

(2018) 08 BOM CK 0175
In the Bombay High Court
Case No : Writ Petition No.449 Of 2018

Mr. Luis Antonio Romualdo Jesus de Maria Jose De Abreu	APPELLANT
Vs	
Mrs. Linda D'Souza e Fernandes	RESPONDENT

Date of Decision : 24-08-2018

Acts Referred:

Code of Civil Procedure, 1908 — Order 41 Rule 5, Order 41 Rule 11, Order 41 Rule 3A(3), Section 96
Constitution of India, 1950 — Article 227

Citation : (2018) 08 BOM CK 0175

Hon'ble Judges : Nutan D. Sardesai, J

Bench : Single Bench

Advocate : M. D'Souza, Sagar Dhargalkar

Final Decision : Allowed

Judgement

1. Heard forthwith with the consent of the learned Advocate for the parties.
2. Admit.
3. Shri Sagar Dhargalkar, learned Advocate waives service of notice on behalf of the respondents.
4. This petition takes exception to the impugned order dated 14/02/2018 by invoking the jurisdiction of this Court under Article 227 of the Constitution of India. The parties would be referred to in their status before this Court as the petitioner and the respondents for brevity's sake hereinafter.
5. It was briefly the case of the petitioner that he alongwith his siblings were declared to be the owners of the suit property pursuant to the Judgment and Decree passed by the Senior Civil Judge, Panaji dated 21/08/2008 whereby the respondents were directed to give quiet and vacant possession thereof to them. The petitioner had filed the execution proceedings on

29/09/2016 seeking to execute the Judgment and Decree dated

21/08/2008.Â The respondents filed an appeal challenging the said Judgment and Decree on 27/06/2017 alongwith an application for the condonation

of delay of 9 years in filing the appeal and the same was registered and allotted to the Court of the District Judge-I, Panaji.Â The petitioner was

served and the matter of condonation of delay was fixed for appearance of his other siblings from time to time.Â One of such dates was fixed on

16/01/2018 and thereafter the matter was fixed on 27/02/2018 which was substantiated from the cover of the Court file and recorded by the Judge

under his hand.Â Â The learned District Judge-1 however took up the Misc. Application for hearing out of turn on 14/02/2018 and stayed the

operation of the Judgment and Order dated 21/08/2008 without hearing the petitioner and in blatant violation of law giving rise to the petition assailing

the order and seeking an appropriate writ to quash and set aside the same.

6. Heard Shri M. D'Souza, learned Advocate for the petitioner who contended that the respondents filed the First Appeal challenging the Judgment

and Decree dated 21/08/2008 after a delay of 9 years in June,2017 alongwith an application for the condonation of delay.Â The learned District Judge

-1 took the matter out of turn on 14/02/2018 and granted the stay of the Judgment and Decree which was sought to be executed by the petitioner.Â

The petitioner was served with the notice of the application for the condonation of delay in July,2017.Â Â The District Court did not assign any

sufficient causeÂ for granting the stay of the Judgment and Decree.Â It was his contention that the Appellate Court could not have granted the stay

of the Judgment and Decree when the appeal was not registered and the applicationÂ for the condonation of delay was sub-judice.Â In thatÂ

context he adverted to the provisions of Order XLI Rule 5, Order XLI Rule 3A and Order XLI Rule 11 CPC and besides placed reliance in Bhagwan

s/o. Ganpatrao Godsay v/s. Kachrual s/o. Bastimal Samdariya [1987 Bom.CR 153] while praying for the quashing of the order under challenge.

7. Shri S.G. Dhargalkar, learned Advocate for the respondents submittedÂ that the CMIS maintained by the Court showed the date of hearing as

06/02/2018 with the next date on 14/02/2018.Â The learned Judge had not at all taken the matter out of turn but on the scheduled date of hearing

when the petitioner had remained absent and for which no fault could be found

with the order of the Appellate Court. The Appellate Court had rightly granted the stay as otherwise the filing of the appeal would have been rendered infructuous.Â He next adverted to the pleadings in the petition to contend that the petitioner had himself filed the execution proceedings eight years from the date of decree and for that no prejudice would be occasioned to the petitioner in case the appeal was heard and decided.Â He too placed relianceÂ in Bhagwan Godsay (supra), and submitted that no prejudice whatsoever would be caused to the petitioner and therefore the petition had to be dismissed.

8. Shri Dâ??souza, learned Advocate for the petitioner in reply contended that the extract of the file cover clearly indicated the sequence of the dates recorded under the hand of the Judge unlike the CMIS which was maintained by the clerk of the Court. It was his contention that even assuming without admitting that there was inadvertent noting which had caused prejudice to the petitioner when the application was taken out of turn, in his absence and the order of stay passed by the Appellate Court the impugnedÂ order passed by the District Court was in gross violation of Rule 3A and the dicta in Bhagwan Godsay (supra), and therefore the petition had to be allowed.

9. i would consider their submissions, the judgment in Bhagwan Godsay (supra) apart from provisions of Order XLI CPC and decide the petition appropriately.

10. Admittedly, the Judgment and Decree in the petitionerâ??sfavour was passed on 21/08/2008 and which was sought to be executed by the petitioner in the year 2016 i.e. 8 years thereafter but within the time prescribed for the execution of a decree.Â However, the respondents had sought to challenge the said Judgment and Decree in appeal before the District Court 9 years later i.e. well beyond the period of limitationÂ Â alongwith an application for the condonation of delay.Â It is another matter that the learned District Judge granted a stay of the Judgment and Decree dated 21/08/2008 even before the appeal could be registered and stayed the judgment which was the subject matter of execution at the instance of the petitioner.Â The file cover relied upon by the petitioner clearly shows the listing of the dates of hearing on 05/07/2017, 22/08/2017, 05/10/2017, 23/10/2017, 05/12/2017, 16/1/2018 and next 27/02/2018 with this sequence of

the succeeding date disturbed by 14/2/2018. Therefore as rightly contended by Shri Dâ??souza, learned Advocate for the petitioner 14/2/2018 could never have been the date after 16/01/2018 when the file cover clearly reflected that it was listed on 27/2/2018.Â It is another matter that the CMIS shows that the case was fixed for hearing before the District Judge on 16/01/2018 followed by 06/02/2018 and thereafter on 14/02/2018 which apparently was a record made by the clerk of the Court and not by the Judge who had otherwise reflected the next date of hearing on the file cover under his hand.Â Besides this assertion by the petitioner in his petition had not been controverted by the respondents by filing any affidavit to the contrary to rebut that filed on behalf of the petitioner.Â Â It is in this backdrop that the proceedings have to be examined in the light of the relevant provisions of Order XLI to ascertain whether the learned District Judge was at all justified in his action to take the file out of turn and to stay the Judgment and Decree under execution even before the registration of the appeal.

11. Order XLI CPC deals with the appeals from original decrees while Rule 5 deals with the grant of the stay by an Appellate Court.Â Â Sub Rule 1 clearly provides that an appeal shall not operateÂ as a stay of the proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree. Rule 3(A) deals with an application for the condonation of delay and reads that when an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by an affidavit setting forth the facts on whichÂ the appellant relied to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.Â Sub-rule 3 in particular provides that where an application has been made under sub-rule(1), the Court shall not make an order for stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under Rule 11, decide to hear the appeal.Â Â In other words, it is amply clear from a reading of Rule 3(A)(3) that when an application for the condonation of delay in filing the appeal is made, the Court shall not make an order for the stay of the execution

of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under Rule 11, decide to hear the appeal.

12. Rule 11 empowers the Court to dismiss the appeal without sending notice to the Lower Court. In terms of Subrule (1) the Appellate Court after

fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day may dismiss the appeal. Sub Rule (2)

provides that if on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on

for hearing, the Court may make an order that the appeal be dismissed, sub-rule(3) and (4) Where an Appellate Court, not being the High

Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in

accordance with the judgment. Rule 11-A prescribed the time within which hearing under Rule 11 should be concluded and reads that every

appeal shall be heard under Rule 11 as expeditiously as possible and endeavour shall be made to conclude such hearing within sixty days from the date

on which the memorandum of appeal is filed. From a reading of this Rule and the records of the case it would be apparent that the first Appellate

Court had adjourned the hearing of the application for the condonation of delay time and again and which was well beyond 60 days as contemplated

under Order XLI Rule 11 (A) CPC. In any event looking to the dates of hearing involved in the application for the condonation of the delay from

05/07/2017 till 27/02/2018, it is apparent that more than 6 months time had elapsed only in deciding the stay application at the instance of the learned

District Judge -1.

13. Bhagwan Godsay (supra) were revisions which were placed before the Division Bench for hearing upon a reference made by Ratnaparkhi, J who

deferred from the view adopted by S.J. Deshpande, J. on the construction of Rule 3-A of Order XLI CPC. Shri S.J. Deshpande, J. had taken a

view that the provisions of Rule 3(A)(3) of Order XLI which prohibits the grant of the stay are directory and not mandatory and dismissed the

plaintiff's revision application. However Shri Ratnaparakhi, J. who heard the Civil Revision Application concluded that the view held by Shri

Deshpande, J. was opposed to Rule 3A(3) of Order XLI CPC and in that view of

the matter directed the matter to be placed before the learned Chief

Justice for the constitution of a Division Bench to deal with the matter.Â Â In that context the Division Bench formulated a question whether Rule

3A (3) of Order XLI CPC which directs that "the Court shall not make an order of stay of execution" whether the Appellate Court was

empowered to make interim orders of stay of execution of the decrees appealed from, pending the disposal of the application for the condonation of

delay made under Order XLI Rule 3A(1) CPC. In that context the Division Bench considered the scheme of Order XLI Rule 3A CPC, the powers of

the Appellate Court to grant the stay of execution of the decrees under Rule 5 and observed that Rule 3A thus, enacts a limitation on the powers of

the Appellate Court to grant stay of the execution of decrees in appeals barred by limitation.Â

14. In Bhagwan Godsay (supra), the Division Bench considered the scheme of Order XLI Rule 3A and considered the legislative enactment of Rule

3-A of Order XLI being thus intended to curb the practice "to admit appeal subject to the provisions as to limitation being raised at the time of

hearing," by prescribing a regulatory procedure. Thus, what the Legislature intended was to prevent the courts from admitting appeals without deciding

as to whether the appeal was barred by the law of limitation. This process of decision making would naturally take some time. The Legislature, aware

of this fact, also enacted Rule 11-A by the same Amending Act of 104 of 1976. Under Rule 11-A introduced simultaneously with Rule 3A, the appeal

is required to be heard for admission within 60 days from the date on which the memorandum of appeal is filed. This means that there is a period of 60

days from the date of filing the memorandum of appeal and the date on which the hearing under Rule 11 takes place. Did the Legislature intend that

during these 60 days the judgment-creditor should be free to execute the decree by virtue of the prohibition created by Rule 3-A? The Legislative

intent is clear. The Appellate Court should receive the memorandum of appeal, application for the condonation of delay and the application for stay.

The Legislative intent is that the right of appeal created by Section 96 should be advanced. The intent was that the courts should not admit appeals and

stay the execution of the decrees without deciding the question of limitation. The provision of the period of 60 days is an indication of the Legislative

awareness that during these 60 days the right of appeal should not be frustrated. We are of the opinion that the Legislature intended that the Appellate

Court may exercise its power of granting stay during these 60 days but shall not extend it beyond 60 days without admitting the appeal.

15. In *Bhagwan Godsay* (supra), the Division Bench was also seized of the question whether the use of the word 'shall' in Order XLI, Rule 3-A(3)

CPC indicates Legislative imperative. The Division Bench was seized of the construction of the word 'shall' as mandatory or imperative consistent

with the object of the Legislature to expedite disposal of the cases of condonation of delay and to ensure that such applications subserve the remedy

of appeal itself? The provision of 60 days for the transformation of the 'proposed' appeal [R. A(3)] into an 'appeal' (Rule 11) the situations like those

set out in paragraphs 19 and 20 are consistent with the permissive nature of the word 'shall'. The object of the enactment is merely to provide a

regulatory procedure to prevent appeals being admitted without considering the question of condonation of delay. The permissive or directory use of

the word 'shall' fully conforms to this Legislative intent. If construed as mandatory, the appeal may become infructuous, thereby destroying the

regulatory content of Rule 3-A for, then there is nothing left to regulate.Â In their opinions, therefore, the word 'shall' in Rule 3-A has not been used

to denote the imperative. It is permissive while the application for the condonation of delay is pending during the 60 days provided by the statute.Â

16. In *Bhagwan Godsay* (supra), the Division Bench in conclusion observed at paragraph 30 that theÂ creation of the right to appeal, and the Court's

duty to consider condonation of delay in preferring the appeal, on the one hand and the prohibition against grant of stay of execution of decrees on the

other create a situation which has to be resolved on the basis of accepted rules of construction. We have elaborated the reasons in the paragraphs 13

to 22 above. This discrepancy can be resolved by equitable construction of Rule 3-A of Order XLI , of Code of Civil Procedure. Order XLI , Rule 3-

A was enacted not for the purpose of prohibiting the stay of execution of decrees pending consideration of the applications for the condonation of

delay but for ensuring that the courts do not admit appeals without consideration of the application for the condonation of delay and to provide a

procedure to regulate the practice of Courts in this matter. This being the dominant purpose of the legislation, it is adequately fulfilled by the

construction which we have laid down. The construction which we have proposed is consistent with legislative intent that during 60 days that may be

taken for the hearing of the appeal under Rule 11, the appeals should be kept alive. In our opinion, Legislation did not intend that the right of appeal

should be frustrated by refusal to stay the execution of decrees during the interregnum between proceeding under Order XLI , Rule 3-A and Order

XLI , Rule 11. The intent was to enable the courts to stay the execution of decrees during this short period.Â The word 'shall' employed in Order

XLI, Rule 3-A(3) is permissive and not mandatory.Â There is a thin dividing line whereby this judgment would not support the case of the respondent

inasmuch as unlike what is contemplated in Rule 11A, the application for the condonation of delay was not decided within 60days period as to keep the

appeal alive and to grant the stay of theÂ execution of the decree under execution. In that view of the matter there is force in the contention of Shri

Dâ??Souza, learned AdvocateÂ that the learned District Judge -1 could not have granted the stay of the judgment and order dated 21/08/2008 only

on the specious premiseÂ that the purpose of filing the appeal would be defeated if stay was not granted.Â The appeal at the instance of the

respondents was the proposed appeal pending the condonation of delay of more than 9 years and besides the said application for the condonation of

delay was not decided within 60 days. Looked at from any point of view, the learned District judge could not have passed the order as it did in a

perfunctory manner and thereby caused prejudice to the petitioner.Â The impugned order therefore which is without jurisdiction cannot be allowed to

stand and in view thereof, iÂ pass the followingÂ Â

ORDER

The petition is allowed and the impugned order which does not assign sufficient reasons too is quashed and set aside. The First Appellate Court is

directed to expedite the hearing in the matter.