Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

MISC. CIVIL APPLICATION NO.277/2024
IN
SECOND APPEAL NO.21/2014

VIMLESH SHANTARAM
DESAI AND ANR. ...APPLICANTS

Versus

USHA SRIRANGA PRABHU
DESSAI AND 4 ORS. ... RESPONDENTS

Mr S. Karpe with Mr Anand Shirodkar, Advocates for the Applicants.
Mr N. Marathe, Advocate for the Respondent No.2.

CORAM: M. S. KARNIK, J.

DATED: 2nd AUGUST 2024

P.C.:

1. Heard Mr S. Karpe for the applicants and Mr N. Marathe for respondent no.2.

2. This is an application for condonation of delay. The applicants are the original plaintiffs. A suit was filed for recovery of possession. The area of property of which the plaintiffs claim to be the owners is 2,97,000 sq.mtrs. situated at Rivona village, Sanguem Taluka. It was the case of the plaintiffs that the property came to acquired by the late father of the plaintiffs by virtue of Deed of Quittances, Exchanges,

Sales and Gifts with acceptance dated 31.10.1957 executed before the Ex-Officio Notary Public in Margao.

3. It is the case of the plaintiffs that an area of 5000 sq.mtrs. was handed over to the respondents on some understanding. It is alleged that as the plaintiffs were staying in Bombay the defendants encroached upon the property. The Suit was therefore filed for recovery of possession and injunction before the Trial Court. The Suit was decreed in favour of the plaintiffs. Thereafter the defendants filed an appeal. The First Appellate Court reversed the decree and dismissed the Suit of the plaintiffs.

4. The present Second Appeal which was numbered as Second Appeal No.21/2014, was filed in the year 2014. On 26.08.2014, in the Second Appeal, some documents were wrongly placed on record which needed to be substituted by appropriate documents. Leave was granted by this Court to substitute the documents. The applicants failed to clear the office objections. There was no appearance on behalf of the appellants on some of the dates.

5. On 20.01.2015, this Court recorded that the chronology filed is not as per the rules. The office was directed to examine the position. The matter was to be placed on board after the office objections were cleared.

6. The appellants failed to clear the office objections despite the Registrar granting time. Ultimately, on

13.06.2017, this Court granted two weeks' time as a last chance to take steps failing which, the appeal was to stand dismissed without further reference to this Court.

7. As the office objections were not cleared, order dated 13.06.2017 operated and the appeal stood dismissed.

8. It is pertinent to note that the original appellant no.1 expired on 15.08.2020. On 14.09.2020 an application was made to bring the legal representatives of deceased appellant no.1 on record. By order dated 24.02.2022 the Registrar observed that as the appeal was already dismissed due to failure on the part of the appellants to take steps, the application does not survive and hence it was dismissed.

9. Hence this application for restoration and condonation of delay in filing the application was made. The learned counsel for the applicants submitted that the applicants were not aware that the appeal was dismissed. It is further submitted that the original appellants were under the impression that the appeal was being attended to by their Advocate. The appellants came to know about the dismissal of the appeal somewhere in July 2023 when they had gone for mutating their names in the survey records.

10. The application for restoration of the Second Appeal was filed on 13.02.2024. Mr N. Marathe, the learned counsel for respondent no.2 vehemently opposed the application for condonation of delay. It is submitted that the

applicants have not shown any sufficient cause to condone the delay. It is submitted that even though the applicants stated that they came to know about the dismissal of the appeal in July 2023, the application for restoration is filed only in February 2024 and hence even for this delay there is no proper explanation. It is submitted that absolutely no explanation is found in the application for constituting sufficient cause for condoning the delay.

11. Learned counsel for respondent no.2 relied on the decision of The Hon'ble Supreme Court of India in ***Pathapati Subba Reddy (Died) by L.Rs. & Ors. v/s. The Special Deputy Collector (LA) – 2024 SCC OnLine SC 513*** to contend that the application is highly belated and this Court should not allow stale matters to be revived or re-opened by taking the aid of Section 5 of the Limitation Act. The learned counsel for the respondent relied upon the decision of the High Court of Orissa, Cuttack in ***Shankarlal Patwari v/s. Jagannath Mahaprabhu and Others – I.A. No.348 of 2019 arising out of CMAPL No.864 of 2019*** in support of the submissions that if there is no sufficient cause and the delay is gross, the application for condonation of delay should not be entertained. It is submitted that the delay is inordinate and therefore the application should be rejected.

12. I have perused the explanation/reasons set out in the application for condonation of delay. From the records it is apparent that the Second Appeal was dismissed for non-

removal of the office objections. After having placed all the documents on record, what was to be submitted by the appellants was the synopsis in proper form. However, since the synopsis was not filed within the time granted by the Court, the appeal came to be dismissed for non-removal of office objections. No doubt there is delay of 2406 days which is approximately six years and seven months in filing the application. The appellants had succeeded before the Trial Court. The First Appellate Court had reversed the decree against which the Second Appeal was preferred by the appellants.

13. The Appeal was dismissed on 13.06.2017 for non-removal of office objections. It is pertinent to note that in the year 2020 after the death of the appellant no.1 on 15.08.2020, the application was in fact filed for bringing the legal representatives on record. It is the case of the applicants that they were not aware of the conditional order that was passed and that the appeal was already dismissed. According to the applicants, they were not informed by their Advocate about the progress of the matter or the conditional order that was passed by this Court. It is only when the applicants went to mutate their names in the survey records sometime in July 2023 that they came to know about the dismissal of the appeal. The application for restoration of the appeal and condonation of delay was ultimately filed in February 2024.

14. In *Perumon Bhagvathy Devaswom v/s. Bhargavi Amma - (2008) 8 SCC 321*, the Hon'ble Supreme Court in the context of principles applicable to the setting aside abatement observed that, the extent or degree of leniency to be shown by a court depends on the nature of application and facts and circumstances of the case. *For example, courts view delays in making applications in a pending appeal more leniently than delays in the institution of an appeal. The courts view applications relating to lawyer's lapses more leniently than applications relating to litigant's lapses. The classic example is the difference in approach of courts to applications for condonation of delay in filing an appeal and applications for condonation of delay in refiling the appeal after rectification of defects.*

15. Further, that want of "diligence" or "inaction" can be attributed to an appellant only when something required to be done by him, is not done. When nothing is required to be done, courts do not expect the appellant to be diligent. Where an appeal is admitted by the High Court and is not expected to be listed for final hearing for a few years, an appellant is not expected to visit the court or his lawyer every few weeks to ascertain the position nor keep checking whether the contesting respondent is alive. He merely awaits the call or information from his counsel about the listing of the appeal.

16. The only compliance that was required was filing a synopsis which is essentially for the Advocate to comply. In my opinion, for the reasons mentioned in the application and upon consideration of the oral submissions made by the learned counsel for the applicants, undoubtedly though there is delay, it cannot be regarded such that the same cannot even be condoned by compensating the respondents with costs. The respondents can be compensated in a matter of such a nature by imposing costs. In my opinion, if the delay is condoned and the Second Appeal is heard on merits, the same will not prejudice the respondents in any manner. There is no change in the position as on the date of filing the application for restoration except for the parties applying for effecting change in the revenue records.

17. The application is therefore allowed. The delay is condoned subject to costs of ₹50,000/- payable to the respondents within the period of two weeks from today. Learned counsel for the respondent submits that he will furnish details of bank account to the applicants.

18. Misc. Civil Application No.277/2024 is allowed and accordingly disposed of.

M. S. KARNIK, J.

Signed by: SUCHITRA NANDAN SINGBAL
Designation: Personal Assistant
Date: 07/08/2024 16:53:23