

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 303 OF 2018
WITH
INTERIM APPLICATION NO.3962 OF 2023

Shivaputra Bhimanna Tolnure,

(Deceased through his legal heirs) & Ors.

...Appellants

(Orig. Plaintiff)

Versus

Nagarparishad Akkalkot,

Taluka Akkalkot, District Solapur

...Respondent

(Orig. Defendant)

Mr. Sumedh Modak i/by Ms. Geeta Mulekar for the Appellant.

Mr. Ajit Hon for Respondent

CORAM : VINAY JOSHI, J.

DATED : 13 SEPTEMBER 2023

PC. :

1. Heard learned Advocate for both the parties.
2. Following substantial question of law has been framed :

*Whether the First Appellate Court erred in
rejecting the delay condonation application*

despite non resistance, without following the settled principles of law?

3. Considering the limited controversy, the second appeal is taken up for final hearing with consent of the parties. The reply is taken on record.

4. The facts in brief are that the Appellants' predecessor-Shivaputra had filed a Special Civil Suit no. 218 of 2003 seeking the relief of perpetual injunction against Respondent Nagarparishad, Akkalkot. The Original Plaintiff Shivaputra was running a business in tin shed which was initially demolished. However it was again reconstructed and business continued. The Municipal Council was recovering occupation charges. Since the Municipal Council had issued notice and asked for removal of tin shed, the suit for injunction was filed. The said suit came to be dismissed vide Judgment and Order dated 11th December 2006, after dismissal of suit, the Original Plaintiff Shivaputra died. Legal heirs of Shivaputra raised challenge to the dismissal of suit by filing Civil Appeal. However, as there happened to be delay of 3 years and five months, they applied for condonation of delay in terms of Section 5 of the Limitation Act. The said Application

M.A. no. 236/12 came to be rejected vide Order dated 19/12/2014 which is the subject matter of challenge in second appeal.

5. The learned counsel appearing for the Appellants would submit that the procedure for removal adopted by Corporation was improper. The Appellants are carrying their business for livelihood since long for which the Nagarparishad was receiving charges. The other side would submit that it is a public property and the Appellants are carrying business illegally, hence it cannot be protected.

6. As a matter of fact, issue involved in this appeal is limited to the extent of legality of impugned order about rejection of delay condonation application. Few facts are necessary to decide this appeal. The impugned order was passed by the First Appellate Court on 19/12/2014. The suit was came to be dismissed on 11th December 2006. The Original Plaintiff died on 13/08/2007. The first appeal was preferred with delay condonation on 28/07/2010. It reveals from the impugned order that the learned counsel for the Plaintiff has applied for certified copies in the year 2007.

7. It is the Appellants' case that during life time, Shivaputra was looking after Court proceedings. At the subject property, he was

running Footwear Shop. Once it was demolished in the year 2003 however in the month of December 2004 he reconstructed the same and continued the business. It is Applicants' case that for the period of one year preceeding to the death of Original Plaintiff he remained bed ridden due to illness. After his death, the Applicants also obtained Shop Act License and continued the business. When the Respondent Nagarparishad threatened to demolish the structure, legal heirs of Plaintiff made inquiry and learnt that their suit was dismissed. According to Applicants they were totally unaware of dismissal of suit. It is stated that as their father was suffering from ailment, the Applicants were not aware and thus the delay was unintentional and therefore it needs to be condoned.

8. It is pertinent to note that though the Respondent Nagarparishad was served with delay condonation application, they neither appeared nor contested the application which is evident from Para 3 of the impugned Order dated 19/12/2014. The learned Trial Court was well aware that there was no resistance to the delay condonation application, still it doubted the correctness and by measuring the length of delay, dismissed the Application. It is pointed

out that the learned Trial Court expressed that there was inordinate delay of five years, however, in fact the delay is of 3 and half years only.

9. The learned counsel for the Applicants has relied on the decision of Supreme Court in the case of ***State of Nagaland vs. Lipok AO and Others***¹ to contend that the Court shall adopt liberal approach while dealing with the Application under Section 5 of the Limitation Act. Particularly, my attention is invited to Para 9 of the decision wherein by referring earlier decisions it has been observed that the term “sufficient cause” should receive a liberal construction and unless want of bonafides or negligence delay cannot be refused to be condoned. Moreover, reliance is placed on another decision of this Court in case of ***Arvind Yeshwant Kulkarni and another Vs. Vinay Madhukar Kulkarni and Others***² wherein similarly it has been observed that the Court has to adopt pragmatic justice oriented approach while considering the aspect of delay. The other side has relied on the decision of this Court in the case of ***Municipal Council,***

1 (2005) 3 SCC 752

2 [2019(2) Mh.L.J.

Pusad Vs. Kundanlal Mohanlal Jaiswal & Others³ however since the same pertains to the merits of the case to which I am not inclined to consider at this stage.

10. It is well settled position of law that the Court shall adopt liberal justice oriented approach while condoning delay. The term “sufficient cause” has not been explained by the statute and thus it has to be understood depending upon the facts of each case, as substantial justice is paramount consideration. Unless lack of bonafides are shown by other side, the delay shall be generally condoned. It is matter of consideration that the Applicants came with certain causes of delay before First Appellate Court which remained unresisted. Basically, unless the cause canvassed is doubted to the satisfaction of the Court, the Court shall generally accept the cause. However there is no resistance to the delay condonation Application in the First Appellate Court. In that context, the cause canvassed is required to be accepted. It is the Applicants’ case that the Original Plaintiff was bed ridden for one year and his children were unaware about the proceeding. According to Applicants when the Nagarparishad demolished the

3 2007(3) Mh.L.J.

structure, they came to understand that there was suit which was dismissed and thus the delay occurred. Moreover, the appellate Court appears to have been much swayed by length of delay of five years, which was not the factual aspect.

11. When the above factual background is considered on the basis of settled norms, there is no reason to hold that delay was intentional as it would be detrimental to the Applicants. In the circumstances, it is apparent that the Appellants have made out sufficient case for condonation of delay. True if delay is condoned then again there would be one another round of litigation. It is matter of record that the lis was originated in the year 2003 and thus while allowing the condonation certain directions are necessary. Considering the line of decisions about adopting liberal approach, on facts the Appellants' have made out satisfactory case hence the substantial question of law is answered in the affirmative.

12. The Appeal is allowed as follows;

- i) The order of rejection of condonation of delay dated 19/12/2014 passed in M.A. no. 236/12 is hereby quashed and set aside subject to costs of Rs. 10,000/- to be paid to the

Respondent within a period of two weeks from today.

ii) Deposit of cost amount in first appellate Court amounts to sufficient compliance.

iii) On deposit of costs, the delay stands condoned and appeal be registered.

iv) The Appellate Court is directed to decide the appeal within three months from the appearance of parties.

v) The parties shall appear before the First Appellate Court on or before 3rd October 2023.

vi) The Appellants are at liberty to apply for interim relief to the First Appellate Court which shall be decided on its own merits.

vii) The parties to maintain status qua for two weeks from today.

13. The Application disposed of.

(VINAY JOSHI, J.)