

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 1143 OF 2025.

IN/WITH

FIRST APPEAL (ST) NO. 1087 OF 2025.

Husein Yusuf Kakroliwala And Ors.

...Appellants/Applicants.

Versus

Alifiya Y Kankroliwala

...Respondent.

Ms. Veenu Chunilal Khatri for the Appellants/Applicants.

Mr. Rashid Khan i/by Tasneem Zaidy for the Respondent.

Coram : Sharmila U. Deshmukh, J.

Date : February 10, 2025.

P. C. :

1. The First Appeal challenges the judgment dated 13th December, 2023 passed by the City Civil Court at Bombay in S. C. Suit No. 878 of 2014 instituted by the Respondent seeking declaration that the Appellants, who are her in-laws, have no right to dispossess her from the suit property and for injunction from disturbing the Respondent's possession of Room No 40 and preventing her from using other parts of the house including kitchen and the bathroom.
2. By the impugned judgment, the Trial Court decreed the suit as under:

"a. The defendants have no right to dispossess the plaintiff from the suit proeprty without following due process of law.

b. The defendants are perpetually restrained from dispossessing the plaintiff from the suit premises Room No 40 and also restrained from obstructing plaintiff from using the bathroom and kitchen of Room No 42."

3. As the Appeal was not filed within prescribed period of limitation, the present Interim Application has been filed seeking condonation of delay of 299 days caused in preferring the present Appeal.

4. The explanation tendered for the delay in the Interim Application is that they had appointed an Advocate to represent them, who represented them till about February, 2000 and thereafter due to Covid 19 as matters were being adjourned, they were informed as only urgent matters were taken up and as and when full fledged hearing commences, they will be informed. However they did not get any information and when they tried to get in touch with the Advocate, they were informed that he had undergone surgery for leg fracture. In October, 2024 when the Applicants through their representative approached the Advocate, they were informed that he was not attending Court due to his health and they should appoint new Advocate. On 25th October, 2024, the Applicant's approached the present Advocate, who informed them after taking online search that the suit has been decreed. After obtaining information about the

decree on 25th October, 2024, the Applicant's got drafted two power of attorney's for appointing Applicant No 5 as their Constituted Attorney as one of the applicant was out of India, which were ready on 15th November, 2024 and 11th December, 2024 and stamped on 23rd December, 2024. Thereafter the present Appeal came to be filed resulting in delay of 299 days.

5. The application came to be resisted by the Respondent contending that in February, 2020, the Appellant's Advocate had appeared in the proceeding and the Appellants were aware of the stage of proceedings.

6. Learned Counsel appearing for the Applicant would submit that though they had appointed their Advocate, after Covid 19 pandemic, he stopped attending Court hearings and did not inform the Applicants. She submits that during Covid pandemic, they had contacted their Advocate who had informed them that only urgent matters are taken up and as and when full fledged hearing will commence he will inform them. She would further submit thereafter they contacted their Advocate and became aware that was not keeping good health as he had undergone surgery for leg fracture. She submits that for the in October-2024 the Applicants were informed by the erstwhile advocate that due to his inability to attend the Court matters he will return the papers to them, which were initially not traceable.

She would further submit that on 25th October, 2024 the present advocate was appointed who took an online search and found that the suit has been decreed on 13th December, 2024 and thereafter power of attorney's were prepared to appoint Applicant No 5 as their constituted attorney which took time.

7. *Per contra*, learned Counsel appearing for the Respondent would submit that the Applicants were aware of the filing of the proceedings and had also participated in the proceedings till the year 2015. He submits that in the February-2020 the advocate for the Defendant had appeared in the proceedings and thereafter neither the advocate nor the Defendants attended the proceedings and in the year 2023 the suit came to be decreed. He submits that in the proceedings the interim order was passed restraining the defendant from dispossessing the Plaintiff and residing in the same house and they were well aware of the proceedings and the injunction order which was operating in Respondent's favour. He submits that the Applicants are now seeking to blame their advocate when they themselves are negligent. He submits that therefore there is no explanation for delay of 299 days and the Application be dismissed.

8. I have considered the submissions and perused the record.

9. The explanation tendered for the delay is the default on part of their Advocate to attend the proceedings. The roznama

indicates that till 25th February, 2020, their Advocate had attended the proceedings. Therefore it can be presumed that the date of February, 2000 occurring in the interim application is typographical error and till February, 2020, they were being represented. Thereafter from March, 2020 due to Covid 19 pandemic, the Courts were functioning partially taking up only urgent matters for hearing.

10. The pleading is that thereafter when no information was received from their Advocate, the Applicants had contacted their Advocate who had undergone a leg surgery. There are no details about the date when the Applicants contacted their Advocate but as reference is made that there was no information received, the period would be after Covid pandemic. The Applicants were thus well aware that their Advocate was not in a position to attend the Court hearings. Even if it is accepted that such information was received by the Applicants, the first and foremost duty of the Applicants as litigant is to either brief a new advocate or to attend the proceedings to see that the Court is informed about the inability of the advocate and seek necessary adjournment. No such thing was done by the Applicants in the present case. Till October, 2024 the Applicants remained passive and neither contacted their Advocate to find out fate of the Court proceedings nor attended the Court hearings.

11. Even assuming arguendo that the Applicants became

aware of the suit being decreed in October, 2024, it was expected that prompt steps would be taken to file the Appeal immediately. Thereafter under the pretext of preparing power of attorneys, till 2nd January, 2025, the Appeal was delayed.

12. The Applicants are related to the Respondents who seeks an injunction against dispossession on the ground that the premises is matrimonial house and therefore the Applicants were well aware of the pendency of proceedings. The Applicants seeks to lay the blame squarely on the Advocate by attributing negligence, however, the sequence of events noted above will indicate total negligence on part of the Applicants from the time of receiving information about their Advocate's surgery till October, 2024. The Roznama indicates that it is only on 3rd October, 2022 the Respondent filed her Affidavit of evidence and thereafter the matter was adjourned on eleven occasions and was decreed thereafter about one year and two months later. If the Applicants would have demonstrated some diligence, they could have participated in the proceedings. The Applicants are not rustic villagers or illiterate person unaware of the legal procedure, whose explanation that the Advocate did not keep them informed would suffice. The entire application is silent about the efforts taken by the Applicants to contact their advocate to keep themselves abreast of the proceedings.

13. The averments in the Application indicates the casual manner in which the Application has been filed to fit in the explanation for period of 299 days without any details. The liberal approach principle will not come to the aid of litigant , who is demonstrably negligent and missing in his duty as litigant. It is the duty of the litigant to keep in constant touch with the Advocate to ensure that the proceedings are well defended. In the present case, despite being aware of the Advocate's surgery for leg fracture, no steps were taken by the Applicants and no further efforts to contact the Advocate till October 2024 are shown.

14. If the Applicants explanation is accepted that they were not kept informed by their Advocate, then in every case the litigant would seek to justify the delay by placing the blame on the Advocates. It is not that such a reason cannot be accepted but it must be shown that despite the litigant being in constant touch with the Advocate, the Advocate did not keep them informed. There is no communication addressed by the Applicants to the Advocate seeking an explanation for not attending the matter and not aprising the Applicants of the development which would have lend credence to the explanation that the Applicants were kept in dark by their Advocate.

15. In *Kanta vs Manjulabai*¹ this Court has held in paragraph 4

¹ Civil Application No. 19 of 2018 in Second Appeal St. No. 22803 of 2017.

and 7 as under:

"4. This submission, at the first blush, appears very attractive and tends the Court to interfere with the matter. However, after hearing the learned counsel for the applicant, especially when a query was put to the learned counsel in respect of the conduct on the part of the applicant as to whether at any point of time, she on her own, contacted her advocate, the reply was in negative. A litigant who approaches to the Court must be diligent. He or she must take all steps to pursue his or her litigation. It is expected from the litigant that he or she is in contact with the lawyer who is representing his or her cause in the Court of law. A litigant cannot take a spacious plea that once the case is entrusted with an the advocate his or her work is over and the advocate will take care of the matter. An Advocate always discharges his duties on the instructions given to him by his client.

7. It is very easy for a litigant to make allegations against an advocate behind his back. If the applicant wishes to make allegations against the advocate, the applicant should have a courage to join the advocate as a party and in his presence should make allegation against him. Here, the applicant wants to condemn the advocate behind his back. In my view, it is impermissible and unacceptable. Further, no steps are also being taken by the applicant against any advocate under the provision of the Advocates Act."

16. In ***Pathapati Subba Reddy vs. The Special Deputy Collector (LA)***² the Apex Court has summarised the law on the aspect of condonation of delay in paragraph 26 as under :

² [2024 (3) ALT 51]

"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."

17. In *Esha Bhattacharjee vs Managing Committee of*

Raghunathpur Nafar Academy (2013) 12 SCC 649, the Apex Court has held that the conduct, behaviour and attitude of the party relating to its inaction or negligence are relevant factors to be taken into consideration. The Courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

18. The law of limitation is founded on public policy with the intent to give a quietus to the litigation. It is not the duration of the delay but the explanation tendered which deserves consideration. The principle of liberal approach in matters of condonation of delay cannot be stretched to such an extent that where the litigant is evidently negligent and is guilty of inaction, on the bedrock of substantial justice, the delay should be condoned. If the facts of the present case are considered, it is evident that the Applicant seeks to lay the blame squarely on the shoulders of his Advocate and consequently being unaware of the passing of the impugned judgment. In my opinion, it is the Applicants who is guilty of gross negligence and inactive attitude and therefore the application lacks bonafides.

19. If a litigant wishes the Court to adopt a liberal approach while adjudicating the Application under Section 5 of the Limitation Act, it is necessary to show that there was no negligence on part of the

litigant and that sufficient explanation has been given for the delay. Law comes to the aid of a litigant who has been diligent in pursuing his remedies. Further, although the applicant has sought to blame his Advocate, admittedly, no steps have been taken against the Advocate concerned and there is not even a single communication addressed by the Applicants to the Advocate calling for an explanation.

20. It cannot be presumed that no prejudice will be caused to the Respondent and the imposition of costs will justify the delay. The Respondent has succeeded in the Trial Court in the year 2023 and the Applicants have lost the right to have the matter considered on merits by reason of their own negligence and inaction.

21. In my view, it is not a fit case to exercise the discretion in favour of the Applicants and to condone the delay of 299 days. Resultantly, the Application stands dismissed.

22. As the Interim Application for condonation of delay stands dismissed, the First Appeal does not survive for consideration and same stand disposed of.

[Sharmila U. Deshmukh, J.]