
(2015) 06 BOM CK 0152

In the Bombay High Court

Case No : Writ Petition No. 6835 of 2014

Rajendra Namdeorao Akre

APPELLANT

Vs

Rajkumar Bhalerao Balbudhe and Others

RESPONDENT

Date of Decision : 30-06-2015

Acts Referred:

Citation : (2016) 1 MhLj 184

Hon'ble Judges : A.S. Chandurkar, J

Bench : Single Bench

Advocate : H.S. Chitaley, for the Appellant; S.P. Kshirsagar, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.S. Chandurkar, J.—Shri H.S. Chitaley, the learned counsel appearing for the petitioner states on instructions that respondent No. 2 has filed a pursis before the Appellate Court stating that she does not desire to contest the proceedings. Statement accepted. In view of aforesaid statement presence of respondent No. 2 is dispensed with.

2. Rule. Heard finally with consent of the learned counsel for the parties.

3. By the present writ petition the petitioner takes exception to the order dated 11.09.2014 passed in Misc. Civil Application No. 328/2012 whereby the delay in filing restoration application has been condoned subject to costs of Rs.10,000/.

4. Brief facts are that the petitioner is the original plaintiff who filed suit for specific performance of an agreement dated 11.04.1991. Said suit came to be decreed on 10.10.1994. The respondents had filed First Appeal No. 101/1995, which came to be dismissed by learned Single Judge on 02.05.2009. This adjudication was made subject matter of challenge before the Supreme Court and on 30.07.2010, the Supreme Court allowed the appeal preferred by the respondents and after setting aside the judgment of learned Single Judge remanded the proceedings for fresh disposal.

5. After this order came to be passed, First Appeal No. 101/1995 was dismissed in default on 13.06.2011. An application for restoration of this appeal was filed on 06.07.2011 and by order dated 14.10.2011 said application came to be allowed. Accordingly, the First Appeal was restored. On 23.11.2011 the appeal was again dismissed in default due to absence of the appellants and their counsel. On 15.02.2012 an application seeking condonation of delay in filing restoration application was moved by the respondents. The proceedings came to be transferred to the District Court due to enhancement of its pecuniary jurisdiction. By the impugned order this application has been allowed by the learned District Judge by condoning the delay subject to costs of Rs.10,000/to be paid to the present petitioner.

6. Shri H.S. Chitaley, the learned counsel appearing for the petitioner submitted that the Appellate Court erred in condoning the delay in filing the application for restoration. He submitted that the respondents had been negligent throughout the proceedings and no reason whatsoever was assigned by them for having the delay condoned. He referred to the earlier application for restoration dated 06.07.2011 and submitted that the reasons mentioned in that application had been repeated in the subsequent application dated 15.02.2012. He further submitted that after the appeal was restored on 14.10.2011, the respondents were expected to be diligent in prosecuting the appeal. The reason as assigned that Vakalatnama was not available with the counsel indicates callous approach of the respondents. He then submitted that the respondents were merely interested in delaying the proceedings with a view to deprive the petitioner of the fruits of the decree passed. He submitted that execution proceedings had already been filed in which the petitioner had deposited a sum of Rs.11 lakhs and the sale deed came to be executed in his favour on the basis of decree as passed. He also submitted that in one hand the respondents were delaying the proceedings and on the other hand they were going ahead with some construction on the suit property. He, therefore, submitted that in absence of any explanation whatsoever the delay could not have been condoned merely by observing that the proceedings were required to be adjudicated on its own merits. He placed reliance on the following decisions.

[i] P.K. Ramachandran Vs. State of Kerala and Another, AIR 1998 SC 2276 : (1997) 2 CTC 663 : (1997) 72 ECR 785 : (1998) 7 JT 21 : (1998) 120 PLR 605 : (1997) 6 SCALE 209 : (1997) 7 SCC 556 : (1997) 4 SCR 204 Supp : (1997) 2 UJ 747 : (1998) AIRSCW 2177 : (1997) 8 Supreme 332

[ii] Pundlik Jalam Patil (D) by Lrs. Vs. Exe. Eng. Jalgaon Medium Project and Another, (2009) 1 CLR 123 : (2008) 5 CTC 663 : (2009) 153 PLR 128 : (2008) 13 SCALE 773 : (2008) 17 SCC 448

[iii] Balwant Singh (Dead) Vs. Jagdish Singh and Others, AIR 2010 SC 3043 : (2010) 7 JT 398 : (2010) 8 SCC 685 : (2010) 8 SCR 597 : (2010) AIRSCW 4848 .

[iv] Oriental Aroma Chemical Industries Ltd. Vs. Gujarat Industrial Development

Corporation and Another, (2010) 2 JT 389 : (2010) 5 SCC 459 : (2010) 2 SCR 1172 : (2010) 3 UJ 1276 .

[v] Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai, AIR 2012 SC 1629 : (2012) 114 CLT 847 : (2012) 3 RCR(Civil) 73 : (2012) 4 SCALE 248 : (2012) 5 SCC 157 : (2012) AIRSCW 2412 : (2012) 2 Supreme 674 .

7. Shri S.P. Kshirsagar, the learned counsel appearing for respondent No. 1 supported the impugned order. According to him, the Appellate Court had rightly exercised discretion in favour of the respondents by condoning the delay. He submitted that dismissal of the appeal could not be attributed to the respondents but the same was on account of absence of their counsel and in view of the fact that the counsel was not having the requisite Vakalatnama. He relied on the averments made in the application dated 15.02.2012 and contended that necessary explanation had been duly assigned. He further submitted that there was no question of prejudice being caused to the petitioner as costs had been directed to be paid while condoning the delay. He also submitted that in view of observations made by the Supreme Court while remanding the proceedings the same were liable to be decided on merits. He placed reliance on the decisions in Improvement Trust, Ludhiana Vs. Ujagar Singh and Others, (2010) 159 PLR 777 : (2010) 6 SCALE 173 : (2010) 6 SCC 786 and Gangadhara Palo Vs. The Revenue Divisional Officer and Another, (2011) 2 CTC 451 : (2011) 3 JT 518 : (2011) 164 PLR 516 : (2011) 3 RCR(Civil) 343 : (2011) 3 SCALE 498 : (2011) 4 SCC 602 : (2011) 3 SCR 746 : (2012) 25 STR 273 : (2012) 35 STT 463 : (2011) AIRSCW 1811 .

8. I have carefully considered the rival submissions and I have gone through the documents filed on record. The proceedings have been long drawn and the parties are litigating with regard to validity of the agreement dated 11.04.1991. The manner in which the proceedings have progressed is evident from various orders passed that have been referred to hereinabove. The aspect that requires consideration is whether the Appellate Court was justified in condoning the delay in seeking restoration of the appeal.

9. After the proceedings were remanded, the appeal came to be initially dismissed on 13.06.2011. In the application for restoration dated 06.07.2011 in para 2 thereof it was stated that as the earlier counsel had not given no objection along with the record of the case, the appeal came to be dismissed on 13.06.2011 in default. This reason was accepted by this Court when it restored the appeal on 14.10.2011. The appeal was again dismissed on 23.11.2011. In para 2 of the subsequent restoration application dated 15.02.2012 the very same reason that was stated in the earlier application dated 06.07.2011 has been reproduced. In para 4 of the application dated 15.02.2012 it has been stated thus, "That the applicants enquired about the progress of the matter on 12-02-2011 and on 13-02-2011 the search of the matter was taken. It is noticed that the first appeal was dismissed by this Hon"ble Court on 23.11.2011. Therefore, immediately the application for condonation of delay along with

application for restoration are prepared and filed before this Hon''ble Court".

Except these averments in para 4 of the said application there is no other statement made seeking to explain the reason for the delay that occurred in filing the restoration application. In fact the application for condonation of delay does not contain any reason whatsoever to explain the cause for the delay in filing restoration application after dismissal of the appeal on 23.11.2011.

10. The learned Judge of the Appellate Court while considering said application has held firstly the previous order of dismissal could not be considered to be on account of any fault of the present respondents. It is then observed that as the proceedings had been remanded for adjudication on merits the delay deserved to be condoned. It has then considered the averments made in para 2 of the application which averments can at the most be said to be the reason for dismissal of the appeal in default. In this background the Appellate Court proceeded to condone the delay subject to costs of Rs.10,000/.

11. It is a settled position of law that in absence of any proper explanation for delay, the same cannot be condoned merely for the asking. The explanation has to be reasonable or plausible to enable the Court to exercise judicial discretion - Balwant Singh (supra). Similarly, the Court has to record a satisfaction that the explanation for the delay was reasonable or satisfactory - P.K. Ramachandran (supra). Though a liberal approach is required to be adopted, such approach cannot be so exercised when there is total absence of explanation for the delay being caused - Maniben Shah (supra).

As noted above, in para 4 of the application it is stated that on 12.02.2011 and 13.02.2011 the search of the matter was taken and the appeal was dismissed on 23.11.2011. It is thus obvious that there is no explanation furnished by the respondents for the delay to be condoned. The period taken after 23.11.2011 till 15.02.2012 has not been accounted for. In fact the application is totally silent in that regard. The Appellate Court therefore, misdirected itself when it considered the dismissal to be the fault of the counsel and hence the reason for condoning the delay. Such explanation was also not furnished by the respondents herein.

12. In Improvement Trust, Ludhiana (supra) relied upon by the learned counsel for the respondent No. 1 it was observed by the Supreme Court that unless there was mala fide on the conduct of the party, as a normal rule delay should be condoned. There can hardly be any dispute with aforesaid observation. However, in absence of any explanation whatsoever and considering the approach of the respondents of not taking remedial steps even after the earlier order dismissing the appeal on 13.06.2011 was set aside clearly indicates their negligence and lack of diligence in prosecuting the proceedings. It is further well settled that the reason for delay being caused is more material than the period of delay. The reliance placed by learned counsel for respondent No. 1 on the observations made in para 2 of the judgment in Gangadhara Palo (supra) wherein delay of 71 days was condoned, do not assist the case of the respondent No. 1 to have delay

condoned in absence of any explanation whatsoever.

13. As regards the direction to pay costs, it is already noted that the costs can be ordered subject to there being any reasonable ground to condone the delay. By imposition of costs the requirement of furnishing sufficient cause cannot be dispensed with. Costs cannot be a substitute for absence of reasons to condone the delay. The rights that had accrued in favour of petitioner in view of the decree in his favour are also required to be taken into consideration. Therefore, in absence of any reason whatsoever being furnished by the respondents in the application for condonation of delay dated 15.02.2012, the delay in filing restoration application could not have been condoned. While doing so, the Appellate Court disregarded the law as laid down by the Supreme Court and has thereby exercised jurisdiction with material irregularity. Though normally the Court would be loath to interfere with an order condoning delay, the present is a case where the impugned order if maintained would result in an order based on no material being permitted to operate. A case has therefore, been made out to interfere in writ jurisdiction.

14. As a result of aforesaid discussion, the following order is passed:

[i] The order dated 11.09.2014 passed by the Appellate Court below Exh.1 in Misc. Civil Application No. 328/2012 is set aside. Instead the application for condonation of delay dated 15.02.2012 stands dismissed.

[ii] Writ petition is allowed in aforesaid terms. No costs.