

(1986) 11 BOM CK 0021

In the Bombay High Court

Case No : C. Revision Application No. 154 of 1984

Pushpaben Dayashankar Pandya and others

APPELLANT

Vs

Jagannath Valji Kapadia

RESPONDENT

Date of Decision : 06-11-1986

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (1987) MhLj 209

Hon'ble Judges : M.S. Jamdar, J

Bench : Single Bench

Advocate : Narendra V. Walavalkar, for the Appellant; D.K. Ghaisas, for the Respondent

Final Decision : Allowed

Judgement

M.S. Jamdar, J.—The original plaintiffs in Civil Suit No. 400 of 1981 have preferred this Revision Application being aggrieved by the order condoning the delay committed by the respondent in filing the appeal against the Judgment and decree passed in aforesaid suit.

2. The petitioners filed the said suit for declaration that they are the absolute owners of the properties mentioned in the Schedule annexed to the plaint, that the respondent defendant in that suit, has no right, title and interest over or in respect of the suit properties and for injunction restraining the respondent from disturbing or interfering with their peaceful possession.

3. The respondent, after being duly served with the summons of the suit, put in his appearance through his Advocate, but did not file his written statement even after obtaining several adjournments for that purpose. He also failed to give instructions to his Advocate, who was, therefore, constrained to pass no instructions purshis and to withdraw his appearance. Before that, the trial Judge was pleased to pass an order, viz.

".....W. S. not filed. Proceed without Written statement....."

It was thereafter that respondent's Advocate sent a letter on or about 12th October 1981, but the respondent did not remain present in Court to give instructions to his Advocate in response to the said letter and, hence, Shri Vaidya, Advocate, who represented the respondent in the said suit, filed no instruction pursuant on 7th November 1981. The suit, therefore, was proceeded ex parte as against the respondent and decree was passed against the respondent on 9th December 1982. Thereafter the respondent filed an application for setting aside the ex parte decree. As there was delay in filing the said application, he filed another application, being Misc. Application No. 32 of 1983, for condoning the delay in filing the application for setting aside the ex parte decree passed on 9-12-1982. He sought indulgence of condonation of delay on the ground that he was sick and, hence, he could not give instructions to his Advocate and that he came to know about the decree, for the first time, on 1-2-1983. According to him, after coming to know about the decree, he filed an application for certified copies of the Judgment and decree and filed an application for setting aside the ex parte decree within three days viz. 4-2-1983.

4. During the pendency of the aforesaid application for condonation of delay, the respondent obtained certified copies of the Judgment and decree in the suit on 3-7-1983 and filed an appeal against the said decree on 29-7-1983. As obviously, there was delay in filing this appeal, he filed Misc. Civil Application No. 190 of 1983 for condonation of delay in preferring the appeal. He sought the condonation on the ground that he was sick, and that he came to know about the decree for the first time on 1-3-1983 and that he could not arrange for the requisite funds within the time prescribed for filing the appeal.

5. The learned VIth Extra-Addl. Dist. Judge, Thane, who heard the matter, held that the contention that the respondent was sick at the material time, was barred by res judicata in view of the adverse finding given on that question by the learned trial Judge while rejecting the application for condonation of delay in preferring application for setting aside the ex parte decree. He further held that the paucity of funds required for paying the Court fee for the appeal could not be a sufficient cause which prevented the respondent from filing appeal in time, because, he could have filed the appeal and prayed for time for paying the requisite Court fee. The learned Extra Addl. Dist. Judge, however, found that the suit involved substantial questions of fact and law about the ownership of the property involved in the suit and also about the validity of the Will executed in favour of the respondent by the deceased owner of the suit property Shri Vallabhdas Pandey, whose heirs the petitioners claimed to be. This sole circumstance, according to the learned Judge, was sufficient cause for condoning the delay. Consequently, he allowed the application subject to the payment of Rs. 300/- to the petitioners by the respondent as costs of the application. It is this order of the learned Addl. District Judge that is challenged in this Revision Application/

6. As rightly contended by Shri N. V. Walavalkar, the circumstance that the suit

involves substantial questions of law and fact, cannot be sufficient cause for condoning delay u/s 5 of the Limitation Act. Sufficient cause contemplated by section 5 of the Limitation Act, must be such as prevented the appellant or applicant from preferring appeal or making an application within the prescribed time. Section 5 of the Limitation Act does not lay down that the period of limitation can be extended under that provision by the Court for any sufficient cause. It lays down that any appeal or application, other than under any of the provisions of Order XXI of C.P.C. may be admitted after prescribed period, if the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. The satisfaction of the Court contemplated by this provision is about the existence of sufficient cause for not preferring appeal or making application within such period. The Court is not competent to extend the period for any other cause, however weighty it may be. The cause must be such as resulted in the delay sought to be condoned. The cause must have nexus with the delay". Hence, the fact that suit involves substantial questions of law and fact, cannot by any stretch of the relevant provisions of section 5 can be considered as sufficient cause for extension of the prescribed period. The learned Addl. District Judge was, therefore, wrong in condoning the delay on this ground.

7. Ordinarily, the above finding would have justified setting aside the impugned order and dismissing the application for condonation of delay, but for refusal of the Addl. Dist. Judge to take into consideration the first and main ground on which the delay was sought to be condoned, viz. illness preventing the respondent from filing the appeal in time. The learned Addl. Dist. Judge rejected this ground at the threshold holding that this question is barred by res judicata in view of the finding of the trial Judge on that question in the application filed by the respondent for condonation of delay in filing the application for setting aside the ex parte decree. A careful perusal of the Judgment of the trial Judge in the aforesaid application would clearly show that the learned Addl. District Judge was wrong in accepting the plea of res judicata raised by the petitioners in respect of the contention of the respondent that illness prevented him from preferring the appeal in time. As a matter of fact, it will be seen from the Judgment of the learned trial Judge in Misc. Application No. 32 of 1983 that the learned Judge forgot that he was trying the application for condonation of delay in preferring the application for setting aside ex parte decree and not the application itself for setting aside the ex parte decree. He observed while concluding the matter that the applicant (present respondent) did not satisfy him that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. That was not the relevant question. The relevant question was whether the respondent was sick from the date of decree till filing of the application for condonation of delay in setting" aside the ex pane decree. In effect, therefore, there was no finding on this point in the aforesaid Misc. Application decided by the trial Court. There was, therefore, no question of the issue about respondent's sickness during the material time being barred by res judicata.

That finding cannot be sustained and as the learned Addl. District Judge has not considered this contention on merit, the matter will have to be remitted back for decision on this question of fact.

8. The Revision Application is, therefore, allowed and the matter is remanded back to the learned Additional District Judge for deciding on merits whether the grounds given by the respondent for condonation of delay are proved and can be considered as sufficient causes within the meaning of section 5 of the Limitation Act, after giving opportunity to the parties to lead evidence, oral as well as documentary, in support of their respective contentions.

No order as to costs.