

IN THE HIGH COURT OF MADHYA PRADESH AT INDORE
BEFORE

HON'BLE SHRI JUSTICE PRANAY VERMA

ON THE 17th OF FEBRUARY, 2022

MISC. CIVIL CASE No. 481 of 2017

Between:-

1. MOTILAL S/O SHANKAR KULMI ,
AGED ABOUT 64 YEARS, GRAM LANGUR TEH.
MANAWAR (MADHYA PRADESH)
2. KALU S/O SHANKAR , AGED ABOUT 59 YEARS,
GRAM - LANGUR , TEH. MANAWAR , (MADHYA
PRADESH)

.....APPLICANT

(BY SHRI MANOJ MANAV, ADVOCATE)

AND

1. DECD.SHANKAR THRU.LRS.
RUKMABAI W/O BHIMA KULMI,
AGED ABOUT 91 YEARS, GRAM KAROLI
TEH.MANAWAR (MADHYA PRADESH)
2. DECD.SHANKAR HRU. LRS GHANSHYAM S/O
SHANKAR KULMI ,
AGED ABOUT 74 YEARS, GRAM KAROLI,
TEH.MANAWAR (MADHYA PRADESH)
3. DECD.SHANKAR THRU.LRS KAILASH S/O
SHANKAR KULAMI ,
AGED ABOUT 74 YEARS,
GRAM KAROLI TEH.MANAWAR (MADHYA
PRADESH)
4. DECD.SHANKAR THRU.LRS JAGDISH S/O
SHANKAR KULMI ,
AGED ABOUT 58 YEARS,
GRAM KAROLI TEH.MANAWAR (MADHYA
PRADESH)
5. DECD.SHANKAR THROUGH LR's ROOPCHAND S/O
SHANKAR KULMI, AGED ABOUT 59 YEARS, GRAM
KAROLI TEH.MANAWAR (MADHYA PRADESH)
6. DECD KISHOR SHANKAR THROUGH LR'S PREETI
D/O KAMAL KISHOR KULMI , AGED ABOUT 40
YEARS, GRAM KAROLI TEH.MANAWAR (MADHYA
PRADESH)
7. DECD KAMAL KISHOR SHANKAR THRIUGH LR'S
GOLU S/O KAML KISHOR KULMI , AGED ABOUT 18
YEARS, GRAM KAROLI TEH.MANAWAR (MADHYA
PRADESH)
8. THROUGH COLLECTOR THE STATE OF MADHYA
PRADESH DHAR,, (MADHYA PRADESH)

(BY SHRI AKSHAT PAHADIA, ADVOCATE)

This appeal coming on for orders this day, the court passed the following:

ORDER

01. With the consent of the parties, the matter is finally heard on IA No. 5258/2017 which is an application under Section 5 of the Limitation Act, 1963 for condonation of delay in filing the restoration application as well as on the main application also.

02. This application under Order 41 Rule 19 read with Section 151 of the CPC has been filed for restoration of First Appeal No. 74/1998 which stands dismissed in view of peremptory order dated 22-02-2007.

03. Being aggrieved by judgment and decree dated 16-01-1996 passed in Civil Suit No.07-A/1995 by the Additional District Judge, Manavar, District Dhar, the appellants/applicants had preferred FA No. 74/1998 before this Court. For the purpose of prosecuting the appeal on their behalf applicants had engaged Shri Sheel Kumar Nigam and Saket Nigam, Advocates. By order dated 03-07-2006 the appeal was admitted for final hearing. At that time Shri A.K. Mishra was the counsel for the applicants who thereafter took up in Government service. The appeal was then listed for default on the part of the applicants in not paying adequate process fee for service of notices upon the non-applicants. By order dated 22-02-2007, the applicants were granted two weeks time to pay the process fee stipulating that in case of failure to do so the appeal shall stand dismissed without further reference to the Court. Since the order dated 22-02-2007 was not complied with within the period stipulated therein, the appeal stands dismissed.

04. As per the applicants they were not intimated by their counsel that process fee has to be paid as per order dated 22-02-2007. The process fee was also not paid by their counsel. On 22-08-2017 when the applicants came to Indore for seeking information as regards their case and searched for their counsel they acquired knowledge upon making necessary search that the appeal stands dismissed for non-compliance of order dated 22-02-2007. Prior to that they were never informed of the proceedings of the case by their counsel. Thereafter steps have immediately been taken and the attached application for restoration has been

filed.

05. Reliance has been placed on the decision of Hon'ble Apex Court in the matter of Perumon Bhagvathy Devaswom Perinadu Village Vs. Bhargavi Amma (dead) by LRs and others reported in (2008) 8 SCC 321, and of the decisions of this Court in Ulla @ Hulla Vs. Ramkishore and others reported in 2003(4) MPHT 10 (NOC) and Anil Kumar Vs. Dwarika Bai and others reported in 2000 (2) MPHT 3 (NOC).

06. Reply has been filed on behalf of the non-applicants to the application for condonation of delay as well as to the main application. It is submitted that applicants have not demonstrated as to why only after a lapse of ten years and five months they all of a sudden came to Indore for inquiring about the matter. The very fact that they did not contact their counsel for such a long time shows that they were never vigilant about their case and were rather lethargic in conducting the same. As per the Vakalat Nama executed by the applicants in favour of their counsel they were required to keep themselves present on each date of hearing and were to seek information about progress of the case if they failed to remain present. The consequences of failure were to be upon them. The applicants have however not done so. It is further submitted that though allegations have been leveled by the applicants against their then engaged counsel but there is no proof that they have taken any steps against him which shows that their story is made up. Reliance has been placed on the decision of the Hon'ble Apex Court in the matter of **Shanti Devi and others Vs. Kaushaliya Devi** reported in **(2016) 16 SCC 565** and **Brijesh Kumar and others Vs. State of Haryana and others** reported in **(2014) 11 SCC 351** to contend that delay cannot be condoned on insufficient grounds and if there is abuse of process of law or if there is lack of bonafides or there is in-action or negligence.

07. I have heard the learned counsel for the parties and have perused the record. Upon filing of the appeal the same was admitted for final hearing by order dated 03-07-2006 and notices of the same were directed to be issued to the non-applicants. There was defect as regards payment of process fee hence the appeal was listed on 22-02-2007 before the Court. On that day counsel for the applicants was not present and a peremptory order was passed for payment of

process fee within a period of two weeks. There is nothing on record to suggest that the said order was communicated by the counsel for the applicants to them. Applicants have specifically stated that as per their information after admission of the appeal their then engaged counsel had taken up Government service meaning thereby that he has stopped practicing as an Advocate. The said fact has not been denied by the non-applicants in their reply. Thus, for failure on part of their counsel to appear on 22-02-2007 and in not paying the process fee, the applicants cannot be blamed.

08. Hon'ble Supreme Court in the matter of **Perumon Bhagvathy Devaswom Perinadu Village Vs. Bhargavi Amma (supra)** has held in paragraphs 15 and 16 as under :-

"15. The first is whether the appeal is pending in a court where regular and periodical dates of hearing are fixed. There is a significant difference between an appeal pending in a sub-ordinate court and an appeal pending in a High Court. In lower courts, dates of hearing are periodically fixed and a party or his counsel is expected to appear on those dates and keep track of the case. The process is known as 'adjournment of hearing'. In fact, this Court in Ram Charan (supra) inferred that the limitation period for bringing the legal representative might have been fixed as 90 days keeping in mind the adjournment procedure :

"The legislature might have expected that ordinarily the interval between two successive hearings of a suit will be much within three months and the absence of any defendant within that period at a certain hearing may be accounted by his counsel or some relation to be due to his death or may make the plaintiff inquisitive about the reasons for the other party's absence."

16. In contrast, when an appeal is pending in a High Court, dates of hearing are not fixed periodically. Once the appeal is admitted, it virtually goes into storage and is listed before the court only when it is ripe for hearing or when some application seeking an interim direction is filed. It is common for appeals pending in High Courts not to be listed at all for several years. (In some courts where there is a huge pendency, the non-hearing period may be as much as 10 years or even more). When the appeal is admitted by the High Court, the counsel inform the parties that they will get in touch as and when the case is listed for hearing. There is nothing the appellant is required to do during the period between admission of the appeal and listing of the appeal for arguments (except filing paper books or depositing the charges for preparation of paper books wherever necessary). The High Courts are overloaded with appeals and the litigant is in no way responsible for non- listing for several years. There is no need for the appellant to keep track whether the respondent is dead or alive by periodical enquiries during the long period between admission and listing for hearing. When an appeal is so kept pending in suspended animation for a large number of years in the High Court without any date being fixed for hearing, there is no likelihood of the appellant becoming aware of the death of the respondent, unless both lived in the immediate vicinity or were related or the court issues a notice to him informing the death of the respondent."

09. After admission of the appeal there was no date fixed for its hearing.

The same was to be listed for final hearing in due course and in the meanwhile only

the other requirements such as service of notices upon the non-applicants were to be dealt with. There was every reason for the applicants to believe that the appeal would not be listed at all for several years. There was nothing the applicants were required to do during the period between admission of the appeal and its listing for final hearing. They had all the right to presume that their counsel would do all the necessary formalities as regards getting the non-applicants served in the appeal. From the order of dismissal it is apparent that adequate process fee was not paid by the counsel for the applicants for which they cannot be blamed.

10. Since, the appeal was pending before this Court where regular and periodical dates of hearing are not fixed, the applicants could not have been expected to be present on each and every date of hearing or to even be aware of listing of the appeal on a particular date so as to inquire from their counsel regarding its progress on the said date. It is the normal procedure in appeal before this Court that as and when, after admission, it is listed for hearing for any particular purpose the fact regarding its listing and the necessary action required to be taken pursuant thereto is intimated by the counsel to the litigant. The litigant cannot be expected to be aware of listing of the appeal on each date as such listing is only through a Cause list which is prepared and published by the Registry of this Court on a daily or weekly basis.

11. Thus, if the applicants were rest assured upon admission of their appeal that their counsel would take care of it on their behalf and would do the needful and would instruct them whenever necessary, no fault can be found with their approach. The contention of non-applicants that the applicants should have been more vigilant about their case and should have attended each and every date of hearing hence is meritless. Their contention that the applicants are bound by the terms of their Vakalat Nama also does not help them in any manner in view of the aforesaid discussion. The judgments relied upon by the non-applicants are hence distinguishable in the facts of the present case.

12. Only for the reason that no complaint was made by the applicants against their originally engaged Counsel is also of no significance as it is well known that a litigant is neither bound to make any such complaint nor would be inclined to do so since his primary objective is always to take care of his case and

to do whatever is necessary for its prosecution rather than devoting his time and energy in prosecuting his counsel.

13. In view of the aforesaid discussion, if the applicants had come to Indore only in 2017 for the purpose of ascertaining the progress of their appeal, they cannot be held guilty of any negligence on their part. The explanation thus offered by applicants for the delay in filing of the restoration application is plausible. Consequently, IA No. 5258/2017 is allowed and the delay in filing the restoration application is condoned.

14. Since the grounds and objections as regards the application for condonation of delay as well as the restoration application are similar in nature, the main application is also allowed in view of the aforesaid discussion and First Appeal No. 74/1998 dismissed in view of peremptory order dated 22-02-2007 is restored to its original number for hearing on merits. Let the order dated 22-02-2007 in First Appeal No. 74/1998 be complied with positively within a period of four weeks .

MCC is accordingly allowed and disposed off.

Certified copy as per rules.

(PRANAY VERMA)

JUDGE

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