

(2015) 02 BOM CK 0356

In the Bombay High Court

Case No : Civil Revision Application No. 216 of 2014

Nanasaheb Laxman Jadhav and Others

APPELLANT

Vs

Dinkar Laxman Jadhav and Others

RESPONDENT

Date of Decision : 05-02-2015

Acts Referred:

Citation : (2015) 02 BOM CK 0356

Hon'ble Judges : A.I.S. Cheema, J.

Bench : Single Bench

Advocate : P.B. Shirsath, Advocate, for the Appellant; A.K. Gawali, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A.I.S. Cheema, J.—This Revision has been filed by applicants (original defendants in Regular Civil Suit No. 167/1992 - hereafter referred as defendants), whose Regular Civil Appeal No. 158/2004 against judgment and decree passed in favour of respondents (original plaintiffs - hereinafter referred as plaintiffs) was dismissed in default on 23.4.2013. The applicants - defendants tendered restoration application along with Delay Civil M.A. No. 156/2013 to condone delay of 117 days. The application came to be rejected and thus, the present revision.

2. It will be appropriate to refer to some facts in brief:--

Respondents - original plaintiffs, claiming to be step brothers of applicants - original defendants filed Regular Civil Suit No. 167/1992 before Civil Judge, Senior Division, Shrigonda, District Ahmednagar on 28.12.1992. The suit for partition came to be decreed on 5.4.2004 directing partition by metes and bounds to give the plaintiffs 2/5th share in the suit properties. Defendants filed Regular Civil Appeal No. 158/2004 before District Judge, Ahmednagar on 7.6.2004. On 23.4.2013, District Judge passed following order :

"Appellants and their advocate absent though called repeatedly. Respondents and

their advocate present. Since February, 2007 matter is fixed for hearing. Appeal is old one i.e. of the year 2004. It seems that Appellants are not interested in prosecuting the Appeal. Hence, Appeal stands dismissed in default."

3. On 17.9.2013, the defendants filed Delay C.M.A. No. 156/2013. The defendants No. 1 to 3, in the Misc. Application claimed that, defendant No. 1 was suffering from piles since March 2013 and was taking treatment at Dr. Bhapkar Hospital, Shrigonda. He was taking treatment between 20.3.2013 to 20.6.2013 and was advised by doctor not to travel. Thus, defendant No. 1 was unable to attend the Court. The Advocate of the applicants was also busy in another Court and so, could not attend the District Court when the appeal came up on 23.4.2013 and the same came to be dismissed. The defendant No. 1, on 21.8.2013, enquired about the appeal and came to know about its dismissal. On same day he applied for certified copies which were received on 30.8.2013. Thereafter defendant No. 1 was again ill and thus, could not file application in time for restoration of the appeal. On such grounds, defendants applied for condoning delay and to take the appeal on board.

4. Ad-hoc District Judge-2, Ahmednagar gave opportunity to the parties to lead evidence in the Misc. Application. The defendant No. 1 gave his evidence and also examined Dr. Abhayraj Bhapkar to prove the medical certificate. By order dated 13.11.2014, District Judge found that the medical certificate produced was anti-dated and was not genuine. It was observed that the same appeared to have issued on 20.3.2013 for the period of 20.3.2013 to 20.6.2013. The District Judge wondered as to how doctor could have anticipated such period in advance. It was also found that, if the defendant No. 1 was fit to resume work on 21.6.2013, the delay till 17.9.2013 was not explained when the M.A. came to be filed. The District Judge held that the delay caused was deliberate and sufficient cause was not made out. Consequently, the application came to be dismissed with costs.

5. In the present revision, defendants claimed that the order of the District Judge is erroneous. According to them, there was no application of mind. The dispute related to partition and separate possession of property. The doctor was wrongly disbelieved. It was error to hold that the medical certificate (Exhibit 58) was anti-dated and not genuine. It was wrongly held that the delay after 21.6.2013 till filing of the application was not explained. The grounds raised claimed that the impugned order deserves to be quashed and set aside.

6. The respondents - original plaintiffs, vide affidavit-in-reply dated 15.12.2014, prepared chart to show as to how since 28.12.1992 they have been litigating and till now have not been able to get the fruits of the decree. According to the plaintiffs, the defendants, after filing appeal, did not prosecute the same, but kept the same pending since they were in possession and enjoying the suit property. At the behest of defendants, the matter was referred to mediation, but was not attended. It is admitted fact that there was Advocate of the defendants available in the Court, but he did not attend the appeal. The defendants allowed

the appeal to be dismissed in default in calculated manner since they are in possession of suit property and thereafter filed application seeking restoration with application for condonation of delay. The plaintiffs have filed copy of the medical certificate (Annexure R-2) which has been disbelieved by the District Judge. Copies of the evidence recorded in the Misc. Application have also been filed at Annexure R-3. (Pages 55 to 63 - There is defective arrangement in filing. Affidavit-in-chief of defendant No. 1 is at pages 55 to 57 and then copy of evidence of Dr. Abhayraj is there, while cross-examination of defendant No. 1 is at Pages 61 to 63). It is claimed that, the defendant No. 1 admitted that whenever he had any difficulty, the defendant No. 2 Annasaheb Laxman Jadhav was being sent to attend the proceedings. According to the plaintiffs, they have been fighting for the legal rights since 28.12.1992, but the defendants have successfully frustrated all legal means. The entire exercise is to prolong the handing over of possession of the property to plaintiffs and to keep enjoying the suit property. Thus, the original plaintiffs want the revision application to be rejected.

The point for consideration is:--

"Whether the impugned order of the District Judge is illegal or suffers from material irregularity ?"

7. In this regard, the learned counsel for the applicants - original defendants submitted that the defendant No. 1 was suffering from piles and in that regard, had given medical certificate for his ailment between 20.3.2013 to 20.6.2013. During this period, the appeal came to be dismissed on 23.4.2013. It has been argued that, the District Judge wrongly observed that the period between 21.6.2013 (the end of period of medical certificate) till 17.9.2013 (when Delay C.M.A. was filed), had not been explained as according to the learned counsel, in para 4 of the application for condoning delay, the defendants had mentioned that the defendant No. 1 again fell ill after 30.8.2013 when the certified copy was received. The learned counsel submitted that the statutory appeal of the defendants has been dismissed and in the interest of justice, the delay needs to be condoned and the statutory appeal should be restored. The counsel relied on the case of Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Others, , where in paras 15 and 16, the Hon''ble Supreme Court referred to principles which should govern the question of condonation of delay. Referring to the same, it is submitted that there should be liberal approach for condoning of the delay when sufficient cause has been made out. It is submitted that, substantial justice is paramount and technical considerations should not throw out a claim.

8. Against this, counsel for the respondents - original plaintiffs submitted that, he is also relying on the same judgment of "Esha Bhattacharji" (supra). Referring to the principles laid down by the Hon''ble Supreme Court, it is argued by the counsel for plaintiffs that the application for condonation of delay was not bonafide and that the conduct and behaviour of the defendants was required to

be taken note of. According to the counsel, the defendants were conducting the matter in a calculated manner so that the litigation can be protracted as the defendants had possession of the property from which the plaintiffs were being deprived since 1992. It has been argued that, in the appeal filed by defendants, they sought the matter to be referred to mediation and when the same was taken up before mediator, they themselves did not appear. It is argued that, the copies of evidence filed show that defendant No. 1 used to send defendant No. 2 to the Court whenever he had difficulty, but now delay was sought to be condoned on the ground of ailment of defendant No. 1 alone. There was no reason why defendant No. 2 could not have gone and attended the matter. It is argued that the delay condonation application itself shows that on 23.4.2013 the Advocate of defendants was in the Court and was arguing matter somewhere else. There is no reason why the Advocate should not have attended. According to him, looking to the evidence of the doctor, the District Judge has rightly disbelieved the medical certificate. The evidence of doctor shows that medical certificate was issued on 20.3.2013. The doctor could not have anticipated the period from 20.3.2013 to 20.6.2013 as absolute necessity for rest. Referring to para 4 of the delay condonation application, the counsel submitted that the pleading was vague that the defendant No. 1 again fell ill after 30.8.2013. There was no proof of said ailment.

9. Before appreciating the rival contentions, it would be appropriate to reproduce the principles laid down by the Hon'ble Supreme Court with reference to condonation of delay. In the matter of Esha Bhattacharji, paras 15 and 16 read as under :

"15. From the abovesaid authorities the principles that can broadly be culled out are :

(i) There should be a liberal, pragmatic, justice oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant

so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that 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.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

16. To the aforesaid principles we may add some more guidelines taking note of the present day scenario. They are:--

(a) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(b) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(c) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters."

10. Keeping in view the above principles, if the present matter is considered, it

can be seen that the litigation was pending since 28.12.1992. The decree came to be passed on 5.4.2004. The order of the District Judge, dated 23.4.2013, dismissing the appeal observed that the appellants - original defendants and their Advocate was absent though called repeatedly. It was observed that, since February 2007 matter was fixed for hearing and it was an old appeal of 2004. District Judge observed that the appellants - original defendants were not interested in prosecuting the appeal and dismissed the same. The defendants claimed in the delay condonation application that the defendant No. 1 was ill from 20.3.2013 to 20.6.2013. For this, Dr. Abhayraj Bhapkar was examined. Copy of the evidence is available at Page 58 where this B.A.M.S. Doctor claimed that he issued the certificate (Exhibit 58) to the defendant No. 1 on 20.3.2013. He again changed his version to claim that it was given on 21.6.2013. The copy of evidence of defendant No. 1 (Exhibit R-3 - Page 55) shows (at Page 62) that he was admitted in hospital by the doctor on 20.3.2013 for four days and the medical certificate was issued to him after one month. The doctor Abhayraj Bhapkar of course claimed that he had treated defendant No. 1 only as an outpatient. The District Judge has found that the certificate is anti-dated and not genuine. I do not think that the observations of the District Judge are baseless.

11. District Judge observed that delay between 21.6.2013 to 17.9.2013 was not explained. The learned counsel for applicants - original defendants claimed that, in para 4 of the application, defendant No. 1 had claimed that, after receiving certified copy on 30.8.2013, he had again fallen ill. In this regard, while Dr. Abhayraj deposed that after 20.6.2013 the defendant had not come to him for the same ailment (Page 60 of petition), the defendant No. 1 himself claimed (at Page 62) that on 30.8.2013 he again fell ill with piles and took further treatment from Dr. Bhapkar. Even if this was to be ignored, the fact remains that the delay condonation application does not speak anything as to delay between 21.6.2013 when period as per certificate came to an end till 21.8.2013 when it is claimed that defendant No. 1 went to the Court to enquire about the appeal.

12. It is rightly submitted by the learned counsel for the plaintiffs by referring to the evidence of defendant No. 1 (Page 61 of the Petition), that whenever he had difficulty, he used to send his brother Annasaheb (defendant No. 2) for Court work, to the Court, and so, there was no reason why even if it is accepted that the defendant No. 1 was ill, the defendant No. 2 could not have gone and pursued his appeal.

13. For above reasons, I do not find that fault could be found with the observations of the District Judge that the delay caused was deliberate. When there are other defendants also and it is shown on record that defendant No. 2 was indeed attending Court work also, by merely referring to the ailment of defendant No. 1 it cannot be said that the delay has been sufficiently explained. Seeking sympathy of Court by referring to such medical certificate, that too of one of the defendants, when others could also attend and banking on plea that my statutory appeal should not be barred on technicalities, needs to be

discouraged. The request to condone the delay cannot be said to be bona fide. The learned counsel for original plaintiffs has rightly criticized the conduct of the defendants to submit that the litigation was being protracted to keep out plaintiffs from enjoying the fruits of the decree. Defendant No. 2 admitted (Page 62 of Petition) that he had no difficulty to contact his Advocate on phone between 20.3.2013 to 20.6.2013. In present days of mobile phones, it must be treated as fanciful to say that "I was suffering from piles for three months and although my brother is there to attend the matter, I did not send my brother to the Court or to my Advocate and I never phoned called my Advocate and still, look at my ailment of three months and condone the delay of 117 days." Such non-serious approach to condonation of delay cannot be accepted.

14. Keeping in view judgment of the Hon"ble Supreme Court in the matter of Esha Bhattacharji (supra) and considering the material available on record in the present matter, I do not find that the impugned judgment of the District Judge suffers from any illegality or that there is any material irregularity in the same.

15. There is no substance in the revision application. The same is rejected.

On request of counsel for applicants, the interim protection granted vide order dated 22.12.2014 is continued till 4th March 2015. The amount of Rs. 6,00,000/- directed to be deposited by order dated 22.12.2014 be returned to the applicant who deposited the same, after 4th March 2015.