

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10031 OF 2024

Dhandeep Gautam Salot & Anr.

.. Petitioners

Versus

Merloy Jerom Kinny & Ors.

.. Respondents

.....

- Ms. Janvi Joshi a/w Ms. Shilpa Naik i/by Manmohan Rao for Petitioners
- Ms. Poornima Eapen i/by MZM Legal LLP for Respondent No.3 - Bank

.....

CORAM : MILIND N. JADHAV, J.

DATE : SEPTEMBER 2, 2024

P. C.:

1. Heard Ms. Joshi, learned Advocate for Petitioners and Ms. Eapen, learned Advocate for Respondent No 3 - Bank. None appears for Respondent Nos. 1, 2 & 4. Affidavit of service dated 05.09.2024 is filed.

2. On 26.08.2024, this Court passed the following order:-

1. *Heard Ms. Joshi , learned Advocate for Petitioners and Mr. Kumar, learned Advocate for Respondent No.3.*

2. *The order dated 14.02.2023 is impugned and taken exception to in the present Writ Petition by Plaintiffs before the Trial Court. By virtue of the said order, Notice of Motion filed by Plaintiffs bearing No.1799 of 2018 is rejected. Notice of Motion was filed by Plaintiffs for the following reliefs :-*

- (i) *condonation of delay of 2960 days for filing of suit plaint after it was returned back by this Court;*
- (ii) *to set aside order dated 15.12.2009 of return of the plaint; and*
- (iii) *to seek extension of time to pay deficit Court fees on the suit plaint being taken on record.*

3. *The aforesaid reliefs in Notice of Motion are considered by a series of facts which are required to be delineated since by virtue of the impugned order if the Plaintiffs stand ousted, and in that case there is no other remedy available to them for restoration and revival of their suit proceedings which has been returned. There is substantial delay which is also required to be considered in the facts of this case.*

4. *Briefly stated it is seen that suit is filed by Plaintiffs on 26.11.2009 being nomenclatured as Suit No.1093 of 2010 seeking cancellation of Agreement of sale dated 03.11.2007 executed between the parties. It is seen that suit is filed within limitation, but on the ground of pecuniary jurisdiction, suit was returned by this Court to Plaintiffs to be filed in the appropriate Court by order dated 15.12.2009.*

5. *Ms. Joshi would at the outset submit that pursuant to passing of the said order, Plaintiffs were completely unaware about the status of the suit proceedings since the Advocate engaged by Plaintiffs did not revert back to them. She would fairly submit that this position prevailed until 2018 when Plaintiffs approached their Advocate and she orally informed them that their suit was transferred to the City Civil Court. Plaintiffs therefore appointed a new Advocate to undertake search of the suit proceedings in this Court first and thereafter in the Bombay City Civil Court. She would submit that it is at this time in 2018 the Plaintiffs realized about passing of the order dated 15.12.2009 about which they were completely unaware. She would submit that Plaintiffs filed Notice of Motion No.1799 of 2018 seeking condonation of delay of 2960 days as also for seeking to set aside the order of return of plaint dated 15.09.2012 since in the meanwhile the pecuniary jurisdiction of this Court was transferred to the Bombay City Civil Court and since the suit was directed to be returned to the Plaintiffs to be filed in the Bombay City Civil Court itself.*

6. *Ms. Joshi has drawn my attention to the Affidavit-in-support of the Notice of Motion which is appended at page No.316 of the Writ Petition and would contend that the suit filed by Plaintiffs seeks cancellation of an Agreement for sale between the parties which was a registered agreement on the ground that that Plaintiffs were forced and coerced to execute the said sale deed at gun point. She would submit that Plaintiff No.3 being a senior citizen is involved in execution of the Agreement and has so averred in the Affidavit in support of the Notice of Motion. She has drawn my attention to the same and I have perused the same.*

7. *Considering the facts in this case all that Ms. Joshi would submit is that if the impugned order is sustained, Plaintiffs' suit and claim would be completely ousted. She would draw my attention to the fact that Plaintiffs would be rendered completely remediless if the impugned order is sustained.*

8. *I have perused the impugned order and I agree with the submissions made by Ms. Joshi. It proceeds on the premise that the Trial Court would not have jurisdiction to entertain the Notice of Motion and therefore the said Notice of Motion seeking condonation of delay is rejected. It is seen that by virtue of notification dated 28.08.2012 passed by the State Government, on account of pecuniary jurisdiction the suit is transferred to the Bombay City Civil Court. Hence the City Civil Court will have*

jurisdiction to decide the Notice of Motion in respect of the suit proceedings as also any interlocutory application filed by parties therein. In that view of the matter, learned Trial Court is incorrect in arriving at the finding that Plaintiffs have failed to present the suit plaint before the proper Court having jurisdiction as arrived at in paragraph No.14 of the impugned order. Next is the question of delay of 2960 days for setting aside the order and considering the ground for the same. Ms. Joshi would leave it to the Court to condone the delay on appropriate terms as deemed fit since according to her, the factual ground is stated by the Petitioners.

9. **PER CONTRA**, Mr. Kumar, learned Advocate represents the Respondent No.3 - Bank. He would submit that according to his instructions the suit property is mortgaged with the Bank and there are Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short '**SARFAESI**') proceedings going on in DRT qua the suit property. He would submit that today he does not have appropriate instructions but he will endeavour to file Affidavit-in-Reply. He makes a request to the Court for time to file Affidavit-in-Reply. The request made by Mr. Kumar stands allowed. Affidavit-in-Reply by any Respondent herein be filed within a period of one week from today positively.

10. Parties shall take note that this Writ Petition shall be disposed on the next adjourned date at the stage of admission itself when the issue of delay shall be considered.

11. Stand over to **02nd September, 2024**. To be placed under the caption '**First on Board**'.

3. Today Ms. Eapen, learned Advocate for Respondent No.3 - Bank appeared and would draw my attention to the impugned order and would submit that learned Trial Court has considered the case of Plaintiffs and has in fact passed a correct order on the ground of delay and laches. In support of her submissions that impugned order has been correctly passed, she would place on record a decision of this Court in the case of **CVC Infrastructure Pvt Ltd Vs. Hazel Mercantile Ltd¹** to contend that the facts in that case were more or less similar to the facts in the present case. There was a delay of 360 days in that case. She would submit that Court while passing the aforesaid

1 2020 SCC OnLine Bom 507

decision took into account the extant guidelines given by the Supreme Court in the case of **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy**² including the additional guidelines in paragraph Nos. 21 and 22 of the decision of the Supreme Court and while referring to them has carved out the doctrine of prejudice that would be caused to the Defendants in such a case which is the present case. She would submit that Defendants would now have to defend the suit proceedings if Plaintiffs are allowed a second chance by allowing the Plaintiff to maintain the Suit after a lapse of almost a decade. The grounds and reasons stated by the Plaintiffs have been enumerated by me in my previous order reproduced herein above. What is important is the issue as to whether the delay can be condoned in the facts of the present case or not. The question to be answered is who is primarily responsible for the delay. It is contended by learned Advocate for Defendant No. 3 that by taking into account certain principles which have been stated by the Supreme Court in the case of *Esha Bhattacharjee (2nd supra)*, this Court should carve out distinction between "inordinate delay" and "short delay" as according to her. Present case clearly falls in the category of inordinate delay. She would submit that there is no due diligence whatsoever stated and mentioned in the Application filed save and except the medical reason of one of the Plaintiffs which has been stated. She would submit that

² (2013) 12 SCC 649

in so far as the other two Plaintiffs are concerned, facts in support of Notion of Motion are completely silent and therefore it will not enable Plaintiffs to seek condonation of delay of 2960 days which is admittedly occurred in the present case.

4. While considering the reasons advanced by the Plaintiffs and which has been enumerated in my previous order, Plaintiffs cannot be made to suffer due to inaction of the Plaintiff's advocate. Here is a case where suit plaint has been specifically returned back by the Court for submitting it to the appropriate Court and thereafter Plaintiffs' Advocate has not informed the Plaintiffs at all about the return of the Suit plaint. The decision which has been referred to and relied upon by learned Advocate for Defendants proceeds on the basis of want of due diligence and deliberate inaction on the part of Plaintiffs. Such is not the case before me. Facts of the case which have been referred to and relied upon are entirely different than the facts of the present case. One of the reason for vehement objection to the present Petition and condonation of delay is obviously because of the reasons which I have recorded in my previous order. Nothing precludes the Defendants from proving their case in rebuttal if they are right. In fact the main contesting party is not even present in Court. In the facts and circumstances of the present case which have been pleaded in the suit plaint with respect to seeking cancellation of the agreement

between the parties, delay of 2960 days which has occurred pursuant to return of plaint by the Trial Court in my opinion is required to be condoned. The principles laid down in the case of *Esha Bhattacharjee (2nd supra)* which have been referred to by learned Advocate for Defendant No. 3 will have to be construed as a whole and not in piecemeal and ultimately the question is whether the Application made by the Applicants approaching the Court lacks bonafides or otherwise. That apart substantial justice being paramount is also required to be given due consideration. In that view of the matter, the doctrine of prejudice in my opinion will not affect the right of the Applicant – Plaintiffs to seek condonation of delay in the present case in view of the specific reasons enumerated and elucidated by the Plaintiffs, *inter alia*, pertaining to the role of their Advocate in question.

5. In view of the above observations and findings, I am inclined to interfere with the impugned order and condone the delay of 2960 days. Considering that the Suit has been transferred to the City Civil Court which would have the relevant pecuniary jurisdiction, the Suit shall be tried by the City Civil Court in accordance with law.

6. In view of the above, impugned order is quashed and set aside. Learned Advocate for Defendant No. 3 has prayed for levy of exemplary costs if delay is condoned. Undoubtedly in order to balance

convenience of the parties in the facts and circumstances of the present case, costs will be one of the factors to be levied. Hence, I am inclined to accept submission of learned Advocate for Defendant No.3 for levy of costs on Plaintiffs.

7. It is seen that except Respondent No. 3, none of the other Respondents are present. Petition is only opposed by Respondent No. 3 Bank who has invoked action under SARFAESI Act with respect to the suit flat which is presently occupied by Plaintiffs. In that view of the matter, Plaintiffs are directed to pay costs of Rs. 25,000/- to Defendant No. 3 i.e. Respondent No. 3 herein and Rs. 25,000/- to the Kirtikar Law Library, High Court, Mumbai within a period of four weeks from today. Copy of receipt of payment of costs shall be placed before the learned Trial Court for condoning the delay and for setting aside the impugned order. Thereafter the Suit shall proceed strictly in accordance with law.

8. With the above directions, Writ Petition is allowed and disposed.

[MILIND N. JADHAV, J.]

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