

(2009) 08 BOM CK 0124

In the Bombay High Court

Case No : Civil Application No. 9464 of 2008 in Civil Application St. No. 5057 of 2008 in Second Appeal No. 225 of 1989

Vithhal Dhondiba Chawan (Died) (through LRs. Rajaba Chawan, Anil Vitthalrao Chawan and Santosh Chawan

APPELLANT

Vs

Madhavrao alias Mahadev Tukaram Chavan, Rama Tukaram Chawan, Sadashiv Tukaram Chawan and Parasram Sitaram Chawan

RESPONDENT

Date of Decision : 06-08-2009

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2009) 5 BomCR 29 : (2009) 111 BOMLR 3258 : (2011) 1 RCR(Civil) 599 : (2011) 1 RCR(Civil) 599

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : V.D. Salunke, for the Appellant; P.G. Godhamgaonkar, for the Respondent

Judgement

S.S. Shinde, J.—The present civil application is filed for condonation of delay in filing civil application for bringing Legal Representatives of deceased appellant Vitthal Chavan on record, who died on 30th October, 1999. There is delay of 2945 days in filing the application.

2. It is the case of the applicants that the original appellant being Karta of the family, was looking after the affairs of the family including the proceedings of the second appeal. During pendency of the second appeal, the present applicants 2 and 3 were minor and applicant No. 1 being an illiterate lady, residing in village, was not aware about pendency of second appeal before this Court.

It is further case of the applicants that on or about 15th November, 2004, they received a letter from the Advocate Shri C.V. Korhalkar addressed to the original appellant late Vitthal Chavan. The applicants came to know about the pendency of second appeal, they came to Aurangabad and contacted the concerned Advocate

and informed him about the death of original appellant. The Advocate advised them to bring death certificate and heir certificate. He further told the applicants to engage some another advocate of their choice and he will be unable to handle the matter. Along with the application, copy of the letter written by the concerned Advocate is annexed.

3. The applicants returned back to the village and applied for certificates on 26.11.2004 and they received said certificates from the authorities. Immediately, the applicants rushed to Aurangabad and tried to contact the lawyer but, the lawyer was out of station. So, the applicants had no option but to return the village. It is the case of the applicants that the applicant No. 1-B namely, Anil Vitthalrao Chavan was the only person doing all this exercise. The applicants No. 1 and 3 were aware about this progress and were under impression that now the advocate is engaged and required application for bringing Legal Representatives on record is filed. It is further case of the applicants that the applicant Anil again came to Aurangabad on 6th January, 2005 for visiting his lawyer and for filing application but, unfortunately, he met with an accident. He received severe head injury in the said accident. Anil was admitted in the hospital at Tamsa for some days. Because of said accident and head injury, Anil lost his memory to some extent and the fact of litigation slipped from his memory. The applicants annexed copy of the medical certificate at Exh.2.

4. It is further case of the applicants that on 7th February, 2008 when the applicant Anil came to Aurangabad for some work, he coincidentally met his Advocate who asked him about the progress of matter and whether he has engaged another lawyer. At that time, after verifying papers and meeting with lawyers at Nanded he recollected the entire episode. After that he immediately collected necessary documents and handed over the same to the present Advocate who immediately prepared the application and filed the same in this Court.

5. It is the case of the applicants that the delay of 2945 days caused in filing the application is not at all intentional and deliberate. The delay is caused because of the reasons beyond control of the applicants. There is no negligence or laches on the part of the applicants and in the interest of justice, the delay deserves to be condoned.

6. Rule, returnable forthwith and taken up for hearing with consent of the parties. Heard learned Counsel for the applicants. He invited my attention to each and every sentence of the application and contended that the application for condonation of delay in bringing legal representatives on record is filed by the legal representatives of the original appellant. There is delay in filing the application. However, the same is not intentional and deliberate. He submitted that for the first time the applicants came to know about the proceedings of the second appeal when they received letter from their advocate. Though applicant Anil visited Aurangabad, since his lawyer was out of station, he could not meet him. It is further submitted that when he again came back to Aurangabad, he

met with an accident and received severe head injury. Therefore, he lost memory to some extent and fact of litigation slipped from his memory. It was argued that again when applicant Anil came to Aurangabad on 7th February, 2008 and coincidentally met his Advocate, then he realized about the pendency of the second appeal and after verifying the paper with the lawyer at Nanded, he recollected the entire episode.

According to the learned Counsel, the applicants cannot be said to be benefited by delaying filing of the application. On the contrary, the second appeal filed by Vitthal has remained pending for long time and consequently, same was not decide. According to the learned Counsel for the applicant, on perusal of the contents of the application, it is clear that the delay in filing the said application was unintentional and in no way the delay was beneficial to the applicants and therefore, in the interest of justice, the delay is required to be condoned. He further submitted that there is series of decisions of the Supreme Court and this Court which indicate that in case of application for condonation of delay, what is required to be seen is the averment made in the application and not the length of the delay caused in filing the application. According to the learned Counsel, the applicants had not been put to any benefit because of delayed filing of the application. The applicant Anil suffered serious head injury and as a consequence, he lost his memory and only when he came to Aurangabad and met his advocate, he remembered about the pending proceedings. The learned Counsel took me through the contents of the application and submitted that the delay deserves to be condoned.

7. The learned Counsel for the applicants, in support of his contention, invited my attention to reported judgments of the Apex Court in the case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, . The learned Counsel took me through the said judgment and submitted that the legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act, 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on `merits. The expression sufficient cause employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which sub-serves the ends of justice. The learned Counsel, therefore, would submit that while entertaining the application for condonation of delay, liberal approach is required to be taken. The learned Counsel invited my attention to paragraph 3 of the judgment and submitted that, ordinarily the litigant does not stand to benefit by lodging an appeal late. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties. The learned Counsel further submitted that it must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

8. The learned Counsel further invited my attention to the reported judgment of the Supreme Court in the case of N. Balakrishnan Vs. M. Krishnamurthy, and submitted that the words sufficient cause should be construed liberally while entertaining an application for condonation of delay. It is further submitted that the object of fixing time limit is not meant for destroying rights of the parties. It is further submitted that the primary function of the court is to adjudicate the dispute between the parties and to advance substantial justice. The learned Counsel further placed reliance on the reported judgment of this Court in the case of Sonerao Sadashivrao Patil and Anr. v. Godawaribai and Ors. 1999 MCR 430 and submitted that length of delay is not a matter but the acceptability of explanation for the delay is the only criterion. The learned Counsel further relied on reported judgment of the Supreme Court in the case of M.K. Prasad v. P. Arumugam 2001(7) SRJ 408 and placed reliance on paragraph 9 of the said judgment. The learned Counsel for the applicants further relied on the reported judgment of the Supreme Court in the case of Mithailal Dalsangar Singh and ors. v. Annabai Devram Kini and Ors. 2003(6) SC 796 and submitted that, inasmuch as abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside abatement. Justice oriented approach should be taken at the time of entertaining application filed for condonation of delay. The learned Counsel further invited my attention to the reported judgment of this Court in case of Ashok Ratan Vs. Nagpur Improvement Trust, and submitted that in the matter of condonation of delay, the Court has to see as to what shall get condoned if the delay is not condoned. If the grievance of the applicant is not opened for scrutiny, observance of mandatory provision of law shall stand neglected and balance of justice cannot be struck if the delay is not condoned.

The learned Counsel further invited my attention to the reported judgment of the Supreme Court in case of Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead) by LRs. and Others, and submitted that the words sufficient cause for not making the application within the period of limitation should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case, and the type of case. The words sufficient cause in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice. The learned Counsel invited my attention to paragraph 8 of the said judgment and submitted that the facts of the present case warrants that the delay, which is unintentional, should be condoned, in order to do substantial justice to the legal representatives of the deceased appellant. In the end, he prayed that the application for condonation of delay may be allowed.

9. The learned Counsel for the respondents vehemently opposed the application

and submitted that the delay in filing the application for bringing L.Rs. on record is hopelessly time barred. There is about 3000 days delay in filing the application. The averments in the application are vague, dilatory tactics have been adopted by the applicants in filing the application so displayed. There is no explanation in support of condonation of delay, no sufficient cause has been shown in the application for condonation of delay and, therefore, inordinate delay in filing application does not deserve to be condoned. It is further submitted that the application filed by the applicants for condonation of delay in bringing L.Rs. of deceased appellant on record has been filed by three applicants. The explanation that one applicant had met with an accident when he visited Aurangabad somewhere in the year 2004 to meet his Advocate to take steps for filing application for bringing Legal representatives on record, is not acceptable since another two applicants including real brother of applicant Anil, namely Ashok should have persuaded his advocate for filing application for bringing legal representatives on record. The learned Counsel for the respondents, therefore, would submit that if the application is perused carefully, from 2004 till filing of the application for bring L.Rs. on record the application does not disclose sufficient cause and, therefore, though the learned Counsel for the applicants relied on number of judgments of this Court as well as Honourable Supreme Court, the said judgments differs on facts and may not be applicable in the present case in view of the insufficient and vague averments in the application. In support of his contention, the learned Counsel appearing for the respondents invited my attention to the reported judgment of the Honourable Apex Court in case of P.K. Ramachandran Vs. State of Kerala and Another, , and more particularly, paragraphs 5 and 6 of the said judgment and submitted that the law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds.

The learned Counsel for the respondents further invited my attention to the judgment of this Court in the case of Sow. Kamalbai Shrimal and Narsaiyya Shrimal Vs. Ganpat Gavare, and submitted that the delay cannot be condoned only because it is unintentional. The learned Counsel further invited my attention to the reported judgment of this Court in case of Primala Dinkarrao Tahte and Ors. v. Shantabai alias Shalinibai Ramkrishna alias Bhaurao Tathe and Ors. 2008 (Supp) Bom.C.R. 286 and submitted that the length of delay is required to be taken into consideration in absence of proper explanation given in the application for condonation of delay. The learned Counsel also placed reliance on the reported judgment of the Supreme Court in case of Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead) by LRs. and Others, and submitted that that if the paragraph 8 of the said judgment is perused carefully, it is abundantly clear that the extent or degree of leniency to be shown by a Court depends on the facts and circumstances of the case. The learned Counsel for respondents would, therefore, submit that taking overall view of the matter and more particularly, in view of the fact that sufficient cause has not been

disclosed in the application, the delay in filing the application for bringing legal representatives of deceased appellant on record does not deserve to be condoned.

10. I have carefully perused the averments made in the application for condonation of delay and heard the learned Counsel for the applicants as well as respondents at great length and carefully perused the judgments cited by both sides. It would not be out of place at this stage to refer paragraph 6 of the reported judgment of the Apex Court in the case of R.B. Ramlingam Vs. R.B. Bhvaneswari, , which reads thus:

6. A large number of judgments were cited before us by learned Counsel. It is not necessary at this stage to discuss each and every judgment cited before us for the simple reason that Section 5 of the Limitation Act, 1963 does not lay down any standard or objective test. The test of "sufficient cause" is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of Limitation has left the concept of "sufficient cause" delightfully undefined, thereby leaving to the Court a well-intentioned discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted. Each case spells out a unique experience to be dealt with by the Court as such.

11. Keeping in mind the above paragraph from the judgment of the Apex Court, I proceed to decide the present application. The application is filed by the applicants with prayer Clause (B) praying for condonation of delay of 2945 days. The said application was filed on 3rd March, 2008. In paragraph 1 of the application it is mentioned that the appellant Vithal Chawan died on 30th October, 1999 and the present applicants being legal heirs of the deceased, have filed the application. In paragraph 2 of the application, the applicants mentioned that the original appellant being Karta of the family, was looking after the affairs of the family including the proceedings of the second appeal and they were not aware of the pendency of second appeal in this Court. It is further stated in said paragraph that during pendency of the second appeal, the present applicants 2 and 3 were minor and applicant No. 1 being an illiterate lady, residing in village, was not aware about pendency of second appeal before this Court. In paragraph 3 of the application it is mentioned that on or about 15th November, 2004, they received a letter from the Advocate Shri C.V. Korhalkar addressed to the original appellant late Vithal Chavan. The applicants came to know about the pendency of second appeal, they came to Aurangabad and contacted the concerned Advocate and informed him about the death of original appellant. The Advocate advised them to bring death certificate and heir certificate. He further told the applicants to engage some another advocate of their choice and he will be unable to handle the matter. In paragraphs 4 and 5 , it is mentioned that the applicants returned back to the village and applied for certificates on 26.11.2004 and they received said certificates from the authorities. Immediately, the applicants rushed to

Aurangabad and tried to contact the lawyer but, the lawyer was out of station. So, the applicants had no option but to return the village. It is the case of the applicants that the applicant No. 1-B namely, Anil Vitthalrao Chavan was the only person doing all this exercise. The applicants No. 1 and 3 were aware about this progress and were under impression that now the advocate is engaged and required application for bringing Legal Representatives on record is filed.

12. It is further case of the applicants in paragraph 6 that the applicant Anil again came to Aurangabad on 6th January, 2005 for visiting his lawyer and for filing application but, unfortunately, he met with an accident. He received severe head injury in the said accident. Anil was admitted in the hospital at Tamsa for some days. Because of said accident and head injury, Anil lost his memory to some extent and the fact of litigation slipped from his memory. The applicants annexed copy of the medical certificate at Exh.2.

In paragraph 7 It is further mentioned by the applicants that on 7th February, 2008 when the applicant Anil came to Aurangabad for some work, he coincidentally met his Advocate who asked him about the progress of matter and whether he has engaged another lawyer. At that time, after verifying papers and meeting with lawyers at Nanded he recollected the entire episode. After that he immediately collected necessary documents and handed over the same to the present Advocate who immediately prepared the application and filed the same in this Court.

In paragraph 8, it is mentioned that the delay of 2945 days caused in filing the application is not at all intentional and deliberate. The delay is caused because of the reasons beyond control of the applicants. There is no negligence or laches on the part of the applicants and, therefore, ultimately it is prayed that delay in filing application for bringing Legal Representatives on record should be condoned.

13. On careful perusal of the averments in the application, it is understandable that till November, 2004, the applicants were not aware about the pendency of the second appeal in this Court. However, through their Advocate they came to know about the pendency of the second appeal filed by the deceased appellant and also they came to know about the steps to be taken. The applicants were made aware by the concerned advocate that death certificate and heir certificate are required for filing application. It is also apparent from paragraph 4 of the application that the applicants had received necessary certificates on 26.11.2004. From 26.11.2004 till 6th January, 2005 no steps were taken by the applicants and again on 6th January, 2005, the applicant Anil came to Aurangabad. The explanation offered in paragraph 6 that the said Anil came to Aurangabad on 6th January, 2005 and unfortunately he could not meet his lawyer and he met with an accident and sustained head injury, is required to be accepted cautiously. Though the medical certificate is placed on record at Exh.2 in support of the averments made in para 6 of the application that because of head injury applicant Anil lost his memory to some extent, careful perusal

indicates that the applicant was suffering from head injury and he had been to the said hospital from 6.1.2005. The said certificate and the explanation offered by the applicants in para 6, as said earlier, is required to be appreciated with caution. If the applicant Anil had met with an accident at Aurangabad, there is no single word in the application as to what immediate measures were taken, at least preliminary steps to treat the applicant Anil at Aurangabad. The place Tamsa which is mentioned in paragraph 6 appears to be somewhere in Nanded district. The distance between the said place and Aurangabad cannot be below 200 Kms. If really the applicant Anil had lost memory, nothing prevented the applicants from bringing on record the detailed medical report to that extent.

14. From 6th January, 2005 till 7th February, 2008, it appears that no steps have been taken by the applicants to pursue their advocate for filing application for bringing them on record in place of deceased appellant. I find considerable force in the submission of the learned Counsel appearing for the respondents that in case one of the applicants namely, Anil was suffering from some injury, nothing prevented his younger brother to pursue their advocate for filing an application for bringing legal representatives on record. The averments in paragraph 7 of the application are not convincing and to support the contention of the 7th applicants that when the applicant Anil came to Aurangabad on February, 2008, he coincidentally met his advocate and then he recollected the entire episode is not supported by medical report or certificate and, therefore, I find it very difficult to accept the same. Apart from that, the younger brother of the applicant Anil should have taken steps.

15. On perusal of the averments made in the application, it cannot be accepted that from 26.11.2004 the circumstances were beyond control of the applicants and so that they could not file application for bringing legal representatives of deceased appellant on record.

16. There cannot be any dispute that what is required to be seen is the averments in the application and not the length of the delay. It is also understood that the relevant provisions of law of Limitation are required to be interpreted liberally. The judgments cited by the learned Counsel for the applicants are sufficiently hold the field but as stated in paragraph 6 of the judgment in the case of R.B. Ramlingam v. R.B. Bhvaneswari (supra), each case spells out an unique experience to be dealt by the court as such. Therefore, what follows from the aforesaid judgments is that the test of sufficient cause is purely an individualistic test.

17. Taking overall view of the matter in hand, if the application is perused carefully, the averments in the application are vague in nature, they are not supported by any necessary documents and it does not disclose sufficient cause to take a liberal approach to condone the delay. It is true that the provisions under which the application for condonation of delay is required to be entertained should be construed liberally and the length of delay is not a necessary criterion, but the cause shown in the application has to be seen. The averments in the

application for condonation of delay in bringing legal representatives of the deceased appellant on record, by any stretch of imagination, do not disclose the sufficient cause so as to come to the conclusion that the delay of 2945 days caused in filing the said application is bonafide. I am afraid to accept the averments in paragraph 8 of the application that there is no negligence or laches on the part of the applicants in filing the application for bringing legal representatives on record. Viewed from any angle, the delay as prayed for, does not deserve to be condoned.

Hence, the Civil Application No. 9464 of 2008 is rejected. Rule is discharged.