



Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.73 OF 2018
WITH
CIVIL APPLICATION NO.1310 OF 2017
IN
SECOND APPEAL NO.73 OF 2018

Vasant Ishwara Bhuse

...Appellant/
Applicant

Versus

Mangal Chandrakant Bhuse & Ors.

...Respondents

Adv. Shriram Kulkarni i/b Devidas Jadhav for the Appellant/Applicant.

Adv. Valmiky Narvekar a/w Mohammad S. Mulla for Respondent Nos.
1A and 1B.

Coram : Sharmila U. Deshmukh, J.

Date : March 15, 2024

P. C. :

1. Being dissatisfied by the order dated 5th August, 2017 passed by the Appellate Court in Civil Misc. Application No. 50 of 2014 rejecting the Application seeking condonation of delay of 2 years 11 months and 8 days caused in preferring the Appeal, the Appellant-original Defendant No. 1 is before this Court.

2. The Judgment and Decree dated 13th April, 2011 was passed by the Civil Judge Junior Division Mangalwedha in RCS No. 18 of 2005.

The Trial Court partly decreed the suit and determined Plaintiff's share as 1/4th in respect of certain properties while excluding other properties which formed part of the compromise entered into between the parties in an earlier round of litigation in the year 1998.

3. Being aggrieved by the Judgment of Trial Court, Defendant no. 1 preferred an Appeal after delay of about 2 years, 11 months and 8 days for which relief of condonation of delay was sought.

4. To substantiate the cause for delay, evidence was led by the Appellant and the admitted position is that there was no cross-examination of the Appellant. In his evidence, the Appellant has deposed that the Appellant is about 60 years of age and was suffering from various age related ailments such as body ache, diminishing of vision etc. He has further deposed that the Appellant is an illiterate agriculturist and suffering from financial constraint thus could not file the Appeal within time against the Judgment dated 13th April, 2011.

5. The Appellate Court by order below Exhibit-1, assessed the evidence on record. The Appellate Court examined the reasons given by the Appellant for delay in filing the Appeal that he was senile and suffering from age old diseases. The Appellate Court held that except the affidavit of evidence, there is no supporting evidence led by the Applicant to substantiate his contention. The Appellate Court further

held that the reason of old age and old age ailments is equally applicable to the Plaintiff who is older than the present Applicant. The Appellate Court further held that considering the nature of litigation between two brothers where twice the suit for partition was brought before the Court and when the earlier suit was compromised by the Plaintiff and Defendant, there should be stop to such litigation and that there was no reason to condone the delay and as such, rejected the application.

6. Heard Mr. Kulkarni, learned counsel for the Appellant and Mr. Narvekar, learned counsel for the Respondent.

7. Learned counsel for the Appellant would submit that the explanation as regards the old age as well as the age related ailments, and, the financial constraint constituted sufficient explanation for condonation of delay. He further submits that there was no cross-examination by the Respondent and the entire evidence has remained unchallenged. He submits that the substantial question of law which arises is whether the discretion has been judicially exercised by the Appellate Court when the Appellate Court was presented with sufficient explanation which has not been controverted. He would further submit that the Appellate Court has examined the merits of the matter which is impermissible while considering the issue of condonation of delay. In support of his submission, he relies upon the decisions:

- ***Raheem Shah & Anr. vs. Govind Singh & Ors., [2023 SCC OnLine SC 910].***
- ***Pundlik Jalam Patil (dead) by Lrs. vs. Executive Engineer, Jalgaon Medium Project & Anr., [(2008) SCC 448].***
- ***Sheo Raj Singh (deceased thr. Legal Representative & Ors. vs. Union of India & Anr., [(2023) 10 SCC 531].***

8. *Per contra*, learned counsel for the Respondent would submit that at the stage of adjudicating the application for condonation of delay, the Courts can *prima facie* look into the merits of the Appeal in order to satisfy itself that a meritorious matter is not thrown at the threshold. He submits that in the earlier round of litigation there was a compromise only in respect of certain properties and the said properties have been excluded by the decree of the Trial Court in the present litigation. He submits that the Trial Court has rightly examined the issue as regards the compromise decree in the earlier round of litigation and has determined the shares of the Plaintiff in respect of the remaining properties and there is no merit in the Appeal.

9. Considered the submissions and perused the record.

10. There is no dispute that there was an earlier litigation between the parties which resulted in a compromise decree and the instant proceedings arise out of second round of litigation seeking partition.

The Defendant No. 1 has challenged the judgment of the Trial Court dated 13th April, 2011 after a delay of about 2 years 11 months and 8 days. It is trite that each and every days delay is not required to be explained, but what is required is an explanation sufficient enough for the Court to accept for the purpose of condoning the delay. At the stage of adjudication of the application, the Court has to consider whether sufficient cause is made out for condonation of delay and at appellate stage, the Appellate Court is required to examine whether the discretion has been rightly exercised by the Court adjudicating the application seeking condonation of delay. Coming to the facts of present case, perusal of the application indicates that the pleading is that the Applicant is senile and suffering from various old age diseases, suffering from financial constraints and due to his illiteracy necessary arrangement could not be made for filing the Appeal. The same deposition can be found in the affidavit in lieu of evidence filed by the Appellant. No medical record has been produced on record to substantiate the contention about his medical ailments. The Appellate court on basis of evidence has therefore rightly held that there is no supporting evidence led by the Appellant to substantiate his case. Although there is no cross- examination of the Appellant, it is incumbent upon the Appellant to adduce evidence in support of the case put forth for the delay. Usually while adjudication of application seeking condonation of delay liberal approach is required

to be adopted, however, the same cannot be equated with a casual approach. The application for condonation of delay filed by the Applicant would indicate that the same has been filed in a most casual manner secure in the knowledge that as a matter of course the delay will be condoned. The laws of limitation though harsh are required to be applied with full rigour and cannot be brushed aside on the ground of interest of justice. It is not the duration of delay which is material but the explanation tendered for the delay. A few days delay may not be condoned in absence of sufficient explanation whereas substantial delay may be condoned if sufficiently explained.

11. The Apex Court in the case of ***State of Uttar Pradesh & Ors. vs M/S Satish Chand Shivhare & Brothers, [in SLP (Civil) No. 5301 of 2022]*** which was relied by the learned counsel for the Respondent has held thus in paragraph 21 and 22 :

“21. The questions of law purported to be raised in this Special Leave Petition are misconceived. The right of Appeal is a statutory right, subject to the laws of limitation. The law of limitation is valid substantive law, which extinguishes the right to sue, and/or the right to Appeal. Once an Appeal is found to be barred by limitation, there can be no question of any obligation of the Court to consider the merits of the case of the Appellant.

22. When consideration of an Appeal on merits is pitted against the rejection of a meritorious claim on the technical ground of the bar of limitation, the Courts lean towards consideration on merits by adopting a liberal approach towards ‘sufficient cause’

to condone the delay. The Court considering an application under Section 5 of the Limitation Act may also look into the prima facie merits of an Appeal. However, in this case, the Petitioners failed to make out a strong prima facie case for Appeal. Furthermore, a liberal approach, may adopted when some plausible cause for delay is shown. Liberal approach does not mean that an Appeal should be allowed even if the cause for delay shown is glimsy. The Court should not waive limitation for all practical purposes by condoning inordinate delay caused by a tardy lackadaisical negligent manner of functioning."

12. Considering the pleadings and the evidence adduced by the Appellant, the Appellate Court could not be faulted for refusing to condone the delay. The discretion exercised by the Appellate Court cannot be said to be arbitrary so as to constitute substantial question of law.

13. The submission of the learned counsel for the Appellant that it is totally impermissible for the Court while considering an application under Section 5 of the Limitation Act, 1963 to look into the merits of the Appeal stands sufficiently answered by the observations of the Apex Court in paragraph No. 20 where the Apex Court has held that while considering the application under Section 5 of Limitation Act, 1963 the Court may look into *prima facie* merits of an Appeal. The reason being that if a strong *prima facie* case on merits is made out, the same can be considered as it is not desirable that the meritorious case be thrown out on the threshold on the grounds of limitation.

However, at the same time it also needs to be noted that the law of limitation has its own applicability and unless there is sufficient cause shown, the delay could not be condoned. The judgment of the Appellate Court does not indicate that the rejection is only on the merits of the case. The Appellate Court has considered the pleadings and evidence and has held that the Appellant have not substantiated the grounds which even otherwise cannot be said to be sufficient explanation.

14. Having regard to the discussion above, no substantial question of law arises. Appeal stands dismissed.

15. At this stage, learned counsel for the Appellants seeks extension of the interim relief for the further period of four weeks. The same is opposed by the learned counsel for the Respondent stating that the execution proceedings are completed and only the handing over of the possession remains. Considering that the Interim relief has been operating since long, I am inclined to extend the relief for a further period of four weeks from the date of uploading of the order on official website.

(Sharmila U. Deshmukh, J.)