

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL APPLICATION NO.1063 OF 2017
IN
SECOND APPEAL (ST) NO.7221 OF 2017

Sureshkumar Shrivallabh Lahoti (Decd.) thr.
Legal heirs and representatives

...Applicants-
Appellants

Versus

Kanhaiyalala Shrivallabh Lahoti and Ors.

...Respondents.

Mr. Nachiket Khaladkar for the Applicants-Appellants.

*Mr. Dormaan J. Dalal a/w. Irvin D'Souza for Respondent Nos.2 to 8
(Through V.C.)*

Coram : Sharmila U. Deshmukh, J.

Date : 10th April, 2024.

P. C. :

1. Heard.

2. By this Civil Application, the Applicants seek the relief of condonation of delay of two years and 111 days caused in preferring the Second Appeal. Second Appeal has been filed challenging the judgment of the First Appellate Court dated 21st August 2014 upholding the judgment and decree of the Trial Court dated 18th

December 2008 decreeing the suit for partition and separate possession and granting $\frac{1}{4}^{\text{th}}$ share to the Plaintiff and the Defendants. The Applicant in the present case is the original Defendant No.1.

3. In the Civil Application, the explanation tendered for the delay of 2 years and 111 days is that the first appeal was filed by his brother who was Defendant in the suit and the interest was common to the Applicant and his brother. The Applicant was therefore under the impression that his brother would look after the suit and the appeal and will take care of the interest of the Applicant too. It was pleaded that his brother did not inform the Applicant about the decision of the appeal and that the Applicant had been hospitalized due to old age and due to certain serious medical problems and underwent operation. It was pleaded that when the Applicant received notice of final decree proceedings he became aware of the dismissal of the First Appeal and thereafter he contacted his lawyer and after seeking advice filed the appeal alongwith the present civil application.

4. Affidavit in reply dated 21st August, 2017 came to be filed on behalf of Respondent No.2 pointing out that the Applicant was

represented by a lawyer not only in the Trial Court but also in the Appellate Court. As regards hospitalization the same was denied as pleadings were vague and no details were given and neither medical records were placed on record. Vide order dated 12th April, 2019 further opportunity was given to place on record better particulars about the medical records. An additional affidavit came to be filed on 24th April 2021 stating that the Defendant No.1 was hospitalized in the year 2016 and underwent surgery at Kelkar Hospital and produced the medical records along with the affidavit. As the additional affidavit also did not furnish explanation for delay of 2 years and 111 days, liberty was granted to file further Affidavit which came to be filed on 8th April 2024. In the said additional affidavit it was contended that original defendant No.1 had passed away on 25th February 2021 and prior to that the advocate who had filed the second appeal had also expired and a new advocate was engaged in the matter and the Applicants were brought on record. It was further pleaded that on 22nd October 2016 notice of final decree proceedings were received by her husband and although the interim judgments and orders passed in the year 2014 her husband became aware of the same only in October 2016. It was contended that being in poor health condition and not being physically active due to old age delay has occurred in filing the second appeal and the fact that in a few years after the filing

of the second appeal her husband expired corroborates the fact that his health was in poor condition and as such there was delay.

5. Learned counsel for the Applicants would submit that there is sufficient explanation tendered in the Civil Application or the additional Affidavits filed by the Applicants. He submits that the fact cannot be disputed that the original Defendant No.1 was aged about 68 years at the time of filing the Second Appeal and in the Civil Application, it has been stated that he was hospitalized due to old age and medical problems. He submits that as interest of the original Defendant No.1 and his brother were common the original Defendant No.1 was under the impression that his interests would be taken care of by his brother and harboring under such impression he did not take any steps to find out about the fate of the appeal and it is only when notice issued in the final decree proceedings in the year 2016 when he became aware of the same and contacted his lawyer and after seeking advice filed this appeal. He submits that the appeal has been filed in the month of March 2017 and in the interest of justice the delay may be condoned by imposing reasonable cost. He would further point out medical certificate and would contend that it is sufficient material placed on record to show that the original Defendant No.1 was hospitalized in the year 2016 and had undergone surgery and was

discharged from the hospital on 26th March 2016. He would further submit that the suit being for partition and separate possession as incorrect shares have been determined and the Will has not been taken into consideration, in the interest of justice, the appeal be heard on merits. In support he relies upon the following decision:

**(1) *My Palace Mutually Aided Co-operative Society vs.
B. Mahesh and Others, 2022 SCC Online SC 1063***

6. *Per contra*, learned counsel for Respondent Nos.2 to 8 would submit that the medical records produced on record would show that the surgery which the original Defendant No.1 had undergone was for fracture of his right leg and not for any serious ailment which is sought to be projected. He would further point out that there is no explanation which is tendered for the delay from 2014 to 2016 that is from the date of the judgment of First Appellate Court till the surgery in the year 2016. He would further point out the evidence which is forming part of the Trial Court proceedings that the Defendant No.1 through his advocate had actively participated not only in the Trial Court proceedings but also in the Appellate Court proceedings and has also opposed the original Plaintiffs. He submits that the Applicants are well educated people and not rustic villagers who are not aware of the legal procedures and as such no indulgence

ought to be granted. In support he relies upon the following decisions:

(1) Pathapati Subba Reddy (Died) by Lrs. & Ors. vs. The Special Deputy Collector (LA), Special Leave Petition (Civil) No.31248 of 2018;

(2) Modu Sonsing Vanjari and Others vs. Kamlaben Basilal Patil and Ors., 2022 SCC Online Bom 6623.

7. Considered the submissions and perused the record.

8. The delay which is requested to be condoned is of 2 years and 111 days. As the civil application was bereft of any details, twice opportunity was given to the Applicant to explain the delay. If the pleadings in the Civil Application are perused, the explanation tendered is that the Applicant was under the impression that his brother was looking after the appeal and would take care of the Applicant. From the pleadings in the Civil Application, the impression sought to be created is that the Applicant's brother was in charge of the appellate proceedings and as his brother did not inform the Applicant about the judgment of First Appellate Court, the Applicant had no means to acquire knowledge about the judgment. The explanation tendered is difficult to digest in view of the fact that the Applicant was represented by an independent Advocate in the

appellate proceedings. It therefore cannot be said that unless informed by his brother, the Applicant had no means to acquire knowledge about the decision in appellate proceedings. There is no explanation as to why his Advocate did not inform him about the fate of the First Appeal. In fact there is not even a pleading that the advocate had not informed the Applicant about the decision of the First Appellate Court. The pleading in the Civil Application would indicate that the application was drafted in most casual manner secure under the impression that liberal approach would be adopted by the Court and delay would be condoned. As the Applicant was represented by a lawyer in the appellate proceedings, the acquisition of knowledge after notice of final decree proceedings is an attempt to tide over the issue of limitation.

9. The fact that the Applicant had access to his lawyer is evident from the fact that after he acquired the knowledge of the judgment, he contacted his lawyer and after seeking advice filed the appeal. The explanation tendered by the Applicant therefore cannot be accepted.

10. The next explanation sought to be tendered is of hospitalization due to old age and certain serious medical problems.

Mr. Dalal has rightly pointed out the medical records which are annexed to the second affidavit which shows that “serious medical problems” was fracture of leg. It is not the case of the Applicant that by reason of the fracture or by reason of his old age the Applicant was so incapacitated that he was unable to even attend to his day to day affairs and thus would not be in a position to contact his advocate. On the other hand, the pleadings indicate that after being aware he has contacted his lawyer, which could have been done after passing of the judgment of the First Appellate Court. The medical records which are produced on record to show that the hospitalization was from 21st March 2016 the operation was on 23rd March 2016 and he was discharged on 26th March 2016.

11. Even if it is accepted that he became aware of the passing of the judgment on receipt of final decree proceedings on 22nd October, 2016, there is no sufficient explanation for the delay from October, 2016 till filing of the present Application on 10th March 2017. The reason given in the third affidavit is poor health condition of the Applicant in the later half of year 2016. However there are no medical records produced to substantiate the said position. It also needs to be noted that the Applicant is highly educated person and was prosecuting the Trial Court proceedings as well as proceedings before

the First Appellate Court. As such it cannot be said that he was unaware of the legal procedures and was not in contact with his advocate. In any event there is a duty cast upon the litigant to contact his Advocate and keep himself abreast of the proceedings. The discussion above discloses that the Applicant has been most negligent in conduct of the proceedings.

12. It is well settled that each and every days of delay is not required to be explained and it is not the length of delay which matters but the explanation which is required to be taken into consideration. The delay as of 2 years and 111 days is not only an inordinate delay but unexplained inordinate delay. The decision of the Apex Court in the case of ***Pathapati Subba Reddy (supra)*** is squarely applicable to the facts of the present case. In that case the Apex Court has laid down the guidelines in paragraphs 26 which reads as under:

"26. On a harmonious consideration of the provisions of the law, as aforesaid, and the law laid down by this Court, it is evident that:

(i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself;

(ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time;

(iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense whereas Section 5 has to be construed liberally;

(iv) In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;

(v) Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;

(vi) Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the court is not satisfied with the cause shown for the delay in filing the appeal;

(vii) Merits of the case are not required to be considered in

condoning the delay; and

(viii) Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision."

13. It is clear from the decision of the Apex Court that under the guise of advancing substantial justice substantial law of limitation contained in Section 3 of the Limitation Act cannot be permitted to be defeated and that discretion is required to be exercised only if there is sufficient explanation for the delay. Laws of limitation though harsh is required to be applied with full rigour if it is found that the litigant has been negligent in his conduct.

14. Applying the well settled law to the facts of the present case, the explanation tendered is no explanation much less a sufficient explanation for delay of 2 years and 111 days. As such this Court is not inclined to exercise the discretion in favour of the Applicant and condone the delay.

15. Civil Application stands dismissed

[Sharmila U. Deshmukh, J.]