
(2012) 01 BOM CK 0056

In the Bombay High Court

Case No : Second Appeal No. 14 of 2011 with Civil Application No. 113 of 2011

Gotiram Pawar

APPELLANT

Vs

Pravin Borde, Akshay Borde, Mrs. Sangitra Babasaheb Borde,
Respondent Nos. 1 and 2 minor represented through
Respondent No. 3 as a mother natural Guardian and
Babasaheb Borde

RESPONDENT

Date of Decision : 19-01-2012

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2012) 2 ALLMR 672 : (2012) 5 BomCR 236 : (2012) 3 MhLj 464

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : V.N. Damle, for Mr. D.R. Kale, for the Appellant; S.B. Kadu Patil,
Advocate for respondent Nos. 1 to 3 Respondent No. 4, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Shinde, J.—Heard learned Counsel for the parties. This second appeal takes exception to the impugned judgment and order dated 30-09-2010 passed by the District Judge-1 Kopergaon in Delay M.A. No. 41 of 2005.

2. The appellant herein filed application for condonation of delay in filing the appeal challenging the judgment and decree dated 31-08-2002 in R.C.S. No. 45 of 2000. One of the important ground taken in the application for condonation of delay was that, the appellant herein who is original defendant No.1 was persuaded by the original plaintiffs for compromise and therefore, the appellant did not take timely steps for filing the appeal before the lower appellate Court. Another ground which is agitated by the Counsel for the appellant is that, even Darkhast filed by the respondents is in the year 2004. The learned Counsel for the appellant would urge that, out of three persons from the said village, one Mr. Bhavar did file affidavit stating that, the appellant was persuaded by the respondents herein for compromise. Therefore, according to the Counsel for the

appellant, the lower appellate Court taking liberal view in the matter should have condoned the delay.

The learned Counsel invited my attention to the contents of the application which was filed for condonation of delay. He further submits that, right of the party to prosecute the appeal should not get defeated merely on the technicalities and liberal approach should have been adopted by the lower appellate Court. It is not expected from the ordinary litigant to explain day to day delay. The possible explanation was offered and therefore, the lower appellate Court should have condoned the delay. The learned Counsel for the appellant also tried to argue the matter on merits and submitted that, the appellant has very good case on merits and therefore, this Court may allow this second appeal.

3. On the other hand, the learned Counsel for the respondents i.e. original plaintiffs submitted that, there was inordinate delay in filing the appeal challenging the judgment and decree of the trial Court. The appellant was aware about such judgment and decree since he has appeared in the Execution Proceedings. It is further submitted that, in the application for condonation of delay, there is hardly any explanation for such delay has been occurred in filing the appeal. It is submitted that, since the appellant is in possession of the suit property, an attempt has been made by the appellant to seek adjournments in Darkhast Proceedings and also the appeal is filed belatedly. The learned Counsel for the respondents further submits that, the appellant was supposed to explain the delay in filing the appeal properly.

The learned Counsel for the respondents, in support of aforesaid contention, placed reliance upon the judgment of this Court in the case of Sow. Kamalbai Shrimal and Narsaiyya Shrimal Vs. Ganpat Gavare, and in particular para-10 of the said judgment.

4. The learned Counsel further pressed into service the judgment of the Supreme Court in the case of P.K. Ramachandran Vs. State of Kerala and Another, and submitted that, Law of Limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds. Therefore, the learned Counsel for the respondents submits that, the second appeal is devoid of any merits, same may be dismissed.

5. I have given due consideration to the rival submissions of the learned Counsel for the parties. With the assistance of the Counsel for the parties, perused the impugned judgment and order and also other documents placed on record. Since the second appeal is directed against the order of the District Judge-1, Kopargaon rejecting the application for condonation of delay, unless this Court is satisfied that, the delay was properly explained by the appellant and then allow such application, question of entertaining arguments on merits of the matter would not arise.

6. On careful perusal of the averments in the application which was filed for

condonation of delay, the main ground which is raised by the appellant before the lower appellate Court for condonation of delay appears to be that, the decrees holders persuaded the appellant to compromise the matter and in the said process, the appellant did not file the appeal. From the perusal of the application, according to appellant, there were three persons from the said village who were involved in the process of compromise. However, from perusal of the impugned judgment, there is no any argument advanced on behalf of the appellant to that effect. According to appellant, one Mr. Bhavar has filed affidavit and he has stated that, there was compromise between the parties. However, said Mr. Bhavar is neither examined nor his affidavit is exhibited. From careful perusal of the impugned judgment and order of the District Judge-1 Kopargaon, it clearly emerges that, in support of pleadings in the application for condonation of delay, the appellant herein did not lead any documentary evidence and therefore, the Court was constrained to observe that, the appellant has not led any evidence to support his contention that, the decree holders have persuaded appellant for compromise. The respondents herein who are decree holders have specifically denied such compromise talks. On the contrary, it appears that, the decree holders have stated before the lower appellate Court that, since the decree is in their favour, why they will persuade the appellant for compromise. Therefore, the District Court taking into consideration the rival submissions and material brought on record, has rejected the application for condonation of delay.

7. There was delay of about 1144 days. It is true that, it will be a hyper-technical view to say that, day to day delay should be explained by the party. However, it is also equally true that, "sufficient cause" should be disclosed by the party who is approaching the Court with prayer for condonation of delay. It will depend upon the facts of each case. It is also necessary to see that, the delay in filing the appeal is intentional or the party has gained some benefit out of it. In the present case, admittedly, the appellant is in possession of the suit property and therefore, there is every reason to believe that, since the appellant is in possession of the suit property, he has delayed filing the appeal though he was aware about judgment and decree passed by the trial Court.

8. In the case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, , in paragraph 3, the Apex Court observed:

3. The legislature has conferred the power to condone delay by enacting S. 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which sub serves the ends of justice that being the life purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

- (1) Ordinarily a litigant does not stand to benefit by lodging an appeal late;
- (2) Refusing to condone delay can result in meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned the highest that can happen is that cause would be decided on merits after hearing the parties.
- (3) "Every day"s delay must be explained" does not mean that a pedantic approach should be made. Why not every hours delay, every seconds delay? The doctrine must be applied in a rational common sense pragmatic manner.
- (4) When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non deliberate delay.
- (5) There is no presumption that delay is occasioned deliberately, or on account culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay in fact he runs a serious risk.
- (6) It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Upon reading the first principle from above judgment, one of the consideration while considering the application for condonation of delay is, ordinarily a litigant does not stand to benefit by lodging an appeal late. In the present case, at the cost of repetition, it has to be stated that, the appellant is in possession of the suit property. It is not the case of the appellant that, he was not aware about the judgment and decree passed by the trial Court. He was also aware about the execution proceedings filed by the original plaintiffs. The only ground appears to be taken is that, the decree holders have persuaded him for compromise, however, no any evidence was led to that effect before the lower appellate Court. Therefore, in absence of any evidence to that effect, whether there was such proposal or the appellant was persuaded by the original decree holders for compromise, I do not think that, the view taken by the lower appellate Court can be unreasonable or contrary to the record. Therefore, for the reasons aforesaid, I do not find any merits in the second appeal.

9. The Supreme Court in the case of Lanka Venkateswarlu (D) by L.Rs. Vs. State of A.P. and Others, in para26 held;

26. We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as "liberal approach", "justice oriented approach", "substantial justice" can not be employed to jettison the substantial law of limitation. Especially, in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to

maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay u/s 5 of the Limitation Act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections can not and should not form the basis of exercising discretionary powers.

In the afore mentioned judgment, the Supreme Court has taken a view that, all discretionary powers, especially judicial powers have to be exercised within reasonable bounds, known to the law.

10. Therefore, for the reasons aforesaid, when this Court is of the opinion that, the delay in filing the appeal before the lower appellate Court was not properly explained, no sufficient cause was shown, in that case, the question of adjudicating the second appeal on merits would not arise. Therefore, the impugned judgment and order dated 30-09-2010 needs no interference. The second appeal does not raise any substantial question of law, same stands dismissed. Consequently, the Civil Application is rejected.

11. The learned Counsel appearing for the appellant, at this stage, prays for continuation of interim relief granted by this Court during the pendency of this second appeal. The said prayer is vehemently opposed by the Counsel appearing for the respondents on the ground that, they are prosecuting the execution proceedings from the year 2004 and they are not able to get fruits of the decree which they have obtained as back as in the year 2002. However, in the facts and circumstances of this case, I feel it appropriate to continue interim order operating during the pendency of the second appeal for further four weeks from today. On expiry of four weeks from today, protection granted by this Court will cease to operate.