
(2014) 11 BOM CK 0192
In the Bombay High Court
Case No : Appeal against Order No. 62 of 2014

Devkisan and Others

APPELLANT

Vs

Mahavir

RESPONDENT

Date of Decision : 11-11-2014

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2015) 5 ALLMR 202 : (2015) 4 MhLj 473

Hon'ble Judges : S.B. Shukre, J

Bench : Single Bench

Advocate : Yogesh B. Sawal, Advocate for the Appellant; A.V. Bhide, Advocate for the Respondent;

Final Decision : Dismissed

Judgement

S.B. Shukre, J.

1. Admit. Heard finally by consent of the learned Counsel for the parties.
2. This is an appeal preferred against order dated 22-7-2013 passed in Misc. Judicial Case No. 77 of 2012, thereby refusing to restore the appeal that was dismissed in default on 8-10-2012.
3. The appellant had preferred Regular Civil Appeal No. 80/08 against the judgment and decree passed in Regular Civil Suit No. 106/2001, which was the suit for recovery of rent and mesne profits. The appellants and their Counsel were absent on 8-10-2012 and no adjournment application was also moved and, therefore, the Court dismissed the appeal in default. An application for restoration of appeal bearing M.J.C. No. 77/12 was filed by the appellants and that was also rejected on merits by order passed on 22-7-2013 by the District Judge-I, Khamgaon. The present appeal is preferred against the said order.
4. Learned Counsel for the appellants submits that it is a cardinal principle of law that for the mistake of the Advocate, parties should not be made to suffer and

the very purpose of section 5 of the Limitation Act is to advance cause of substantial justice. He further submits, that this principle of law would require every matter be heard on merits and be not thrown out on some technical grounds. He submits that the approach adopted by the learned District Judge is too technical, therefore, it has resulted in miscarriage of justice. He also submits that if any inconvenience is caused to the other side, costs can be imposed upon the appellants.

5. Learned Counsel for the respondent submits that the appellants have been sleeping over their rights for long a period of time and absence of appellants and their Advocate on 8-10-2012 was not an isolated incident. He submits that roznama of the appeal would bear testimony to this submission and, therefore, he submits that no case has been made put by the appellants to interfere with the discretion exercised by the first Appellate Court.

6. Upon going through the certified copy of roznama, which is produced on record and marked as document "X" for identification, I find that there is substance in the argument advanced on behalf of the respondent and there is no merit in the argument advanced on behalf of the appellants. The roznama discloses that the date of 8-10-2012 was not a single and isolated date when the appellants or their Advocate were absent before the Court. There were several dates prior to that date when the appeal was fixed for final hearing and yet on those dates, barring a few, the learned Counsel for the appellants was absent. The roznama further discloses that the matter was fixed for final hearing on 6-4-2010 on which date both the Counsel for rival parties were present but the matter could not be heard as the Court was busy. Thereafter, the appeal was fixed for final hearing on 2-7-2010 and there were at least 15 days, which fell in between; on which dates the appeal was kept for final hearing; and out of these 15 dates, barring a few dates, on all the occasions, learned Counsel for the appellants was absent and the matter was required to be adjourned to 8-10-2012. Even, on 8-10-2012 learned Counsel for the appellants was absent and even no adjournment application came to be filed on his behalf, thereby giving sufficient indication of disinterestedness of appellants to prosecute the appeal. At least, adjournment application could have been filed and if it was not filed, adequate cause which prevented the appellants from filing such an application should have been shown. Appellants did not do so.

7. Having regard to the afore-stated background of this case, the attitude displayed by the appellants and their Counsel in not prosecuting the appeal, in spite of ample opportunities coming their way, and absence of any sufficient cause, I do not think that the discretion exercised by the learned District Judge in rejecting the restoration application can be found to be unfair, arbitrary or unreasonable. Therefore, no interference with the impugned order is warranted. After all, in such matters, the Court has also to take into account the rights which accrue in favour of the other side, which rights are allowed to become final by the appellants owing to their laziness. If the appellant displays negligent

attitude for which no sufficient explanation is given, the Court cannot disturb the rights which have become final in favour of the other side. This is one such matter wherein no indulgence deserves to be shown to the appellants at the cost of disturbing the rights which have accrued and which have become final in favour of the respondent. In the result, the appeal stands dismissed.

No order as to costs.