



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Civil Application [CAO] No.111 of 2024
in
Civil Application [MCA] St. No.139 of 2024
in
Second Appeal No.410 of 2013 (D)

Vishnukumar s/o Babulal Agrawal
vs.
Sau. Mamtadevi w/o Dineshkumar Agrawal

*Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.*

Court's or Judge's Orders

Mr. J.M. Gandhi, Advocate for the Applicant/Appellant.
Mr. O.W. Gupta, Advocate for the Non-Applicant/Respondent sole.

CORAM : M.W. CHANDWANI, J.
DATE : 25th OCTOBER, 2024.

Heard the learned Counsel for the parties.

02. The applicant seeks condonation of delay in preferring an application for restoration of the second appeal and also seeks restoration of the second appeal which came to be dismissed on 14/09/2018 for non-filing of paper-book by the applicant.

03. The applicant on or around 10/12/2023 came to know that the execution proceedings are going on and the sale-deed in respect of the suit property has been executed and registered through the Officials of the Court. At that time only, he came to know about dismissal of the appeal for non-compliance of the order.

04. It appears from the record that the second appeal has been admitted on 26/11/2014. Thereafter, by common order dated

02/12/2016, this Court had granted 12 months' time to the applicant to file private paper-book. Since, the applicant failed to file private paper-book, again by order dated 03/08/2018, this Court had granted further six weeks' time to comply with the earlier order dated 02/12/2016. By the same order, it was directed that if the applicant fails to comply with the order within the extended period of six weeks, the appeal shall be dismissed without reference to the Court.

05. The contention of learned Counsel Mr. J.M. Gandhi for the applicant is that the applicant was under *bona fide* and faithful impression that his Counsel Mr. G.S. Bapat must be taking care of the appeal and there was no reason for the applicant to expect any negligence on his part. Rather, the applicant himself was in grief, since he was suffering from a critical ailment for years together and had undergone spine surgery. His wife was also suffering from severe ailments. Advocate Mr. G.S. Bapat engaged by the applicant was attached to the Office of learned Counsel Mr. S.P. Bhandarkar, therefore, name of Mr. Bhandarkar appeared in the orders. Infact, the applicant used to get instructions from Mr. Bapat. Even Mr. Bapat was critically ill during those years and had undergone brain surgery at Hinduja Hospital in Mumbai.

06. Learned Counsel Mr. Gandhi further submitted that in an appeal, generally the parties do not appear and it is only an Advocate who attends the proceedings and does all the necessary compliance on behalf of the parties. In this case, due to ill-health of Mr. Bapat, who has been engaged by the applicant, the matter could not be pursued by him and therefore, the second appeal met with the fate of dismissal for non-compliance. There is no negligence on the part of the applicant, particularly when admitted appeals do not get listed periodically before the Court.

07. The sum and substance of the argument of the learned Counsel for the applicant is that an application for condonation of delay in filing the application for restoration of the appeal stands on a different footing than an application for condonation of delay in filing the appeal and therefore, '*sufficient cause*' has to be construed liberally in such type of cases. It is the cause, which is to be construed while considering the delay and not the length of delay. Therefore, according to him, the medical documents filed on record go to show the cause.

08. *Per contra*, Mr. O.W. Gupta, learned Counsel appearing on behalf of the non-applicant objected the application on the ground that there is a considerable delay in filing the application for restoration of the appeal, which has not been explained properly and therefore, sought rejection of the application.

09. Evidently, the second appeal has been admitted by order dated 26/11/2014 and a bunch of second appeals were listed before this Court on 02/12/2016, in which private paper-books were not filed by the appellants. Therefore, this Court granted time of twelve months to file private paper-books. Again by order dated 03/08/2018, the period was extended by six weeks. For non filing of paper-book by the applicant, the appeal came to be dismissed.

10. It is to be noted here that the usual practice in the High Court is that after the appeal gets admitted, it does not list periodically unlike in the subordinate Courts. The parties are not required to attend the proceedings and the proceedings are being looked after by their Advocates/Counsel and the entire compliance of the proceedings is left to the Counsel. Thus, if the paper-book is not filed, then the negligence cannot be attributed to the applicant.

11. Further, a distinction has to be, therefore, understood between the cases where the condonation of delay is sought for restoration of the matter dismissed in default due to non-appearance of the Counsel engaged and the cases where the condonation of delay caused in challenging the orders passed in presence of the Counsel engaged. A litigant cannot be made to suffer for default on the part of his Counsel. On the contrary, filing of an appeal within the period of limitation and engaging the Counsel to contest the matter, shows the interest of the client in prosecuting the matter and there is no presumption that a litigant is not interested in prosecuting the matter, which is dismissed in absence of a Counsel. Filing of an application for restoration shows the interest of the client to prosecute and the Court will have to consider as to whether the explanation furnished is true, correct, *bona fide* and proper to constitute sufficient cause.

12. It will be relevant to mention here the decision rendered in the case of **Mool Chandra vs. Union of India & Anr.**¹, wherein the Supreme Court in paragraph 22 has held as under :

“22. If negligence can be attributed to the appellant, then necessarily the delay which has not been condoned by the Tribunal and affirmed by the High Court deserves to be accepted. However, if no fault can be laid at the doors of the appellant and cause shown is sufficient then we are of the considered view that both the Tribunal and the High Court were in error in not adopting a liberal approach or justice oriented approach to condone the delay.”

13. It is well settled that in condoning delay, the Court has to adopt a practical and pragmatic approach rather than a technical and pedantic one. The application has to be read as a whole to find out

¹ Civil Appeal Nos.8435-8436 of 2024 (@ S.L.P. (Civil) Nos. 2733-2734 of 2024)

whether the explanation furnished covers the whole period for which condonation of delay is sought. The discretion to condone or not to condone the delay needs to be exercised depending upon the facts and circumstances of each case and no straight-jacket formula is available. In the absence of lack of *bona fides*, negligence, false case, the inclination of the Court will be to condone the delay upon proper explanation furnished. Of course, creation of rights in favour of the opponent will have to be given due weightage.

14. That apart, the documents filed by the applicant go to show that during this period, he had undergone spine surgery and was suffering from heart ailments. Further, the documents filed on record go to show that his Counsel Mr. Bapat had also suffered from Brain Tumor and had undergone brain surgery during such period. Thus, the applicant was having '*sufficient cause*' which prevented him from filing the application for restoration of the appeal. The applicant, on affidavit has stated that he came to know about dismissal of the second appeal on 10/12/2023. The non-applicant except denial, has not demonstrated anything to show that the applicant had knowledge of the order of dismissal prior to the date which he claimed. There is nothing on record to show that the delay occurred is not an intentional one. The negligence cannot be attributed to the applicant. Therefore, I do not find force in the argument of the learned Counsel for the non-applicant that there is no "*sufficient cause*". It is desirable that the matter should be decided on merits as substantial justice cannot be denied for technical reasons. The appellant is ready to file private paper-book. Therefore, a case is made out for condonation of delay and restoration of the appeal on certain conditions.

15. Delay in filing the application for restoration of the appeal is condoned and the appeal be restored to file subject to payment of costs of Rs.10,000/- (Rupees Ten Thousand Only) to be deposited with the Taluka Bar Association, Tiroda, District Gondia for development of it's library. The applicant is directed to file private paper-book within four weeks from today. Both the applications are allowed and disposed of accordingly.

JUDGE

**sandesh*