IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Amk

APPEAL FROM ORDER NO. 447 OF 2013
WITH
CIVIL APPLICATION NO. 551 OF 2013

Baba Prakash Dasji .. Appellant
Vs.
Baba Poonamdasji Udasin .. Respondent

Mr. J. S. Chandnani for the Appellant.
Mr. Atul Damle a/w. Mr. Jayesh Patel for the Respondent.

CORAM : MRS. ROSHAN DALVI, J.

Date of reserving the Order : **21st AUGUST, 2013.**
Date of pronouncing the Order : **30th AUGUST, 2013.**

ORDER

1. Rule. Made returnable forthwith.

2. The appellant has challenged the order of rejection of the application for restoration of a dismissed suit of the appellant passed by the Judge, Bombay City Civil Court dated 16.02.2013. The appellant sued on 04.07.1992 for declaration that he was a Mahant and in-charge of Hanumanji Mandir and an Ashram next to the Mandir and that the defendant has no right to interfere therein. He also sued for injunction restraining the defendant from disturbing his possession thereof and took out a Notice of Motion for the interim injunction. He was granted ad interim relief on 06.07.1992 and interim relief on 11.11.1992. His suit came to be dismissed for default on 22.11.2002, 10 years after the filing of the suit and 10 years before his application for setting aside the order of dismissal. On 04.10.2012 he took out an application for restoration of his suit.

3. The learned Judge has rejected his application on the ground, not of the length of delay, which is inordinate and exorbitant, but on unacceptability of his explanation which has been observed to be the only criteria as per the judgments relied upon by the learned Judge and which were cited before this Court too.

4. The appellant's explanation for condonation of delay of 10 years in taking out that application would, therefore, have to be seen. It is his case that he came to know about dismissal of the suit in the last week of September, 2012 when the defendant sought to enter the suit premises and tried to interfere with and disturb his possession over the suit premises. He claims that, therefore, he inquired about the suit. He learnt that his Advocate had died and another Advocate, who was entrusted with the work thereafter, had retired from practice so that neither appeared in his suit when it reached hearing. He also claims that being a Mahant he used to keep the vow of silence, go to the cave for mediation and hardly used to come out of the Ashram. He was busy in spiritual preaching and vipasana and, therefore, never attended Court. These grounds are taken to be unacceptable to restore the suit. The learned Judge has observed that this is not a satisfactory explanation of the circumstances which prevented him from attending the Court. He has also observed that there facts show that the plaintiff was throughout negligent in attending the Court.

5. The defendant/respondent contended that the appellant's explanation is false that the respondent was always in possession of the suit premises and continued to be so.

6. It would have to be seen whether the explanation of the

plaintiff/appellant that he came to know in September, 2012 when the defendant/respondent attempted to enter upon the suit premises and disturbed his possession would be incorrect. Much would turn upon the correctness or otherwise of that statement even if the plaintiff's conduct of leaving everything to his Advocate and not attending the Court at all as admitted by him could be accepted.

7. Both the plaintiff and the defendant are Sadhus. They are called by the title by Baba or Maharaj. They both live in the Ashram and look after the temple. The Plaintiff's initial case is that both are Sanyasis being disciples of one Baba Bhaskar Dasji. The plaintiff claimed that he was looking after Hanumanji Mandir and Ashram and the defendant was in-charge of another Ashram called Bhageshwari Ashram. Whereas the plaintiff has produced documents in respect of Hanuman Mandir, defendant has also produced documents in respect of same Mandir. The defendant is also a Sadhu. The defendant has acted upon the dismissal of the suit and created a trust, formulated a scheme and sought to get it registered on 30.10.2010 well after the suit was dismissed in 2002. The defendant claims that thus rights have been created in his favour after the decree. However those rights are seen only from the judgment of the Assistant Charity Commissioner dated 30.10.2010 and not before.

8. It must be kept in mind that both the parties to the suit are Sadhus and consequently their style of living would be different from the other litigants. The case of the plaintiff would have to be accepted or rejected upon such appreciation.

9. Judgments relied upon Mr. Chandnani on behalf of the appellant show a liberal approach in condoning the delay for filing appeals, for bringing heirs on record, for getting suits restored or for

getting ex parte decree set aside. The principles upon which the jurisprudence in each of such cases is developed are much the same.

10. It has been held that contesting parties should not suffer from absence of their Advocate (See. **Rafiq & Anr Vs. Munshilal & Anr. (1981) 2 SCC 788**) in which the costs of Rs.200/- were directed to be recovered from the Advocate who absented himself. The dismissal when the matter appeared suddenly on board after 7 years was held condonable (See. **Smt. Lachi Tewari & Ors. Vs. Director of Land Records & Ors. 1984 (Supp) SCC 431**). 883 days delay was also condoned in the absence of deliberate delay as a dilatory tactic and malafides upon construing the expression "sufficient cause" liberally (See. **N. Balakrishnan Vs. M. Krishnamurthy (1998) 7 SCC 123**). 554 days delay was condoned to advance substantial justice but in the case where a litigant could not be castigated as an irresponsible litigant though he did not adopt extra vigilance. This was, of course, with a rider that the applicant must show that he acted diligently and some reasons prevented him from preferring an appeal during the period of limitation. It is also with a rider that when the decree holder obtained a benefit under the law of limitation to treat the decree as beyond challenge, the legal right which accrued to him should not be lightheartedly disturbed, not ignoring the consideration that if sufficient cause was shown discretion could be exercised to advance substantial justice. In that case the Court held the explanation satisfactory. The appellant was observed to be "as vigilant as ought to have been" and not an irresponsible litigant (See. **M. K. Prasad Vs. P. Arumugam (2001) 6 SCC 176**).

11. In the case of **Improvement Trust, Ludhiana Vs. Ujagar Singh & Ors. (2010) 6 SCC 786** the Supreme Court also held that hypertechnical approach should be avoided and delay could be condoned

in the absence of malafides writ large on the conduct of the party or when the appellant had been absolutely callous and negligent in prosecuting the matter so that an attempt should be made to allow the matter on contesting the merits rather than throw it out on technicalities. In this case the Supreme Court observed that the appellant "woke up from its slumber" and took steps in execution. However the appeal was barred by limitation of two months and a few days which delay came to be condoned.

12. Following the Supreme Court principles this Court held that it was the duty of the Advocate to attend the Court and not require his client's presence. (See. **Ashok Ravji Vadodriya Vs. Municipal Corporation of Greater Bombay AIR 2004 Bom 8**). The Court laid down the same principles earlier enunciated again in the case of **Shivaji Shivlingappa Kadge & Ors. Vs. Chief Officer, Municipal Council 2005 (6) Bom C.R. 424 and Ashok s/o Balaji Ratan Vs. Nagpur Improvement Trust 2004 (6) Bom C. R. 861** and condoned the delay of 139 days and 85 days respectively.

13. Mr. Damle referred to the later exposition of the law laid down by the Supreme Court in the judgment setting the tone of discipline of work as a matter of principle for the judiciary as also the legal fraternity. In the case of **Balwant Singh (Dead) Vs. Jagdish Singh & Ors. 2010 (6) ALL MR 480** 778 days delay was refused to be condoned when the valuable right accrued in favour of one party as a result of failure of other party was held unreasonable to be taken away on mere asking of the applicant. Condonation of delay directly as a result of negligence of a party in implementing its rights and remedies is held to be equally unfair to the other party who would be deprived of valuable right that accrued to it as a result of acting vigilantly. In that case no steps were taken to bring

the heirs of the plaintiff on record. The explanation offered was held not reasonable or plausible to be taken to be true and was observed to be lacking in bonafides. It was observed that it did not reflect the normal behaviour of a common prudent person. The delay was held to be considerable by the applicant who were observed to be totally callous irresponsible, negligent and who had not approached the Court with clean hands holding that the reasonable standard of practicable and cautious men who adopt all possible steps within their power and control and exercise due care and attention must be seen to condone the delay beyond their control. The Court variously observed throughout the judgment citing earlier judgments the principles thus:

(a) The Court need not be over-strict in expecting proof of the suggested cause.

(b) The Court should not readily except whatever was explained away. The Court should scrutinize the cause stated.

(c) The Court should use its discretion soundly and judiciously in the interest of justice. The interpretation of the words "sufficient cause" should be applied in a reasonable pragmatic, practicable and liberal manner depending upon the facts and circumstances and the type of the case. Liberal construction must fall within the concept of reasonable time and proper conduct.

(d) If a party has been thoroughly negligent in implementing its remedies it would be unfair but deprive the other party of the valuable rights appropriated.

(e) The explanation must reflect normal behaviour of a common prudent person.

(f) The Court must maintain a balance in deciding applications.

(g) Rights accrued should not be lightheartedly disturbed; discretion should be to advance substantial justice.

(h) The word "sufficient" means "adequate enough".

(i) The test is to see whether that delay could have been avoided by the party by the exercise of due care and attention.

(j) The Court must take into account the conduct of the party.

(k) The Court must see whether the delay could have been easily avoided.

It is well observed in para 14 of the judgment that if the liberal approach that the Court is to take is to be construed so liberally, irrespective of the period of delay, it would amount to practically rendering all the provisions redundant and inoperative. Such an approach is impermissible in law. The Court observed that the advancement of substantial justice presupposes no negligence or inaction on the part of the applicant to whom want of bonafides is imputable. Substantial justice, therefore, is not only synonymous with the condonation of delay; it would also be synonymous with refusal to condone inordinate delay of an inactive or wholly negligent party exercising no care or attention towards his action in law. In that case 778 days delay in taking steps to bring the legal representative of the deceased appellant on record was was held to be such abnormal conduct as was uncondonable so that their application was rejected.

Indeed if the rights of parties have accrued consequent upon an order of the Court which has not been diligently sought to be set aside and when the litigation itself is not diligently prosecuted, the Courts would be enjoined to stay their hands in setting the clock back after years of hiatus when the litigant did not care for his own proceeding.

14. In the case of **Lanka Venkateswarlu Vs. State of A. P. & Ors. 2011 (4) Mh. L. J. 104** “pathetic explanation” for 3703 days' delay was held uncondonable upon following the case of **Balwant Singh** (supra) relying upon the case of **N. Balakrishnan** (supra). The Court observed that the rules of limitation are not meant to destroy the rights of parties.

They are meant to see that the parties do not resort to dilatory tactics but seek their remedy promptly. It is held in para 26 of the judgment that the concepts such as "liberal approach", "justice oriented approach", "substantial justice" cannot be employed to jettison the substantial law of limitation where there is no justification for the delay. The Court held that the discretionary powers must be exercised in a systematic manner informed by reason. Whims or fancies, prejudices or predilections cannot and should not form the basis of exercising discretionary powers.

15. Applying the principles of **Balwant Singh** (supra) this court in the case of **Baburao Ganpatrao Shirole & Ors. Vs. Deccan Education Society & Ors. 2013 (1) Bom. C. R. 70** condoned the delay of bringing various heirs on record between the period of 3 1/5 years to 17 years holding that valuable rights could not be taken to have accrued to the defendant by the inaction of some of the plaintiffs and the failure to bring their legal representatives on record.

16. It must be seen whether in the type of case that this is, valuable rights accrued to the respondent such that the appellant could not be heard in his suit on merits. Indeed the appellant as the plaintiff "woke up from his slumber" after 10 years. But he is a plaintiff unlike most others. This case is, therefore, of a "type" unlike most others; both parties being Sadhus and consequently leading lives in quiet seclusion. The plaintiff claims that his possession remained unchanged for the years even after the suit remained dismissed and he peaceably enjoyed the suit premises where he works as a Mahant of the temple so that he had no reason to suspect that his suit was dismissed. He claims that the defendant disturbed his possession propelling him into action to inquire about his suit which he had left to his Advocates, one of whom died and the other of whom retired from practice. Though the decree was passed in

2002 and the respondent claims that he has formed a trust, appointed trustees and got a scheme framed so as to acquire valuable rights, his application for framing the scheme under Section 50 (B) (1) of the Bombay Public Trust Act, 1950 has been filed only in 2010 annexing inter alia the minutes of the meeting dated 17.03.2010 and which came to be granted on 30.10.2010. The respondent, as the defendant in the dismissed suit is, therefore, seen to have acted many years after the dismissal of the suit. The rights would accrue to him also at that distance in time. He would get the scheme framed unknown to the plaintiff. Merely the framing of the scheme would not confer upon him the valuable right that has accrued 8 years in the past which cannot be disturbed by setting aside the decree of dismissal. In a case where both the plaintiff and defendant are Sadhus and Mahants, they would be expected to lead similar lives and perform similar duties. Their respective case of possession of the suit temple to carry on duties claimed by them would require to be seen on merits upon the documents of possession produced by the plaintiff and his case of the defendant being in possession of another temple. In a rare case of two Sadhus who lead secluded lives as claimed by the plaintiff, the prudence required of him in taking action after appointing his lawyers would be of a standard different from other litigants with more materialistic approach to litigation since all principles must be viewed from the facts of the case judiciously and without a over-strict approach to see if the explanation is reasonable and plausible, pragmatic and practicable but in a liberal manner. The normal behaviour of Sadhus, and not other litigants, would have to be appreciated to strike the balance between the delay and the reasons for its condonation so as to do substantial justice to the parties. It will have to be seen whether the aforesaid case of the applicant would fall within the concept of due care and caution and whether the reasons given by the applicant are adequate enough. The conduct of the appellant though seemingly abnormal for

commonplace litigants is not a conduct unexpected of a Sadhu. The valuable rights in favour of the defendant are not shown to have accrued soon after 2002 when the suit was dismissed. Taking such rare circumstance into consideration condonation of even 10 years delay is required to be accepted as the defendant is seen to have acted upon the dismissal of the suit only about a year or two prior to the plaintiff taking action. Even if the plaintiff's case of his knowledge of the dismissal of the suit in September, 2002 itself is not accurate, the intrinsic evidence would show that the plaintiff's possession could not have been disturbed as also his spiritual preaching and vipasana, prior to the defendant having the scheme for his trust sanctioned in October, 2010 after which alone he could have claimed to be in possession and disturbed the plaintiff's possession. The defendant's case that he was always in possession would thus require to be seen on merits. It would be unjust to discard the claim of the plaintiff without hearing him on merits.

17. Consequently the view expressed by the learned Judge, City Civil Court, Mumbai in impugned order dated 16.02.2013 would require to be altered. Hence the order of rejection of the Notice of Motion for setting aside the dismissal of the suit is set aside. The suit is restored to file of the Bombay City Civil Court, Mumbai. It shall be heard and disposed of on merits.

18. Rule is granted accordingly.

19. Appeal from Order and the Civil Application are disposed of accordingly.

20. This order is stayed for 2 weeks.

(ROSHAN DALVI, J.)