

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3565 OF 2019.

Shankarrao Mohite Patil Sahakari Bank Ltd.

...Petitioner.

Versus

Jubedabi Rafique Shaikh And Ors

...Respondents.

Mr. R. D. Phade for the Petitioner.

Adv. Shilpaon Gaonkar a/w Mr. P. M. Jadhav for the Respondent Nos. 1 to 4.

Coram : Sharmila U. Deshmukh, J.

Date : November 26, 2024.

P. C. :

1. Heard.

2. By this Petition, the challenge is to the order dated 30th November 2018, passed by the Maharashtra State Co-operative Appellate Court in Miscellaneous Application No. 4 of 2018, condoning delay of about 15 years and 193 days caused in preferring the Appeal against the Judgment and Award dated 8th July 2002, passed by the Co-operative Court in Dispute No. 970 of 2001, initiated by the Petitioner Co-operative Bank for recovery of the amount of which admittedly default was committed.

3. The facts of the case are that the husband of the Respondent No. 1 had obtained financial assistance of Rs. 2 Lakh in the year 1998 from the Petitioner Bank and the Respondent Nos. 5 & 6

herein had given surety for the said loan and property bearing City Survey No.3745 being the house property was given as collateral security. As there was default on part of the Respondent No. 1 notices for repayment were issued but were not complied with. On 5th January 2009, the husband of Respondent No. 1 expired and notices were issued by the Bank to all the Respondents herein, being the legal heirs and the surety, for the payment of loan amount. Recovery proceedings were initiated under Section 91 of the MCS Act, 1960, being recovery Dispute No. 970 of 2001. The proceedings were conducted *ex-parte* and by Judgment and Award dated 8th July 2002, the Respondents were held liable to pay a sum of Rs.2,42,016 @ 16% p.a. Subsequently recovery certificate was obtained and demand notice, attachment notice etc., were issued and after following the due procedure of law, it is claimed that the auction was conducted and the property was attached and sold in auction.

4. The Respondents objected to the entry made in the Revenue records which was allowed by the Circle Officer as against which RTS Appeal was filed before the Sub Divisional Officer which came to be decided in favour of the Petitioner as against which the Respondents preferred Second Appeal before the Additional Collector which was also decided in favour of the Petitioners and the Additional Commissioner also held in favour of the Petitioner Bank. Subsequently,

during the proceedings for auction the District Collector issued the notice to the Respondents for fixing the upset price and out of the consideration received by auction of the property, after adjusting the loan amount the remaining amount which was available to the Petitioner Bank, was informed to the Respondents.

5. Miscellaneous Application No. 4 of 2018, was filed after delay of 16 years challenging the Judgment and Award dated 8th July 2002, passed by the Co-operative Court. The Application came to be resisted by the Petitioner Bank. By the impugned judgment and order dated 30th November 2018, the Application came to be allowed and the delay of about 16 years came to be condoned which led to the filing of the present Petition.

6. Learned Counsel appearing for the Petitioner would submit that without any sufficient cause, the Appellate Authority has condoned the delay of about 16 years by adopting liberal approach which was not warranted in the facts and circumstances of the present case. He would point out the pleadings in the Application for condonation of delay stating that the Applicants were not served any notice of the dispute proceedings nor recovery notice and that they became aware of the same in the year 2013. He submits that even, if it is accepted, that the Respondent Nos. 1 to 4 acquired knowledge in the year 2013 no steps were taken till the year 2018 for challenging the

Award. He would submit that the fact that the notices are served has been noted by the Appellate Court in its Judgment and therefore the said ground is not available to the Respondent Nos. 1 to 4.

7. He submits that the Award of the year 2002 was put in execution and auction proceedings have already been conducted and third party rights are created and at this stage to condone the delay of 16 years would result in manifest injustice especially considering that there is no sufficient explanation tendered for condonation of delay. He points out to the compilation of documents tendered and would submit that the notices were duly served. He would also point out that apart from the notices in the dispute Application public notices for sale of the property were also issued and also the final notice before auction was served upon the Respondent Nos. 1 to 4. He submits that all these documents have been ignored by the Appellate Court and the delay of about 16 years is condoned.

8. *Per contra*, learned Counsel appearing for the Respondents would submit that the Appellate Court has rightly adopted the liberal approach in the present case particularly when the Award is nullity. He would submit that the dispute which was filed in the present case was against the Respondent No. 1 and Respondent Nos. 2 to 4 who were minors by misrepresentation by showing their name as adults when admittedly Respondent Nos. 2 to 4 were minors. He submits that the

Award in such a case is nullity. He would further submit that there was no notice which was served upon the Respondent Nos. 1 to 5 and the burden was upon the Petitioner to prove service of notice. He submits that the knowledge about the Award of the Co-operative Court was acquired for the first time in the year 2013 which is evident from the fact that RTS proceedings were initiated in the year 2013. He submits that if the RTS proceedings could have been initiated there was no reason as to why the Respondents would not have challenged the Award and the only reason why there is a delay is by reason of wrong legal advice. He submits that the delay is not of 16 years but about a period of 5 years as the knowledge was acquired in the year 2013. He would further submit that the sympathetic approach is required to be adopted as the Respondent No. 1 is a widow and illiterate lady and has acted on the wrong legal advice. He would however fairly concede that as far as the merits of the matter are concerned for the present purpose the same cannot be gone into. He would however insist that an opportunity is required to be given to the Respondents to contest the Award which has been granted by the Co-operative Appellate Court. He submits that no prejudice will be caused to the Bank as the Bank has already received the amount from the sale of the property and therefore secured. He submits that the equities have been balanced by the Appellate Court as the delay came to be condoned by

payment of cost of Rs. 2,50,000/- and therefore no interference is warranted.

9. Considered the submissions and perused the record.

10. Before proceeding to the facts of the present case, it would be apposite to refer to a recent decision of the Apex Court in the case of ***Union of India & Anr. Vs. Jahangir Byramji Jeejeebhoy (D)***¹ where the Apex Court was considering the issue of condonation of delay of about 12 years 158 days caused in filing the restoration application for restoring the Writ Petition in that matter by Union of India. The Apex Court declined to look into the merits of the matter as long as sufficient cause was not made out for condonation of such a long and inordinate delay. The Apex Court held that, if the litigant chooses to approach the Court long after the lapse of time prescribed under the relevant provision of the law, then he cannot turn round and say that no prejudice would be caused to either side by the delay being condoned. The Apex Court further held that the length of the delay is relevant matter which the Court must take into consideration while considering whether the delay should be condoned or not.

11. The Apex Court held that once it is held that the party has lost in right to have the matter considered on merits because of his own inaction for long it cannot be presumed to be non deliberate delay

1 2024 SCC Online SC 489

and in such circumstances of the case he cannot be heard to plead that the substantial justice deserves to be preferred as against the technical consideration. While considering the plea for condonation of delay the Court must not start with the merits of the main matter. The Court owes the duty to first ascertain the bonafides of the explanation offered by the party seeking condonation. It is only, if sufficient cause is assigned by the litigant and the opposition of the other side is equally balanced that the Court may bring into aid the merits of the matter for the purpose of condoning the delay.

12. The facts of the present matter will therefore have to be examined in light of the clear enunciation of law laid down by the Apex Court. In the present case, admittedly there was a default in repayment of loan which led to the filing of the dispute in which the Respondent No. 1, being the wife and the children, though minors came to be assailed as major. Whether the decree in the present case is nullity or not is not a question which is required to be decided at the stage of condonation of delay and it is only if sufficient explanation has been tendered that the merits of the matter can be looked into.

13. The present Petition has been filed against the order of the Appellate Court condoning the delay of about 16 years. The Petition seeks judicial review of the discretion which has been exercised by the Appellate Court and the only consideration is whether

the discretion has been rightly exercised in favour of the Respondents. The Appellate Court has held that bonafides of the Respondent Nos. 1 to 4 is demonstrated from the fact that from 2013 the Respondent No. 1 had approached various authorities against execution of decree therefore she could have approached the Court to set aside the decree and has accepted the explanation tendered about wrong legal advice being given. The Appellate Court has held that the Respondent No. 1 is a mother of three minors protesting the decree and has taken the same into consideration to adopt the liberal approach and has thereafter condoned the delay. While doing so the Appellate Court considered that the costs of Rs. 2,50,000/- would justify the condonation of delay by holding that no prejudice would be caused to the Bank.

14. It needs to be noted that in the present case the Award is of the year 2002 and much water has flown under the bridge. The Award was put into execution, the property was auctioned and third party interest have already been created. There is no question of no prejudice being caused to the Bank for the simple reason that setting aside of the Award if permitted would amount to prejudicing not only the rights of the Bank but also the rights of the auction purchaser.

15. The Apex Court in the decision referred above has clearly held that it cannot be presumed that by non deliberate delay and no

prejudice will be caused to the other side. Now coming to the explanation tendered for the delay, it is pleaded that the Respondent Nos. 1 to 4 were not served with the notice of the Dispute proceedings and they acquired knowledge for the first time in the year 2013. The said explanation has not been accepted by the Appellate Court as far as the Respondent No. 1 is concerned and there is a specific finding in paragraph No. 8 of the impugned Judgment that the Respondent No. 1 was duly served with the notice of dispute. Once such a finding has been held against the Respondent No. 1, which has not been challenged till date, the case becomes clear case of negligence and inaction on part of the litigant and the law will not come to the aid of the party who is negligent. Despite observing thus, the Appellate Court has thereafter proceeded to consider the social status, educational qualification and the status of the Respondent No. 1 of being mother of three minors which, in my view, are irrelevant considerations for the purpose of considering the explanation for condonation of delay. Even if it is presumed that no notice was received in the year 2002, when the Award came to be passed, subsequently the auction was conducted and public notices were issued. The Respondent No. 1 cannot be heard to say that the Respondent No. 1 was totally unaware of such proceedings and there is presumption that the Respondent No. 1 had due notice in view of the fact that public notices of the auction was

issued and the compilation of documents, which have not been disputed in the present case, would indicate that notices prior to the auction have also been issued to the Respondents.

16. The fact remains that not only the mutation entries were challenged but subsequently the challenge was carried further till the Additional Commissioner which would indicate that the Respondent No. 1 cannot be said to be unaware of legal proceedings. Blaming Advocate for wrong legal advice cannot be accepted as explanation for the purpose for condoning the delay of about 5 years from 2013. In the case of ***Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy***² the Apex Court has held that no presumption can be attached to deliberate causation of delay but gross negligence on part of the Counsel or Litigant is to be taken note of and that there is a distinction between inordinate delay and delay of short duration for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. The first one therefore warrants strict approach whereas the second calls for liberal delineation.

17. After holding that the Respondent No. 1 was duly served with the notice of the dispute the inaction thereafter for a period of about 16 years would warrant a strict approach and therefore the

² 2013 12 SCC 649

discretion which has been exercised in favour of the Respondent Nos. 1 to 4 by the Appellate Court cannot be countenanced.

18. In light of the above, the impugned order dated 30th November 2018, is hereby quashed and set aside. Petition succeeds.

[Sharmila U. Deshmukh, J.]