

(2020) 01 GUJ CK 0164
In the Gujarat High Court

Case No : R/Civil Revision Application No. 149 Of 2019

Malara Group Mk Shipping And Allied Services Thru Shri
Ashishbhai Joshi

APPELLANT

Vs

Ashwinbhai Harilal Padhariya

RESPONDENT

Date of Decision : 16-01-2020

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2020) 01 GUJ CK 0164

Hon'ble Judges : G.R.Udhwani, J

Bench : Single Bench

Advocate : Nikita S Barot, Sanskruti R Shukla, Kunal M Dave, Hardik H Dave

Judgement

G.R.Udhwani, J

1. The revision application seeks to assail the order dated 25.03.2019 rendered by the learned Principal District Judge, Kachchh at Bhuj in Civil Misc.

Application No.39 of 2018; seeking condonation of delay of 929 days in preferring the Regular Civil Appeal to assail the judgment and decree

rendered by the trial Court.

2. It appears that subject matter of the dispute in the suit is a commercial transaction between the parties. The petitioner herein in its written statement

has disowned such transaction and has alleged collusion between the plaintiff and defendant No.2.

3. To defend the suit one Ms. P.Y. Soni came to be engaged as an advocate by the defendant No.1 who allegedly defaulted appearance in the case.

It is stated that initially, in response to regular inquiry from the advocate, the defendant No.1 learnt that the suit was pending; however, eventually the

defendant No.1-petitioner came to know that the suit was decreed in absence of

the advocate Ms. P.Y. Soni and on being confronted with the said fact, she pleaded that advocate Mr. D.J.Gusai who jointly represented the petitioner failed to appear in the matter as a consequence of which the decree without hearing the petitioner was passed. This fact was known to the petitioner after about more than two years. It is the case of the petitioner that joint Vakalatnama with Mr. D.J.Gusai was filed by Ms.P.Y. Soni without knowledge and consent of the petitioner, and for such default, the proceedings against Ms. P.Y.Soni under the Advocates Act has been initiated and are pending consideration with the competent authority.

4. In the background of the above facts, this revision application is required to be considered.

5. Delay would necessarily put a litigant to an obligation to explain it before taking up his main cause. Needless to say that in absence of condonation of delay, main cause would suffer a premature termination to the prejudice of the litigant who may fail to explain the delay. The prudent litigant would therefore not cause a deliberate delay. Therefore, in absence of the demonstration of undue advantage of delay having been taken by such litigant, the

presumption would be that there was no deliberate delay. Therefore, endeavour of the Court would be to impart substantial justice on merits rather than

terminating the proceedings prematurely on the mere ground of delay. Of course, there is nothing wrong to expect the vigil from the litigant; at the

same time, the fact that the litigant would tend to rely upon the advocate engaged by it also cannot be ignored. In such cases if it is demonstrated that

the advocate was negligent, the Court would not be justified in prematurely terminating the meritorious case only on the ground that the litigant himself

was also negligent. In such cases also where no undue/unreasonable benefit was intended by delay, it must be condoned by imposing appropriate cost

upon the negligent litigant. It be noted that the procedure is hand made of law, its object is not to penalize a person, but to regulate or guide the

proceedings to substantial justice. This Court may add word of caution here that this would not mean that the delay should be blindly condoned. If no

explanation comes forth, if the delay is deliberate, if prejudice was intended to the adversary by delay, if undue advantage has been procured to the

prejudice of the adversary of the person seeking the condonation of delay, if the degree of negligence either by an advocate or the litigant himself puts

the case beyond the pale of repairs as also in similar such circumstances, the case must suffer premature termination. Thus, it would all depend upon the facts and circumstances of the case.

6. When it comes to representation of the client by an advocate in the litigation, it should not be forgotten that there exists implied assurance by an advocate to his client that he would give his optimum and would update his client with all the developments. Therefore, a litigant would be justified in relying upon his advocate. Considering the present day scenario where the hearing of the case may take years or decades, the litigant would be absolutely justified in his expectation that he would be updated by his advocate as and when a development takes place in the case or as and when the case is ripe for hearing. Litigant, under the circumstances, is not expected to track the matter on day to day basis. If the litigant says that he was assured by an advocate and he would be informed about the developments in the case or that he will call him as and when the case is ripe for hearing and that the advocate failed to do so, there could be no reason to doubt his statement in absence of contrary evidence or prejudice by delay to his adversary.

7. In Special Civil Application No. 23728 of 2007 between Samusunisha Begaum w/o Dr. Nasarullahkhan Dhaniani v. Vishnukumar Ambelal Patel, decided by this Court on 11.05.2012, it appears that focus of the Court was on the advocate exploiting or using the principle that for advocates' fault litigant should not be made to suffer by filing an affidavit taking entire blame upon himself. In the said context, it appears that the Court was constrained to make the observations in Paras 25 and 26. Although in Para 26, the Court referred to the observations made in Salil Dutta Vs. T.M. & M.C. Private Ltd. [(1993) 2 SCC 185]where the Court has pointed out that there is no absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognized and such an absolute rule would make the working of the system extremely difficult. Such observations were made after observing that in certain situation, the court may, in the interest of justice, set aside a dismissal order or an ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant. It was also observed that the defendant before the Supreme Court was not a rustic ignorant

villager but a private limited company with its head office at Calcutta itself and managed by educated businessmen who know where their interest lies. There is no difficulty in applying the observations in a suitable case; however, where it is shown that the advocate was negligent and such say was translated by a litigant into an action against the advocate. There can be no reason to discount the statement of litigant made on oath that it was suffering a decree sans hearing only on account of the negligence of an advocate.

8. In *Brij Kishore S. Ghosh Vs. Jayantilal Maneklal Bhatt and another* [AIR 1989 Gujarat 227] this Court while explaining what is liberal construction under Section 5 of the Limitation Act for construing 'sufficient cause' held that absence of negligence or inaction on the part of the party seeking condonation of delay is not a pre-condition for interpreting 'sufficient cause' in liberal manner. It was further held that the underlying principle to be kept in mind is that the ultimate object of the procedural law is to see that substantial justice is done to the parties, and therefore, it should be an endeavour of the court to ensure the resolution of the dispute as far as possible on merits in just, fair and reasonable manner. Technicalities should be discouraged. The Court pointed out that the questions to be asked is 'Is there deliberate delay?' 'It is on account of culpable negligence or on account of mala fides?' 'Is it on account of any ulterior motive so that it can reasonably be pointed out that by resorting to delay the litigant was likely to be benefited?'

9. This Court in Civil Application No.1 of 2018 in First Appeal No.32594 of 2018 decided on 04.02.2019 ruled that quantum of delay is not material but its explanation is material. No mala fides or malice would be presumed on the part of the litigant invoking the remedy with delay to his prejudice. It was further observed that no litigant particularly the one who pleads a good case would deliberately cause delay saddling upon explanation on his head for the same. The principles that 'sufficient cause' received liberal construction was reiterated in case of *K. Subbarayudu and Others Vs. The Special Deputy Collector (Land Acquisition)* [2017(8) SCALE 61].

10. Thus, there are cases and cases dealing with the different situations. In the opinion of this Court, each case is required to be decided keeping in mind the above principles on its own merits.

11. Reverting to the fact of the case as indicated above, the defendant No.1 has not only pleaded that it has a good case to try; not only has made grievance against erring advocate, but has translated the grievance into an action by prosecuting the advocate under the Advocates Act which action is pending consideration. There is no denial to the fact that the advocate for the defendant No.1 did not pursue the proceedings during the hearing of the case. There is no allegation against the defendant No.1 having procured undue advantage during the delayed period, prejudicing the case of the plaintiff. Thus, in the opinion of this Court, the case for condonation of delay is made out and the Court below was in serious error in rejecting the application after ignoring the settled judicial principles as also after failing to appreciate the facts of the case in its true perspective. Impugned order therefore cannot be sustained. The same is quashed and set aside. Delay is condoned. Appeal shall be posted with the lower appellate Court for its hearing in accordance with law. Rule is made absolute to the aforesaid extent.

12. It will be open for the petitioner to bring to the notice of the Executing Court this order and seek adjournment which shall be considered by the Executing Court in accordance with law.

Direct service is permitted.