

varsha

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 1066 OF 2022**

Pankaj Nandkishore Mehta
Residing at 301/302, Jupiter Cuffe Parade,
Colaba, Mumbai – 400 005.

AND

N.L. Mehta
having his office at 'D' Office Block,
Wankhede Stadium, 'D' Road,
Churchgate, Mumbai – 400 021.

...Appellant

Versus

1. State of Maharashtra,
Through the City Survey and Land
Records, relating to Property bearing
C.S. No.7, Fort Division, 12A,
General J. Bhosale Marg,
Mumbai – 400 021.

2. Foreshore Co-operative Housing
Society Ltd.
A Co-operative Society registered under
the provisions of the Maharashtra
Co-operative Societies Act, 1960,
having their office at 12A, General
Bhosale Marg, Mumbai – 400 021.

3. M/s. Gaurav Overseas Pvt. Ltd.
A Private Limited company having its
registered office at Maker Chamber
No.3, 9th Floor, Nariman Point,
Mumbai – 400 021.

...Respondents

Mr. Farhan Dubash a/w Mansi Shah i/b. M/s. Pravin Mehta and Mithi and
Co. Advocate for the Appellant.

Ms. Nilima V. Sanglikar, for the respondent no.2.

Mr. Punit Damodar a/w. Ms. Nikita Vardhan i/b. Kanga & Co. for respondent no.3.

CORAM : GAURI GODSE, J.

DATE : 4th DECEMBER 2023

P.C. :

1. This appeal is preferred by the son of the original plaintiff for challenging the order of the trial court, refusing to set aside the order dismissing the suit for default. The Notice of Motion (“application”) for restoration of the suit was filed with a prayer for condonation of delay of 222 days caused in filing the application for restoration. The suit was dismissed for default on 20th October 2016, and the application for restoration was filed on 20th June 2017.

2. To appreciate the arguments made on behalf of the appellant, it is necessary to note a few relevant dates. The suit was filed by one N.C. Mehta, in the year 1995. The main contesting defendant, i.e. defendant no.2, had filed a written statement on 1st December 1999. Issues were framed on 20th February 2001, and the suit was posted for recording evidence on 28th July 2003. Thereafter, the plaintiff had filed a transfer

petition and the suit was transferred from the City Civil Court to this court. However, by order dated 28th February 2013, the suit was again re-transferred to the City Civil Court.

3. On 20th October 2016, though the suit was fixed for evidence of the plaintiff, none appeared on behalf of the plaintiff. It appears from the order dated 20th October 2016 that while the order was dictated the advocate for the plaintiff appeared and undertook to file an affidavit of evidence of the witness of the plaintiff during the course of the day. Hence, the matter was kept back for filing the affidavit of evidence. A perusal of the order dated 20th October 2016 indicates that the Learned Judge had kept back the matter on condition that if the affidavit of evidence was not filed, the suit would be taken up for dismissal on that day itself. Later on, a list of witnesses was filed on behalf of the plaintiff on the same day, and the suit was kept back for filing an affidavit of evidence. However, an application was filed on behalf of the plaintiff for an adjournment. The said application was opposed by defendant no.2. The learned Judge, on 20th October 2016, rejected the application for grant of adjournment and dismissed the suit for default.

4. Thereafter, on 20th June 2017, the present appellant, i.e. son of the

plaintiff, filed the application for restoration of the suit with a prayer for condonation of delay of 222 days. The appellant also prayed for permission to file his affidavit in lieu of examination in chief. Since the original plaintiff had expired on 15th February 2017, a prayer was also made for permitting the applicant to amend the plaint for adding names of heirs and legal representatives of the deceased plaintiff as party plaintiffs. Thus, the application was filed with combined prayers for condonation of delay, setting aside the order dated 20th October 2016 and restoration of suit, permission to file the affidavit in lieu of examination in chief and permission to amend the plaint for adding heirs and legal representative of the deceased-plaintiff. The said application was opposed by defendant no.2 by filing an affidavit-in-reply. By judgment and order dated 30th September 2021, City Civil Court dismissed the notice of motion filed by the present appellant, hence this appeal from order.

5. Learned counsel appearing for the appellant submitted that in the affidavit in support of the application, the appellant has raised specific grounds for condonation of delay. He relied upon relevant dates as explained in paragraphs 25 to 34 of the supporting affidavit. He submitted that on 16th November 2016, the appellant's advocate received a copy of the order dated 20th October 2016. Thereafter, on 18th November 2016, his

advocate contacted the appellant and asked him to give instructions in the matter to draft the affidavit in lieu of the examination in chief. On 28th November 2016, the appellant attended the office of the advocate, gave information and instructions to his advocate and also handed over documents related to the matter. On 13th December 2016, a draft affidavit in lieu of examination in chief was received by the appellant with certain requisitions to be answered by the plaintiff. It is further contended that in lieu of the various litigations in respect of the suit property up to the Supreme Court and also due to the regular ill-health of the appellant's father, inadvertently, the affidavit in lieu of examination in chief could not be finalised in time. Thus, it is contended that inspite of the affidavit in lieu of examination in chief being prepared, it could not be finalised and filed in court. On 15th February 2017, the plaintiff, i.e. the appellant's father, expired. The appellant attended the advocate's office on 24th March 2017. It is stated in the affidavit that the advocate asked the appellant as to whether he had personal knowledge of the subject matter in the suit, and hence, the appellant had requested for some time to enable him to confirm the query put forward by the advocate. Accordingly, on 31st March 2017, the appellant informed his advocate that he had personal knowledge of the matter and would be able to lead the evidence in the matter and further

instructed the advocate to prepare his affidavit in lieu of examination in chief. It is, thus, contended that accordingly, on 15th April 2017, the draft of the affidavit in lieu of examination in chief of the appellant was received from the advocate, and after making certain corrections and suggestions, the same was finalised on 12th May 2017. Thus, the notice of motion was filed on 20th June 2017 to restore the suit and other reliefs as stated above.

6. By referring to the aforesaid dates, the learned counsel for the appellant submitted that the affidavit in support clearly shows the reasons as to why, during the plaintiff's lifetime, the application could not be filed within time and that after the death of the original plaintiff steps were taken by the present appellant for preparing his affidavit in lieu of examination in chief and application was filed for restoration of the suit. Learned counsel, thus, submitted that the delay of 222 days caused in filing the application for restoration of the suit is very well explained in the affidavit in support, and hence, the learned trial court ought to have allowed the notice of motion.

7. Learned counsel further submitted that even on 20th October 2016, the advocate on behalf of the plaintiff had made an application for time to

file the affidavit in lieu of examination in chief and that the order of 20th October 2016 would show that even on that day efforts were made on behalf of the plaintiff which shows that suit was never unattended. He submitted that since the adjournment application on behalf of the plaintiff was rejected and time was not granted for filing the affidavit of evidence of the plaintiff, all necessary steps were taken for preparing the affidavit in lieu of examination in chief of the plaintiff before filing an application for restoration of the suit. He further submitted that, unfortunately, the original plaintiff expired before his affidavit could be finalized. Hence, the appellant, thereafter, took immediate steps to prepare his own affidavit in lieu of examination in chief and the application for restoration of the suit was made at the earliest.

8. By referring to the impugned order, the learned counsel submitted that the learned judge has recorded reasons with respect to the non-filing of the affidavit in lieu of the examination in chief for the purpose of deciding the prayer for condonation of delay. He further submitted that the learned judge has also erroneously stated that there is no specific prayer made with respect to the condonation of delay. He referred to the specific prayer in the application and submitted that there is a prayer made for condonation of delay in filing the application as well as for permission to

file the appellant's affidavit in lieu of examination in chief. Learned counsel further submitted that the trial court has failed to consider the specific reason given for the delay in filing the application. He submitted that the learned judge had unnecessarily referred to the earlier dates in the roznama and held that the plaintiff was not interested in proceeding with the matter.

9. The learned counsel for the appellant submitted that the learned Judge adopted a technical view by referring to rule 43 of the Bombay City Civil Court Rules, 1948 and refused to condone delay on the ground that the appellant has to file separate chamber summons for bringing legal heirs on record and for amendment of pleadings. Learned counsel submitted that, since the original plaintiff expired after the dismissal of the suit, the appellant needed to file a combined application for restoration of suit and seek leave to bring on record heirs and legal representatives along with prayer for condonation of delay. He submitted that the learned Judge should not have rejected the application on such technical grounds.

10. In support of his submission, learned counsel relied upon the decisions of the Hon'ble Supreme Court in the cases of ***State of Nagaland v Lipok AO and Ors***¹ and in the case of ***G. Ramegowda, Major and Ors v***

1 (2005) 3 SCC 752

*Special land Acquisition Officer, Bangalore*². By referring to the propositions laid down by the Hon'ble Supreme Court in the case of *State of Nagaland*, learned counsel submitted that for constituting sufficient cause, there is no hard-and-fast rule. He relied upon paragraphs 8 and 9 of the said decision and submitted that in the present case, the explanation given on behalf of the appellant should have been taken into consideration by the learned Trial Judge and, by exercising the discretionary powers, ought to have condoned the delay and granted an opportunity to the appellant to contest the suit on merits. The learned counsel also relied upon the decision of the Hon'ble Supreme Court in the case of *G. Ramegowda, Major and Ors* and, in particular, relied upon paragraph 14 of the said decision and submitted that sufficient cause for condonation of delay be liberally construed so as to advance substantial justice. Thus, the learned counsel for the appellant submitted that the present appeal requires consideration and that the appellant is entitled to proceed with the suit on merits.

11. Learned counsel for defendant no. 2/respondent no.2 vehemently opposed the present appeal by relying upon the affidavit in reply filed on behalf of respondent no.2 in the City Civil Court. Learned counsel

2 (1988) 2 SCC 142

specifically referred to the dates and events stated by respondent no.2 in the said affidavit in reply. She submitted that the suit was kept pending for recording evidence since 2003. She submitted that even on earlier occasions, conditional time was granted to the plaintiff for taking steps. However, on one or the other ground the plaintiff had kept the suit pending. She submitted that when the suit was transferred to this court, even at that time, there was a conditional order passed against the plaintiff directing him to pay the cost and take appropriate steps, and this court had observed that the suit deserved to be dismissed on the ground that the plaintiff was not interested in prosecuting the suit. She submitted that in the written statement filed on behalf of defendant no.1-State of Maharashtra, a statement was made that no mutation would be recorded in the name of defendant no. 2 during the pendency of the suit. She submitted that there is no registered document in favour of the plaintiff in respect of the suit property. The learned counsel for respondent no. 2 submitted that respondent no. 2's right, title, and interest in the suit property are based on registered title documents, and the appellant has no right to the suit property. She submitted that there is no merit in the suit filed by the original plaintiff, which is only seeking a decree of injunction and that only because of the pendency of the suit, the statement made by

defendant no.1 continued, which has caused serious prejudice to the rights of the defendant no.2. It is further submitted that the application for restoration of the suit is filed belatedly only with an intention to keep the proceeding pending. There is no genuine intention on the part of the present appellant to prosecute the suit. She submitted that the conduct of the plaintiff of making all efforts to keep the suit of the year 1995 pending for recording evidence since 2003 should be taken into consideration for deciding the present appeal.

12. She submitted that on 20th October 2016, the learned trial Judge specifically recorded that inspite of specific directions and despite of availing sufficient time and opportunities, no evidence is adduced by the plaintiff. Hence, the application for adjournment was rejected, and the suit was dismissed in default. Learned counsel supported the impugned order and submitted that the learned trial judge has rightly recorded that there are no reasons assigned for condonation of delay for filing restoration of application. Learned counsel submitted that in the affidavit filed for restoration of the suit, there is no specific ground given as to what steps were taken for filing an application for restoration till June 2017. She submitted that only an explanation was given with respect to steps taken for preparing an affidavit in lieu of examination in chief. She, thus,

submitted that though the original plaintiff and the appellant were aware of the dismissal of the suit, no steps were taken within the limitation period. She, thus, submitted that the reasons given for taking steps to prepare a draft affidavit in lieu of examination in chief cannot be considered for condonation of delay caused in filing the application for restoration of the suit as the plaintiff had not taken any steps during his lifetime and that even after the death of the original plaintiff in the month of February 2017, the application for restoration was made only in June 2017 by the appellant.

13. I have considered the submissions made on behalf of both the parties. I have perused the record. The dates and events given by defendant no.2 in the affidavit in reply are not disputed. It is not in dispute that the original suit was filed in the year 1995 and the same was kept for evidence of the plaintiff on 28th July 2003. It appears that since July 2003, no steps have been taken to adduce evidence. A perusal of the order dated 20th October 2016 indicates that the stage of the suit was for filing evidence of the plaintiff.

14. The learned trial Judge has observed in the Order dated 20th October 2016 that despite directions issued by Orders dated 22nd June

2016 and 29th August 2016, neither anyone was present for the plaintiff nor any evidence of any witness for the plaintiff was tendered. It is not disputed that the plaintiff's advocate had undertaken to file the affidavit of evidence of the witness of the plaintiff during the course of the day, and therefore the matter was kept back. However, the undertaking was not complied with, and instead, an application was filed for adjournment.

15. The application for adjournment was opposed by respondent no. 2 by filing a Say. The application for adjournment was rejected as the plaintiff had not complied with the directions, and no grounds were made out for an adjournment. The order rejecting the application for adjournment was never challenged. Even today, no submissions were made on behalf of the appellant, pointing out the reason for seeking adjournment on 20th October 2016. Thus, I find no fault in the order dated 20th October 2016 rejecting the application for adjournment. Even otherwise, neither the original plaintiff nor the appellant has any time challenged the order rejecting the adjournment application. It is not the appellant's case that rejection of the adjournment application was also a subject matter of challenge in the application.

16. The notice of motion is filed for setting aside the Order dated 20th

October 2016 and for restoration of the suit. The learned counsel for the appellant submitted that the notice of motion was filed under the provisions of Rule 9 of Order IX of the Code of Civil Procedure 1908 ("CPC"). Thus, for seeking an order to set the dismissal aside, it was incumbent for the plaintiff or the appellant to show sufficient cause for the non-appearance of the plaintiff on 20th October 2016, when the suit was called out for hearing. I have not been shown any reason for the non-appearance of the Plaintiff or his witness for adducing evidence on 20th October 2016. I have also not been shown any reason for seeking adjournment on 20th October 2016.

17. Though the plaintiff was aware of the dismissal of the suit for default, no efforts were made on behalf of the plaintiff during his lifetime to make an application for restoration of the suit within the period of limitation. The dates and events relied upon by the learned counsel for the appellant in the affidavit in support of the notice of motion give explanations regarding steps taken from the date of receipt of the order dated 20th October 2016 on 16th November 2016. The affidavit in support of the application for restoration does not offer any explanation as to any attempt made on behalf of the plaintiff from the date of order ie. 20th October 2016. Thus, without making out any case as to what steps were taken to obtain the order dated 20th October 2016, the date of 16th November 2016 of

receiving the copy of the said order is immaterial.

18. Though there are explanations given with respect to taking steps for preparing the affidavit in lieu of examination in chief of the original plaintiff from the date of receipt of the order, i.e. 16th November 2016, there is no explanation given as to what prevented the original plaintiff for making an application for restoration of suit within the period of limitation. It is sought to be submitted by the learned counsel for the appellant that the suit was dismissed in default as the affidavit in lieu of examination in chief was not filed on behalf of the plaintiff; hence, filing of an application for restoration would have been a futile attempt, in the absence of affidavit in lieu of examination in chief of the plaintiff. Hence, steps were first taken to prepare the affidavit of evidence before filing an application for restoration. However, the supporting affidavit is bereft of any such explanation. It is not in dispute that the original plaintiff did not take any steps during his lifetime for restoration of the suit. The present appellant, who is the son of the original plaintiff, appears to have taken steps to prepare his own affidavit in lieu of examination in chief after the death of the original plaintiff.

19. The reasons given in the restoration application, along with prayers for condonation of delay, do not appear to be justifiable grounds for not

filing the application within time. It is a well-settled principle of law, and the length of the delay is immaterial, and what is material is an explanation given for the condonation of delay. In the present case, for seeking restoration of suit, the relevant date required to be explained by the original plaintiff and later by the present appellant is the non-appearance of the plaintiff for adducing evidence on 20th October 2016 when the suit was kept for recording evidence. Further, a justifiable explanation is required for not taking steps by the plaintiff during his lifetime and, later, the reasons for not taking immediate steps by the appellant after the plaintiff's death. However, the affidavit in support does not give any such explanation for not taking steps for filing restoration application in time. The explanation that time was required for preparing the affidavit in lieu of the examination in chief does not appear to be a justifiable ground for not making an application for restoration when the original plaintiff, as well as the appellant, was aware of the dismissal of the suit.

20. I find substance in the submission made on behalf of respondent no.2 that, for some or the other reason the original plaintiff during his lifetime and now the appellant is interested only in keeping the suit pending. She is right in submitting that in view of the statement made on behalf of defendant no. 1, the suit was kept pending, and now the

application is belatedly filed with an intention to keep the proceeding pending, and neither the original plaintiff was interested, nor the appellant is interested in proceeding with the suit on merits. I find substance in the argument advanced by the learned counsel for respondent no. 2 that the pendency of the suit has caused prejudice to defendant no.2.

21. In paragraph no. 14 of the decision in the case of ***G. Ramegowda***, relied upon by the learned counsel for the appellant, the Hon'ble Supreme Court has held as under:

“14.....However, the expression ‘sufficient cause’ in Section 5 must receive a liberal construction so as to advance substantial justice and ***generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of the delay.***”

Emphasis Applied

22. In the present case, the aforementioned facts would show that there is gross negligence, deliberate inaction and lack of bonafides on the part

of the original plaintiff and the appellant. Thus, there is no ground to exercise the discretionary powers for condonation of delay. Even in the decision of *State of Nagaland*, relied upon by the learned counsel for the appellant, the Hon'ble Supreme Court has held that the true guide for a Court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence. In the present case the appellant has failed to show that he acted with any diligence. Hence, the propositions of law laid down in both the decisions relied upon by the learned counsel for the appellant are of no assistance to him.

23. So far as the submission made on behalf of the learned counsel for the appellant regarding the reasons given by the learned judge for not making a separate application for bringing heirs and legal representative of the plaintiff is concerned, the same is not required to be dealt with, as the appellant has not been able to substantiate his ground for condonation of delay in filing the application.

24. There is no perversity in the impugned order. I do not find any merits in the present appeal. Thus, for the reasons recorded above, the appeal is dismissed.

GAURI GODSE, J.