Defendants since long time, the Court could not have proceeded with the suit without issuing notice to the Defendants. It was incumbent on the part of the learned Advocate to seek discharge and, thereafter, the Court ought to have issued notice to the Defendants. All these aspects were not adequately considered by the learned Judge, urged Mr. Marathe.

7. In opposition to this, Mr Joveson, learned Counsel for the Respondent No.1 stoutly supported the impugned order. It was submitted with a degree of vehemence that the Appellant-Defendants have deprived the Respondents/Plaintiff of her legitimate right in the suit plot by deliberately delaying the disposal of the suit for a number of years. The Defendants deliberately did not participate in the suit and now to cover up their own negligence and default, the Defendants are making reckless and mala fide allegations against their erstwhile Advocate. Such conduct of the parties, according to Mr. Joveson, does not deserve to be countenanced.

8. Mr. Joveson laid emphasis on the fact that ample opportunities were given by the trial Court before passing the impugned decree. The statement of the

1 AIR 1998 SC 3222

erstwhile Advocate for the Defendants that he was not receiving instructions from the Defendants, according to Mr. Joveson, indicates that the Defendants were not interested in defending the suit, and, therefore, the learned was constrained to make such statement. Now the Defendants cannot be permitted to derive an undue advantage from the said statement, which in effect shows the lack of diligence on the part of the Defendants.

9. I have given careful consideration to the rival submissions.

10. A two fold consideration is warranted. First, the aspect of delay in filing the Notice of Motion seeking setting aside of the decree. Second, the sufficiency of the cause ascribed by the Appellant-Defendants for non-appearance when the suit was called on for hearing. Under Article 123 of the Limitation Act, 1963, the 30 days period of limitation to set aside the decree passed ex-parte begins to run from the date of the decree or where the summons or notice was not duly served when the applicant had knowledge of the decree. In the case at hand, the Defendants did appear in response to the summons and had also filed written statement.

11. The Defendants approached the Court with a case that they were unaware of the proceedings in the suit as the Advocate appointed by them did not apprise them of the developments in the proceedings, and, therefore, they could not appear before the Court when the suit was posted for recording evidence and, eventually, an ex-parte decree came to be passed. The Defendants have further

asserted that upon realizing the alleged misconduct on the part of their Advocate, they have lodged a complaint with the disciplinary committee of the Bar Council of Maharashtra and Goa.

12. The learned Judge was not persuaded to accept the aforesaid explanation sought to be offered on behalf of the Defendants as the concerned Advocate had made a statement before the Court on 2 December 2018 that he had not received instructions from the Defendants since a long time. The learned Judge, City Civil Court was thus of the view that the said statement made on behalf of the Defendants indicated that the learned Advocate was taking steps and the Defendants were not giving instructions to the said Advocate.

13. Whether the aforesaid approach is justifiable ? I have carefully perused the roznama of the suit. It appears that the learned Advocate for the Defendants had not appeared before the Court since the suit came to be posted for admission and denial of documents but once, that is on 2 December 2018, on which day the learned Advocate made the statement that he had not received instructions from the Defendants since long and sought an adjournment as a last chance.

14. It is pertinent to note that thereafter also, the learned Advocate did not appear before the Court and seek discharge in conformity with the provisions contained in the Code and the Rules framed under Section 34 of the Advocates Act, 1961. When an Advocate does not get requisite instructions to prosecute or defend the

proceedings from the concerned party, the recognized course is to seek discharge after giving intimation to the concerned party. A bare statement before the Court that the Advocate did not get instructions from the party is not a substitute for seeking discharge in the manner known to law. Such a course leads to a situation of the present nature where the court proceeds on the premise that the non-appearing party does not wish to prosecute the proceedings. Ideally, in a situation of the present nature, the Court ought to called upon the concerned Advocate to get discharge after following the procedure envisaged by the Rules. Such a course rules out the possibility of prejudice to a party.

15. A learned Single Judge of this Court in the case of **Govinda Bhagoji Kamable and Ors. V/s. Sadu Bapu Kamable and Ors.**² had an occasion to consider the question as to whether the appellate court could dismiss the appeal for default on the basis of pursis of no instructions filed by the Advocate for the Appellants when the Advocate had not obtained discharge ? After adverting to the provisions contained in Rule 4 of Order III of the Code, 1908 and the Rules framed under Section 34(1) of the Advocates Act, 1961, the learned Single Judge in terms observed that the practice of the courts taking cognizance of a no instruction pursis which is filed without following the procedure laid down by the rules framed by this Court is to be deprecated. An Advocate cannot simply walk out of a proceeding only by filing such no instruction

2 2005 (1) Mh.L.J.651

pursis. He owes a duty to his client to appear for him in the proceedings till his appointment is terminated by an order of the Court. If the court intended to treat no instruction pursis as an application for discharge of the Advocate, the Court ought to have directed the Advocate to give intimation in writing to his client as required by the Rules. If the court intended to grant discharge to the Advocate, notice to the Appellant ought to have been issued by the Court after accepting the no instruction pursis. The appeal ought not to have been dismissed for default on filing of such pursis.

16. The aforesaid enunciation of law governs the case at hand as well. In the instant case, the Court recorded a statement made by the Advocate that he had not been receiving instructions since long, instead of a formal no instructions pursis. Thereafter, the learned Advocate did not appear for the Defendants, though he had sought an adjournment by way of a last chance. In the circumstances, the court ought to have issued notice to the Defendants if it construed that the non-appearance of the Advocate as the act of discharge.

17. The matter can be looked at from another perspective. It is well recognized that ordinarily a party should not suffer on account of fault or default in appearance of the Advocate whom it had entrusted its case. When a party does everything in its power to participate in the proceedings, by engaging an Advocate and entrusting the brief, it is considered unjust to punish such a party for default in

appearance on the part of its Advocate. Generally, the courts lean in favour of condoning the delay and restoring the proceedings where there is material to show that the default is attributable to the Advocate engaged by a party. Such approach is in accord with the well-recognized principle that the procedure is handmaid of justice and it should not be allowed to score a march over substantive justice.

18. A profitable reference in this context can be made to a judgment of the Supreme Court in the case of Secretary, Department of Horticulture, Chandigarh and Anr. V/s. Raghu Raj³, wherein the principle that a party should not be made to suffer due to default on the part of his Advocate was expounded with reference to the previous pronouncements. Paragraphs 23, 24 and 28 are material and, hence, extracted below :

“23. Now, it cannot be gainsaid that an advocate has no right to remain absent from the Court when the case of his client comes up for hearing. He is duty bound to attend the case in Court or to make an alternative arrangement. Non-appearance in Court without ‘sufficient cause’ cannot be excused. Such absence is not only unfair to the client of the advocate but also unfair and discourteous to the Court and can never be countenanced.

24. At the same time, however, when a party engages an advocate who is expected to appear at the time of hearing but fails to so appear, normally, a party should not suffer on account of default or non-appearance of the advocate.

28. From the case law referred to above, it is clear that this Court has always insisted advocates to appear and argue the case as and when it is called out for hearing. Failure to do so would be unfair to the client and

3 (2008) 13 SCC 395

discourteous to the Court and must be severely discountenanced. At the same time, the Court has also emphasized doing justice to the cause wherein it is appropriate that both the parties are present before the Court and they are heard. It has been noted by the Court that once a party engages a counsel, he thinks that his advocate will appear when the case will be taken up for hearing and the Court calls upon the counsel to make submissions. It is keeping in view these principles that the Court does not proceed to hear the matter in absence of the counsel.” (emphasis supplied) .

19. It is necessary at this juncture itself to record that the Court does not profess to delve into the correctness of the allegations of the Defendants against their erstwhile Advocate. This appeal is neither appropriate proceeding nor the stage is ripe to delve into those allegations. What has to be appreciated is whether there is prima facie material to show that the Defendants did make a grievance about the alleged remissness or negligence on the part of their erstwhile Advocate.

20. As noted above, the Defendants lodged a complaint of professional misconduct with the disciplinary committee of the Maharashtra and Goa on 6 March 2020. The veracity of the allegations undoubtedly was not the remit of the inquiry in the Notice of Motion. However, the sufficiency of cause sought to be ascribed by the Defendants could not have been jettisoned away on the ground that the Defendants ought to have filed a complaint of deficiency in service against their erstwhile Advocate before the Consumer Forum.

21. The learned Judge, City Civil Court clearly misdirected himself in

discarding the grievance of the Defendants for not invoking the remedies under the Consumer Protection Act. At any rate, a complaint to the Bar Council cannot be said to be an inappropriate recourse. This circumstance ought to have been given deserving weight.

22. On the aspect of the delay in filing the Notice of Motion, the City Civil Court has found that there was no explanation, much less satisfactory one, for condonation of delay. Firstly, there was delay of about four months in lodging complaint with the Bar Council and, secondly, there was a time lag of about 16 months in filing the Notice of Motion after one of the Defendants entered appearance in the execution application on 28 November 2019.

23. The learned Judge, City Civil Court was, however, alive to the fact that the Covid-19 Pandemic intervened, and, thus, observed that there was no satisfactory explanation from the date of the service of notice of the execution application on one of the Defendants (27 November 2019) to the imposition of lock-down restrictions in the month of March 2020; roughly a period of four months.

24. It is trite an Application for condonation of delay, be it in preferring an appeal or setting aside of an order of dismissal of a proceeding for want of prosecution or on ex-parte decree receives a liberal consideration. Overarching principle which informs the exercise of the discretion is that the lis should be decided on merits rather than on technicalities and default, so as to advance the cause of substantive justice.

From this standpoint, the term “sufficient cause” is liberally construed and the Courts lean in favour of condonation of delay. Undoubtedly, an inordinate delay brings in its trail, the consequences like the alteration in the position of the parties, creation of third party rights and intervention of equities. An unexplained and inordinate delay thus puts the Court on guard. Nonetheless, it is emphasised that the length of delay may not be the sole barometer for exercise of the discretion. It is the sufficiency or otherwise of the cause ascribed for the delay which carries more weight.

25. In the case of **N. Balakrishnan Murthy V/s. M. Krishnamurthy (supra)**, on which reliance was placed by Mr. Marathe, the principles which govern the exercise of discretion and the philosophy which ought to inform the said exercise were illuminatingly postulated :

“9. It is axiomatic that condonation of delay is a matter of discretion of the court Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in reversional jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter when the first cut refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the

conclusion of the lower court.

10. The reason for such a different stance is thus: The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rule of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. the object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim *Interest reipublicae up sit finis litium* (it is for the general welfare that a period be putt to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain Vs. Kuntal Kumari* [AIR 1969 SC 575] and *State of West Bengal Vs. The Administrator, Howrah Municipality* [AIR 1972 SC 749].

13. It must be remembered that in every case of delay there can be some

lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss.”

26. The Court has enunciated in clear and explicit terms that if the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the party seeking condonation of delay. The Supreme Court has emphasised that the object of law of Limitation is not to destroy the rights of the parties.

27. On the aforesaid anvil, re-adverting to the facts of the case, the reasons ascribed by the Defendants could not have been brushed aside as unsatisfactory. Whether it was on account of want of communication from the erstwhile Advocate of the Defendants or sheer disinterestedness of the Defendants themselves, can be a matter in contest, but the fact remains that the Defendants did not participate in the proceedings in the suit.

28. To lend support to their contention that there was remissness on the part

of their Advocate, the Defendants have lodged complaint with the appropriate authority which is empowered to redress such grievance. The claim of the Defendants that they were unaware of the proceedings, thus, could not have been jettisoned away over board. Explanation for the delay of four months, as reckoned by the learned Judge, City Civil Court, if construed in the light of further assertion that after being served with the notice of execution application, the Defendants made efforts to ascertain the facts, and thereafter, initiated measures, cannot be said to be unsustainable.

29. The nature of the decree passed in Suit No.3513 of 2010 also assumes importance. Under the provisions of Section 97 of the Code of Civil Procedure, 1908, where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. It is equally well-recognized the Defendant who have suffered an ex-parte decree has two remedies : first, either to file an application under Order IX Rule 13 of CPC to set aside the ex-parte decree; second, to file regular appeal before the first appellate court and challenge the ex-parte decree on merits. However, the scope of inquiry under the two provisions is entirely different. A defendant is not precluded from filing an appeal even if an application under Order IX Rule 13 of CPC is dismissed. If the delay is not condoned and ex-parte decree is not set aside, even in a deserving case, the Defendant would be constrained to resort to remedy of appeal

again accompanied by an application for condonation of delay and resultant avoidable multiplicity of proceedings.

30. In the totality of the circumstances, in my view, the delay in taking out the Notice of Motion for setting aside the decree deserves to be condoned and the ex-parte decree is also required to be set aside so as to provide an efficacious opportunity of hearing to the Defendants, especially having regard to the nature of the suit. At the same time, interest of the Plaintiff deserves to be adequately protected. A direction for payment of costs must follow and a time frame for the resultant trial is required to be stipulated.

29. The conspectus of aforesaid consideration is that the Appeal deserves to be allowed.

30. Hence, the following order :

ORDER

(i) The Appeal stands allowed subject to the payment of costs of Rs.25,000/- by the Appellant to the Respondent Nos.1A to 1C within a period of three weeks from today.

(ii) The impugned order dated 9 November 2022 passed in Notice of Motion No.931 of 2021 stands quashed and set aside and the Notice of Motion stands allowed.

(iii) The judgment and decree dated 15 June 2008 passed in S.C.Suit

No.3513 of 2010 also stands quashed and set aside and S.C.Suit No.3513 of 2010 stands restored to the file of City Civil Court for afresh hearing and disposal.

(iv) The orders of no cross-examination of the Plaintiff and closing the evidence of the Defendants also stand quashed and set aside.

(v) Trial in Suit No.3513 of 2010 stands expedited.

(vi) The Defendants shall not seek any adjournment for conducting cross-examination of the Plaintiff and/or her witness/es and also for adducing their evidence.

(vii) The learned Judge, City Civil Court is requested to make an endeavour to decide S.C.Suit No.3513 of 2010 as expeditiously as possible and preferably within a period of 9 months from the date scheduled for the appearance of the parties.

(viii) The parties shall appear before the learned Judge, City Civil Court on 17 August 2023.

(ix) In the event of default in payment of costs or depositing the same with the City Civil Court within the stipulated period of three weeks, this order shall stand automatically vacated without further reference to the Court.

(x) The Appeal as well as Interim Application accordingly stand disposed.

(N.J.JAMADAR, J.)