

HIGH COURT OF MADHYA PRADESH, JABALPUR

First Appeal No.181/2015

Gulab Chand

Vs.

Sardar Patel and another

Present : Hon'ble Shri Justice Anurag Shrivastava

Shri Hemand Kumar Namdeo, Advocate for the appellant.
Ms. Sudipta Choubey, Advocate for the respondent No.1
Smt. Pratibha Mishra, Panel Lawyer for the respondent No.2/State.

Whether approved for reporting: Yes/No

ORDER
(11 .11.2016)

This order shall decide an application filed by the appellant under Section 5 read with 14 of the Limitation Act alongwith the appeal memo against the judgment and decree dated 27.06.1998 passed by Additional District Judge, Harda in Civil Original Suit No.61-A/1995.

2. The material facts for disposal of this application are that the respondent No.1 being plaintiff had filed the suit against the appellant for specific performance of agreement to sale of the disputed property and possession. The same was decreed by the trial Court vide aforesaid judgment. It is in dispute that the appeal against the same was not preferred within the prescribed limitation while it is preferred at belated stage alongwith I.A. No.3704/2015 the application for condonation of delay.

3. According to the appellant, during hearing of the suit the appellant appeared in the Court on 13.05.1996, thereafter his Advocate Shri R.D. Rajput and his junior Advocate Smt. Rekha Chouhan informed him that there is no need of personal appearance of the appellant in the Civil Case, his counsel will appear and if there will be any necessity of appearance of the appellant then he will be informed. Despite this assurance the counsel had not informed the appellant about progress of the case from 13.05.1996 to 06.02.2009.

4. On 06.02.2009 when notice of the execution of the decree was served upon the appellant then he came to know that in aforesaid Civil Suit, the judgment and decree had been passed against him on 27.06.1998. The appellant approached to the counsel Shri R.D. Rajput and then he was informed that Shri Rajput had expired. Thereafter, appellant on advice of the new counsel Shri B.M. Parashar filed an application under Order XXI Rule 97, 101 read with Sections 144 and 151 of CPC for setting aside the judgment and decree dated 27.06.1998 on the ground that the plaintiff had obtained the decree by way of conspiracy and fraud with the help of counsel. This application was dismissed on 04.12.2014 by the trial Court. Against this order the appellant had preferred Civil Revision No.69/2015, which was also dismissed as not maintainable by this Court on 26.02.2015 (Annexure A/6). Thereafter, on advice of the present counsel, the appellant had preferred this appeal.

5. It is submitted by the learned counsel for the appellant that the delay from 13.05.1996 to 27.06.1998 is due to negligence and carelessness of the counsel of the appellant and thereafter the delay till 06.02.2009 is due to non-information of passing of the decree by the counsel and subsequently the delay from 04.02.2009 to 04.12.2014 is caused due to mistake and wrong advise of the counsel of the appellant by which the appellant mistakenly filed the application under Order XXI Rule 97 of CPC. It is further submitted by the learned counsel that the appellant is in possession of the suit land, the decree of the trial Court is non-executable because of vague and wrong description of the disputed land. Therefore, there is substantial question is raised to be decided in this appeal. The delay of 5960 days is caused due to negligence and wrong advice of the counsel of the appellant for which the appellant should not be punished. The grounds of the delay is bonafide, therefore, it should be condoned. The appellant has filed the copy of the complaint made against the Advocate Smt. Rekha Chouhan (Annexure A/4) by him to the Bar Council and also the affidavit of the Advocate Shri Brij Mohan Parashar. Learned counsel for the appellant has relied upon the case laws ***Gulab Chand Vs. Manish Jain, 1998 (1) MPWN short note-31, Laxman Singh Vs. Jagannath, 2000 (1) MPHT 384, Executive Officer,***

Antiyur Town Panchayat Vs. G. Arumugam (Dead) by LRs (2015) 3 SCC 569 and N. Balakrishnan Vs. M. Krishnamurthy, AIR 1998 SC 3222.

6. In reply, respondent No.1 stated that the ground for condonation of delay in filing the appeal as mentioned by the appellant are not cogent or sufficient to grant the relief as prayed by the appellant. There is delay of 18 years, which has not been explained properly. When the appellant himself appeared in the proceeding before the trial Court then he must be knowing the progress of the case. It cannot be believed that his counsel Shri Rajput had asked him not to come to Court and he would be informed if required about the progress of the case. Simply filing a complaint to the Bar Council against the counsel is not sufficient to show the bonafide, therefore, the application for condonation of delay is liable to be rejected. Learned counsel for the respondent relied upon the case law ***Geetaranj Ghosh Vs. Bhagwatibai and Others, 2006(3) JLI 292.***

7. In view of the submission of the respective counsel for the parties, for its proper consideration, I have carefully gone through the averments made in the application and other documents submitted by the learned counsel for the appellant. It is not disputed that in the Civil Suit No. 61-A/1995, appellant has engaged the counsel Shri R.D. Rajput and Smt. Rekha Chouhan. Appellant has filed the copy of the order sheet of the case, which shows that the appellant had personally appeared before the Court on 20.11.1995, 30.01.1996 and 13.05.1996. As the case was fixed for recording of the plaintiff's evidence, therefore, it can be presumed that the appellant has knowledge of this fact that the parties has to produce their evidence in the case. It also appears that after recording of plaintiff's evidence the Court has granted seven adjournments on the request of the appellant's counsel for producing the evidence and lastly the right was closed and on 26.06.1998 the final argument was heard and the judgment was delivered on 27.06.1998.

8. The appellant was expected to seek information about the progress of his case from his counsel time to time as the case was fixed for evidence. It is not possible that the counsel of the appellant had not

informed him about the case which was fixed for defendants evidence and did not direct him to bring his witnesses, despite the seven adjournments taken by the counsel for the same. Even after 27.06.1998 to 06.02.2009 about more than 10 years the appellant kept silent and did not enquire about his case from his counsel, knowing the fact that the case was fixed for evidence. This shows the lack of interest in the case and also the negligence on the part of the appellant.

9. The appellant has filed the application on 04.02.2009 for setting aside the decree on the ground of fraud and conspiracy under Order XXI Rule 97, 98, 101 r/w Sections 144 and 151 of CPC on the advice of his counsel Shri Brij Mohan Parashar. The appellant has filed the affidavit of Shri Parashar in which it is nowhere stated by the counsel that the aforesaid application was filed on the advice of the counsel, who acted with due care and attention. The counsel has not stated that he has advised the appellant to file the aforesaid application on mistaken view of law. It is settled law that legal adviser's mistake, by itself, is no test of bonafides. This mistake must be bonafide i.e. the legal adviser should have acted with due care and attention.

10. Even if, we give the benefit of the period from 06.02.2009 to 04.12.2014 from computation of the period of limitation, the delay of the period from 27.06.1998 to 06.02.2009, which is about more than 10 years is not properly explained. It is not believable that on assurance of the counsel the appellant had not enquired about the progress of his case and he had no knowledge about the judgment and decree of the Court, till 06.02.2009 when the notice of the execution of the decree served upon him. For this long period of 10 years the appellant had not made any enquiry of his case and kept silent shows his negligence and lack of bonafide.

11. Under Section 5 of the Limitation Act the applicant has to satisfy the Court that he has sufficient cause. Sufficient cause does not necessarily mean a cause beyond the control of the party but includes absence of inaction for want of bonafide or negligence. The test whether or not a cause is sufficient is to see whether it could have been avoided by the exercise of due care and attention. Nothing can be done bonafide or in good faith, which is not done with due care and

attention. Hon'ble Supreme Court in **N. Balakrishnan Vs. M. Krishnamurthy AIR 1998 SC 3222** in paragraph No.9 reiterate that:-

"9. It is axiomatic that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory."

12. In the present case, it appears that the appellant has neglected to participate in the Civil Suit and without any reasonable cause avoided to enquire about the result of the case. It shows that the appellant is not diligent in prosecution of his case. The explanation of delay given by the appellant is not acceptable. Appellant is literate person, therefore, it is expected of him to contact his lawyer atleast once in a year as observed by the Hon'ble Supreme Court in **Katari Suryanarayana and Others Vs. Koppiseti Subba Rao and Others, (2009) 11 SCC 183**. Therefore, the ground of delay as stated by the appellant is not reliable and bonafide.

13. The submission of the learned counsel for the appellant regarding incorrect description of the disputed land, which cannot be properly demarcated on the spot, resulting in, in-executability of the decree cannot be considered here, this will be considered and decided by the Executing Court. The case laws **Kashiram Vs.Mitthulal, 2013(1) MPLJ, 56 and Abdul Gaffar Vs. Kousheshiya Bai, 1979 (1) MPWN short Note 306 and Laxman Singh (supra)**, are not applicable in the present case because this relates to merits of the appeal.

14. In the case law **Gulab Chand Jain** (supra) relied by the appellant's counsel, the appeal was filed instead of Revision on wrong advise of the counsel. The period elapsed in the prosecution of appeal was condoned. There was no inordinate delay caused in filing of the above appeal. Therefore, this case law is not applicable in the present case. In the case law **Executive Officer, Antiyur Town Panchayat**

(supra) the delay of 1373 days in filing Second Appeal was occasioned on account of deliberate lapses on the part of the Executive Officer of the Panchayat at the relevant time. The Hon'ble Apex Court condoned the delay in view of the larger public interest. In the case law **N. Balakrishnan (supra)** there was the delay of 83 days caused due to failure of the Advocate to inform the appellant about *ex-parte* decree. Wherein the present case there is delay of more than 10 years for which no sufficient explanation has been given by the appellant. The negligence and inaction of the appellant are apparent who filed the appeal after more than 16 years without showing proper and cogent explanation of the delay.

15. The Co-ordinate Bench of this Court in the case law **Geetarani Ghosh (supra)** in paragraph No.16 considering the principle laid down by the Hon'ble Apex Court in **Ramlal and Others Vs. Rewa Coal Field Ltd, AIR 1960 SC 361** observed that:-

"The valuable right, which has already been accrued in favour of the respondent on expiry of the limitation for appeal cannot be disturbed on the basis of flimsy or baseless or unexplained grounds".

16. Thus, in view of the foregoing aforesaid reasons, I have not found any sufficient cause condoning the delay in filing the appeal, therefore, the I.A. No.5021/2016 filed by the appellant under Sections 5 and 14 of the Limitation Act deserves to be and is hereby dismissed.

17. Consequently, this appeal is also dismissed as barred by time. There shall no order for cost.

(ANURAG SHRIVASTAVA)

JUDGE

(11/11/2016)

Vin**