

(2022) 05 GUJ CK 0006
In the Gujarat High Court

Case No : R/Special Civil Application No. 6547 Of 2020

Nimesh Dilipbhai Brahmbhatt

APPELLANT

Vs

Hitesh Jayantilal Patel

RESPONDENT

Date of Decision : 02-05-2022

Acts Referred:

Constitution Of India, 1950 — Article 227
Code Of Civil Procedure, 1908 — Order 8 Rule 1

Citation : (2022) 05 GUJ CK 0006

Hon'ble Judges : Dr Ashokkumar C. Joshi, J

Bench : Single Bench

Advocate : Mousam R Yagnik, Nirad D Buch

Final Decision : Allowed

Judgement

Dr. Ashokkumar C. Joshi, J

1. RULE.

2. This petition under Article 227 of the Constitution of India is filed by the petitioners – original defendant Nos. 3 and 4 with a prayer to set aside the order dated 6.2.2020, passed below Exh. 44 in Special Civil Suit No. 447 of 2010 by the learned 3rd Additional Senior Civil Judge, Surat. By the said application Exh. 44, the petitioners – original defendant Nos. 3 and 4 had prayed for to open their right to file written statement, which was closed on 1.5.2012.

3. Despite due service, the respondents have chosen not to appear before this Court, leaving no option but to proceed with the matter Ex-parte.

4. Heard learned advocate Mr. Nirad Buch for the petitioners. He submitted that the respondent No. 1 has filed the Special Civil Suit No. 447 of 2010 in the concerned Civil Court at Surat for declaration and permanent injunction, wherein, pursuant to the summons issued, the petitioners filed their appearance through their advocate on 14.12.2010. However, thereafter, there was no instructions

from the learned advocate representing the petitioners before the learned Court below with regard to the filing of written statement and therefore, written statement could not be filed by the petitioners in the suit. It is submitted that the petitioners could not file the written statement only because of the learned advocate did not inform the petitioners about the same nor he took any steps in that regard and accordingly, the right of the petitioners to file the written statement came to be closed on 1.5.2012. He submitted that the respondent No. 1 filed his affidavit in lieu of examination in chief and a copy of the same served upon the petitioners by the R.P.A.D, and only thereafter the petitioners learnt about the non-filing of the written statement by their advocate. He submitted that in the aforesaid facts and circumstances, delay of 3330 days caused in filing the written statement.

5. He submitted that the learned trial Judge has failed to appreciate the fact that for the inaction on the part of the advocate representing the case of the petitioners, the legitimate right of the petitioners to defend the suit cannot be snatched away. He submitted that as soon as the petitioners came to know about the status of the case, they acted upon, hired another advocate to represent their case and filed necessary application. Accordingly, the learned trial Court has committed a material irregularity in passing the impugned order by not allowing the petitioners to file their written statement and by not exercising the powers conferred by Order VIII Rule I of the Civil Procedure Code, 1908 (CPC).

6. Learned advocate for the petitioners further submitted that the learned trial Court has taken a very hyper technical view of the matter and disallowed the application, otherwise, the petitioners have a good case on merits.

7. Thus, making above submissions it is urged that this petition may be allowed in the larger interest of justice by setting aside the impugned order and further to allow the petitioners to file their written statement.

8. Regard being had to the submissions advanced and considering the material placed on record as well as the impugned order passed below Exh. 44 in Special Civil Suit No. 447 of 2010, it appears that the respondent No. 1 has filed the aforesaid suit for declaration for permanent injunction in which the petitioners are arrayed defendant Nos. 3 and 4. Undisputedly summons issued by the learned trial Court was served upon the petitioners on 14.12.2010 pursuant to which, the petitioners engaged an advocate to represent their case before the learned trial Court. However, no written statement was filed on behalf of the petitioners resulting into closure of the right of the petitioners to file the written statement by virtue of an order dated 1.5.2012. It is the case of the petitioners that the learned advocate representing their case before the learned trial Court had not informed the petitioners nor he took any pains to file the written statement on behalf of the petitioners. It is further the case of the petitioners that the petitioners came to know about the status of the suit only when they received the affidavit of examination in chief of the respondent No. 1 – plaintiff by way of R.P.A.D and thereupon the petitioners immediately move on and

consulted another advocate and accordingly such delay has occurred in filing the written statement.

9. In this regard, it would be worthwhile to refer a decision of the Hon'ble Apex Court in *Indian Oil Corporation Ltd. and Ors. vs. Subrata Borah Chowlek and Ors.* (12.11.2010 – SC): MANU/SC/1252/2010 has observed as under:

"7. Having heard the Learned Counsel, we are of the opinion that in the instant case a sufficient cause had been made out for condonation of delay in filing the appeal and therefore, the High Court erred in declining to condone the same. It is true that even upon showing a sufficient cause, a party is not entitled to the condonation of delay as a matter of right, yet it is trite that in construing sufficient cause, the Courts generally follow a liberal approach particularly when no negligence, inaction or mala fides can be imputed to the party. (See: *Shakuntala Devi Jain v. Kuntal Kumari and Ors.* MANU/SC/0335/1968 : (1969) 1 SCR 1006; *The State of West Bengal v. The Administrator, Howrah Municipality and Ors.* MANU/SC/0534/1971 : (1972) 1 SCC 366; *N. Balakrishnan v. M. Krishnamurthy* MANU/SC/ 0573/1998 : (1998) 7 SCC 123; *Sital Prasad Saxena v. Union of India and Ors.* MANU/SC/0294/1984 : (1985) 1 SCC 163).

10. In *Ramlal, Motilal and Chhotelal v. Rewa Coalfields Ltd.* MANU/SC/0042/1961 : (1962) 2 SCR 762, this Court held that:

In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favor of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree -holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree- holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in *Krishna v. Chathappan* ILR (1890) 13 Mad 269 "Section 5 gives the court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fide is imputable to the Appellant.

11. Thus, the consideration which cannot be ignored is that if sufficient cause for excusing delay is shown, discretion is given to the Court to condone delay. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial

justice.

12. Further, it is trite law that a party should not suffer due to the in action on the part of the advocate and that the matter should be decided on merits rather than on technical ground.

13. At this juncture a beneficial reference can be made to a decision of the Hon'ble Apex Court in Ram Nath Sao Alias Ram Nath Sahu and Ors. v. Gobardhan Sao and Ors. MANU/SC/0135/2002: (2002) 3 SCC 195, wherein, Court has observed as under:

"But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over-jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lies terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way."

(emphasis supplied)

14. In the aforesaid backdrop, the Court is of the considered view that valuable right of the defendant Nos. 3 and 4, and petitioners herein should not be defeated by declining to condone the delay which has occurred for the in action on the part of their advocate. More so when, despite service the respondents herein have chosen not to appear before this Court and to controvert the petition. Accordingly, the Court is inclined to exercise discretion in favour of the petitioners, however with some exemplary costs.

15. For the aforesaid discussions and observations, this petition succeeds and is allowed accordingly. The impugned order dated 6.2.2020 passed by below Exh. 44 in Special Civil Suit No. 447 of 2010 by the learned 3rd Additional Senior Civil Judge, Surat is set aside, subject to petitioners paying a costs of Rs.20,000/- (Rs. Twenty Thousand only), which shall be deposited before the learned Trial Court concerned within 15 days, which the original-plaintiff shall be at liberty to withdraw the same. The petitioners are permitted to file their written statement within a period of 15 days from the date of receipt of copy of this order. All endeavour shall be made to expedite the suit and the parties shall co-operate the learned trial Court in the same. Rule is made absolute accordingly.