(2012) 2 GLH 725 : (2012) 3 GLR 2565

Gujarat High Court

Case No: SPECIAL CIVIL APPLICATION No. 23728 of 2007

Samusunisha Begaum and Others		APPELLANT
	Vs	
Vishnukumar Ambelal Patel and Others		RESPONDENT

Date of Decision: May 11, 2012

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 16, Order 22 Rule 10, Order 41 Rule 1, Order 9 Rule 9, 115#Constitution of India, 1950 â€" Article 226, 227#Limitation Act, 1963 â€" Article 120, 164, 5

Citation: (2012) 2 GLH 725 : (2012) 3 GLR 2565

Hon'ble Judges: J.B. Pardiwala, J

Bench: Single Bench

Advocate: Aspi M. Kapadia for Petitioners - 4, for the Appellant; Dhaval D. Vyas for Respondent(s) : 1 and Rule Served by DS for Respondent(s) : 2 - 3, for the Respondent

Final Decision: Allowed

Judgement

Honourable Mr.Justice J.B.Pardiwala

1. This petition under Article 227 of the Constitution is at the instance of original defendants and is directed against order dated 3rd September,

2007 passed by Second Additional Senior Civil Judge, Surat in delay condonation application No. 24/2005 and thereby the Trial Court condoned

the delay of 5 years and 189 days in filing application for setting aside the dismissal of Special Civil Suit No. 423 of 1987 for non prosecution. The

case as set up by the petitioners - original defendants may be summarized thus:

1.1 One Ambelal Umedbhai Patel, father of the respondents herein preferred Special Civil Suit No. 423/1987 for specific performance of the

agreement to sell executed in the year 1974 by the petitioners herein. As per condition No. 4 of the Agreement to sell, the registered sale deed

was to be executed within period of three years from the date of agreement to sell.

1.2 Ambelal Umedlal Patel preferred Special Civil Suit No. 423/1987 in the Civil Court at Surat on 3rd September, 1987 and prayed for specific

performance of the aforesaid agreement to sell.

1.3 In the suit, the Trial Court vide its order dated 3rd September, 1987 granted ex parte injunction in favour of the plaintiff retraining the

defendants from transferring or dealing with the suit property. Upon assurance of the plaintiff that he would co-operate and conduct the proceeding

of the suit so that it is expeditiously tried and disposed off, defendant No. 4 made an endorsement on the injunction Application (Ex. 5) on

6/9/1994, that the said application be heard along with main suit, thereby the order of injunction continued to operate against the defendants.

1.4 The issues in the suit were framed by the Trial Court on 30th September, 1995 at Ex. 65.

1.5 The first date of hearing after framing of issues was fixed on 29th November, 1995.

1.6 The plaintiff on the said day was required under law to remain present in the Court and give deposition in the form of examination-in-chief.

However, the plaintiff failed to remain present on the said day as the plaintiff migrated to U.S.A. with his family. The plaintiff before migrating to

U.S.A. made no arrangements by giving Power of Attorney empowering any person to give deposition on his behalf and attend Court

proceedings.

1.7 The matter was adjourned time to time to enable the plaintiff to lead his evidence. On none of the dates, fixed by the Trial Court, the plaintiff

remained present. The advocate for the plaintiff on each of the date fixed by the Trial Court kept on giving applications for adjournment on the

pretext that the talks for settlement were going on between the parties.

1.8 After the issues were framed on 30th September, 1995, the suit came to be adjourned for thirty times and on none of the occasion, the plaintiff

remained present.

1.9. The suit was notified for hearing on 20th September, 1999 on the said date, the plaintiff was not present in the Court for giving his deposition.

As issues were framed long back on 30th September, 1995 and as no steps whatsoever were taken by the plaintiff to conduct the proceeding with

the suit, the Trial Court was constrained to dismiss the suit for non prosecution. Even the advocate of the original plaintiff did not remain present

when the suit was called out for hearing on 20/9/1999.

2.0 The sole plaintiff i.e. Ambelal Umedbhai Patel passed away on 9th June, 2004. The respondents herein are the legal heirs of the sole plaintiff.

2.1 On 21/4/2005, the respondents preferred application No. 24/2005 before the Trial Court for condonation of delay of 5 years and 189 days in

preferring application for setting aside the dismissal of the suit for non prosecution.

2.2 The petitioners herein filed their reply at exh 11 to the application for condonation of delay and vehemently opposed the prayer for

condonation of delay on various grounds. The advocate for the petitioners, who is also one of the defendants also submitted his detailed written

statement (ex. 24) before the Trial Court. Petitioner No. 2 herein who is a practicing advocate and also one of the defendants filed affidavit exh:12

in the said delay condonation application preferred by the respondents explaining as to why delay should not be condoned and how the application

was lacking in bona fides.

The Trial Court vide its order dated 3rd September, 2007 allowed the delay condonation application and thereby condoned delay of 5 years and

189 days in preferring the application for setting aside the dismissal of the suit for non prosecution subject to payment of costs of Rs. 5,000/-.

Feeling aggrieved and dissatisfied by the said order passed by the Trial Court, the petitioners herein original defendants have come up by way of

this petition under Article 227 of the Constitution.

2. Contentions of the petitioners:

5.1 Mr. S.B.Vakil, learned senior counsel and Mr. Aspi M. Kapadia, learned advocate jointly appearing for the petitioners vehemently submitted

that the impugned order under challenge is erroneous in law and contrary to the evidence on record, which has been resulting in grave injustice to

the petitioners. Learned Counsel further submitted that the suit was filed by the original plaintiff late Ambelal Umedbhai Patel, father of the

respondents herein in the year 1987 for specific performance of the agreement to sell land executed in the year 1974. The suit was dismissed for

default on 20/9/1999. The sole plaintiff viz. Mr. Ambelal Umedbhai Patel expired on 9/6/2004. Learned Counsel further submitted that the

respondents along with condonation application has not preferred any application before Trial Court for impleading themselves on record of the

suit as legal heirs of the deceased plaintiff. It is submitted that in absence of the same, the restoration of the suit would be an act in futility. Even if

the suit is restored, the same would be found to have been abetted on account of the fact that the sole plaintiff had expired on 9/6/2004. It has

been vehemently submitted that in absence of an application for bringing the respondents on record of the suit as the heirs of the deceased plaintiff,

the condonation application and the application for setting aside the dismissal of the suit for non prosecution was untenable in eye of law. It is

submitted that in absence of application for bringing the respondents as heirs on record, the Trial Court had no jurisdiction to allow any application

for setting aside the order dismissing the suit for non prosecution.

It has also been contended that the Trial Court has committed a serious error in allowing the condonation application without any sufficient cause

being assigned by the respondents for not preferring the application for restoration of the suit, which was dismissed for non prosecution within the

period of limitation. According to learned counsels appearing for the petitioners, the existence of sufficient cause in not preferring an application for

restoration of the suit dismissed for non prosecution in time could not be reached in an arbitrary fashion. According to Mr. Vakil, learned Senior

Counsel, the view, which is merely arbitrary or fanciful is vitiated by patent illegality and therefore, result in exercise of jurisdiction not vested in

law.

It has also been submitted that the advocate, who was appearing for the original plaintiff was very much aware of the fact of suit being dismissed

for non prosecution. This fact, according to Mr. Vakil, learned Senior Counsel, was also within the knowledge of the respondents herein.

However, no steps were taken for a period of 5 years and 189 days to prefer an appropriate application for restoring the suit to its original file.

Mr. Vakil, learned senior counsel also submitted that the entire family migrated to USA and thereafter nobody bothered to keep a track of the

judicial proceedings pending in the Court of Law and not only that, till the time original plaintiff passed away he did not bother to even inquire once

with his advocate as regards the status of the civil suit filed by him in the Court of Law.

It has also been submitted that the advocate for the plaintiff was aware that the hearing of the suit was fixed on 20/9/1999 as on the previous date

of hearing i.e. 21/8/1999, the advocate for the plaintiff had given application exh 78 for adjournment. In the presence of the advocate for the

plaintiff, the Trial Court had granted adjournment and had fixed the hearing of the suit on 20/9/1999. The advocate of the plaintiff was, therefore,

aware of the date of hearing of the suit being 20/9/1999.

It has also been vehemently submitted by learned senior counsel Mr. Vakil that the respondent No. 3 Rajendra A Patel i.e. son of the original sole

plaintiff had approached petitioner No. 2 Sidi Mohammed Reza Khan (defendant No. 4 in the suit) in the year 2000 and had requested him to

arrive at an amicable solution in the matter despite the fact that the suit had been dismissed for non prosecution. It is also submitted that Rajendra

A Patel was aware of the dismissal of the suit and had requested petitioner No. 2 to give him a copy of the order dated 20/9/1999 dismissing the

suit for default. On his request, petitioner No. 2 had given a xerox of the certified copy of the said order. The petitioner No. 2 is a practicing

advocate and has filed his personal affidavit in condonation application stating the aforesaid facts. The said affidavit is given exh 12. It has been

submitted by learned senior counsel Mr. Vakil, that the Trial Court while passing the impugned order has very conveniently ignored and

overlooked this particular affidavit exh 12 and has not even cared to look into the same. All these facts would suggest according to learned senior

advocate Mr. Vakil, that the respondents were knowing that the suit has been dismissed for non prosecution but still did not bother to take

adequate steps and were not at all vigilant to file application for restoration of suit. It is only after a gross and inordinate delay of 5 years and 189

days that the respondents thought fit to prefer an application.

It has also been submitted that the respondents have pleaded false facts. The plea of the respondents that the proceedings of the suit were missing

is lacking in bona fides. As a matter of fact, after the impugned order was passed, the petitioners had preferred an application for obtaining

certified copies of the impugned order on 19/4/2000 and the certified copy was supplied to the petitioners on 2/5/2000. According to Mr. Vakil,

learned senior counsel, this is suppressing of fact that the proceedings were very much there before the Court and were never missing as alleged by

the respondents.

Lastly, Mr. Vakil, learned senior counsel submitted that the suit is for a decree of specific performance of the agreement to sell dated 11/11/1974.

According to Mr. Vakil, learned senior counsel, the suit on the face of it is time barred. Secondly, the relief of specific performance is an equitable

relief and being an equitable relief, the grant thereof is the discretion of the Court. The plaintiff had taken no steps for a long period of almost

thirteen years for getting registered sale deed executed in his favour. Even after filing the suit, he migrated to USA and thereafter never bothered to

pursue the civil suit, never took pains to even inquire with his advocate as regards the status of the suit.

Mr. S. B. Vakil, learned senior counsel and Mr. Aspi M. Kapadia, learned advocate appearing for the petitioners jointly submitted that this is a fit

case for interference in exercise of supervisory jurisdiction under Article 227 of the Constitution.

3. Mr. Vakil, learned senior advocate has relied upon the following judgments in support of his contentions:

(i) Lanka Venkateswarlu (D) By Lrs. Vs. State of A. P. & Anr. [2011 SCC 154] Civil Appeal No. 2909-2913 of 2005 decided on 24/2/2011

(ii) Rashtriya Yuva Udhyog Vs. Smt. Dheeraj Kanwar,

(iii) A B S Marine Products Pvt. Ltd. Vs. Indian Bank and Others,

4. Contentions on behalf of respondents:

15.1 Mr. SN Shelat, learned senior counsel appearing with Mr. Dhaval D. vyas, learned advocate for the respondents vehemently submitted that

all that has been done by the Trial Court is to condone the delay in filing the application for restoration of the civil suit, which was dismissed for non

prosecution. According to Mr. Shelat, learned senior counsel, whether to restore the civil suit to its original file or not is yet to be decided by the

Court below and therefore no interference is warranted in the present case in exercise of powers under Article 227 of the constitution. According

to Mr. Shelat, learned senior advocate, no error much less an error of law can be said to have been committed by the Trial Court in condoning the

delay of 5 years and 189 days in filing an application for restoration of the civil suit dismissed for non prosecution warranting any interference at the

end of this Court in a petition under article 227 of the Constitution.

15.2 It has been submitted that the Trial Court in condoning the delay has merely advanced the cause of substantial justice.

15.3 The principle contention of Mr. Shelat, learned senior counsel appearing for the respondents is that for the negligence of the advocate, who

was entrusted with the matter, the party should not suffer. The sum and substance of the submission is that the original plaintiff had entrusted the

matter to one advocate Shri Upadhyay and Shri Upadhyay has also filed an affidavit in support of the application for condonation of delay stating

that he was not aware of the date, which was fixed for hearing of the suit i.e. 20/9/1999 as his clerk had failed to make a note of the same in the

diary. It is also contended that in the affidavit of Shri Upadhyay, Shri Upadhyay has very candidly stated that since he was not aware of the date of

hearing, he was not able to file an application for adjournment on 20/9/1999. Mr. Shelat, learned senior advocate has also relied upon that part of

the affidavit filed by Shri Upadhyay explaining that due to pressure of work, the advocate concerned was not able to keep a track of civil suit. As

per the affidavit of Shri Upadhyay, the Court proceedings came to a halt in the year 2001 due to earthquake and thereafter papers of the suit were

not traceable. It is only when the respondents returned to India from United States, Shri Upadhyay learnt that the original plaintiff has passed away

and accordingly he decided to prefer an application but he was unable to actually prefer such application because the papers were not traceable.

In short, the sum and substance of the submissions of Mr. Shelat, learned senior counsel is that Shri Upadhyay, learned advocate who was

engaged by the original plaintiff ought to have been vigilant enough to inform the party about the dismissal of the suit for non prosecution and further

action ought to have been under taken as per the procedure prescribed under the law.

Mr. Shelat, learned senior counsel further submitted that there is no substance in the contention of learned counsel for the petitioners that as

respondents have not preferred any application before the Trial Court for bringing themselves on record of the suit as heirs of the deceased plaintiff

along with the condonation application, the restoration of the suit would be an act in futility. Mr. Shelat, learned senior counsel submitted that when

the suit itself was dismissed for default then in that case how could respondents prefer an application for bringing themselves on record without

getting the suit first revived to its original file.

5. Mr. Shelat, learned senior counsel has relied upon the following judgments in support of his contentions:

(i) Ram Kumar Gupta and Ors Vs. Har Prasad and Anr [AIR 2010 SUP 1159]

(ii) Raj Mineral through Proprietor Sharad L. Vyas through POA Vs. State of Gujarat & Ors [2011 (3) GLH 257]

(iii) Radhey Shyam and Another Vs. Chhabi Nath and Others,

(iv) Ouseph Mathai and Others Vs. M. Abdul Khadir,

(v) Smt. Yallawwa Vs. Smt. Shantavva,

(vi) Smt. Lachi Tewari and Others Vs. Director of Land Records and Others,

(vii) Rafiq and Another Vs. Munshilal and Another,

6. Having heard learned counsel appearing for the respective parties and having perused the materials on record, the only question that falls for my

consideration in this petition under article 227 of the constitution is as to whether the Trial Court was justified in law in condoning delay of 5 years

and 189 days in filing an application for restoration of suit dismissed for non prosecution.

7. Before adverting to the main issue in question, I must first deal with the main contention of Mr. Shelat, learned senior advocate appearing for the

respondent that even if the impugned order is found to be erroneous in law by this Court even then this Court may not interfere in exercise of

powers under Article 227 of the Constitution, which are superintending in nature. The crux of the contention which I must meet with, is that mere

error of fact or law does not invite the supervisory jurisdiction of the High Court under Article 227 of the Constitution but it would invite the said

jurisdiction if the said error of fact or law which in consideration has ultimately a reference to the jurisdiction of the Court.

8. It is no doubt true and well settled by catena of decisions that only wrong decisions may not be a ground for the exercise of jurisdiction under

Article 227 of the Constitution unless the wrong is referable to grave dereliction of duty and flagrant abuse of powers by subordinate Courts and

Tribunals which result in grave injustice to the parties.

9. Ordinarily, the interference by the High Court in exercise of supervisory jurisdiction under Article 227 of the Constitution can be in three types

of cases namely (1) cases in which the Subordinate Court appears to have exercised a jurisdiction not vested in it by law (2) cases where the

Subordinate Court has failed to exercise its jurisdiction so vested and (3) cases where the Subordinate Court is found to have acted in exercise of

jurisdiction ""illegally or with material irregularity"". I do not propose to define the limits in the case of superintendence as the limits in the case of

superintendence are undefined. Unlike in the case of revision where limits are imposed by the statute, the limits in the case of superintendence are

self-imposed. However, the fact is that if a remedy of revision u/s 115 of the Code is barred then undoubtly petition under Article 227 would be

maintainable but that by itself will not enhance the scope of the adjudication and therefore I have used the word ""Ordinarily"". Now the Trial Court

had jurisdiction in this case to condone delay in filing an application for restoration of the civil suit dismissed for non prosecution only if it is found

that sufficient cause for the delay has been satisfactorily assigned and that the original plaintiff as well as the respondents herein were very much

vigilant so far as the judicial proceedings which were pending in the Court below is concerned and that it was the negligence on the part of their

advocate in not paying appropriate attention on the proceedings and also by not informing the original plaintiff and the respondents as well after the

demise of original plaintiff involves a jurisdictional facts. Therefore, if the Trial Court is found to have decided this jurisdictional facts quite arbitrarily

and without any justification whatever from the material placed before him, it can be successfully contended that by condoning delay of 5 years and

189 days without assigning any sufficient cause by throwing the entire blame on the shoulders of an advocate and thereby disowning him, it has

exercised jurisdiction which it did not possess.

10. In a very pronouncement of the Supreme Court in case of Lanka Venkateswarlu (D) By Lrs Vs. State of A. P. & Ors reported in 2011 SCC

154, Honourable Supreme Court has observed in so many words as under:

The concepts such as ""liberal approach"", justice oriented approach"", ""substantial justice"" can not be employed to jettison the substantial law of

limitation. Whilst considering applications for condonation of delay u/s 5 of the Limitation Act, the Courts do not enjoy unlimited and unbridled

discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The

discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections can not and should not

form the basis of exercising discretionary powers.

11. In the present case, it is undisputed that the suit was preferred in the year 1987. The issues in the suit were framed by the Court on 30/9/1995

and the first date of hearing after framing of issues was 29/11/1995. From the year 1995 to 1999, there was no progress in the suit. On

20/9/1999, the Civil Court in the absence of the plaintiff as well as his advocate, dismissed the suit for non prosecution. From 20/9/1999 the

original plaintiff did not do anything till he passed away on 9/6/2004. I am at a loss to fathom that not even once in six years the original plaintiff

thought fit to inquire with his advocate as regards the status of the civil suit and its progress even assuming that the original plaintiff and his family

was not in India and had migrated to U.S.A. If the original plaintiff was so much keen to pursue the suit with seriousness then probably before

leaving for U.S.A. he could have even executed a power of attorney in favour of any person, who could have proceeded with the suit but even that

was not done. The fact that till 9/6/2004 i.e. till the date the original plaintiff passed away, he did not even bother to inquire once with his advocate

about the progress and status of the suit, itself goes to show that he was not at all serious to go ahead with the suit. Not only this but even

thereafter the respondents as legal heirs of the original plaintiff preferred an application almost after a period of ten months from the date of demise

of the original plaintiff.

12. Under such circumstances, the Trial Court committed a serious error in condoning delay on the ground that the advocate Shri Upadhyay did

not inform the original plaintiff as well the respondents about the dismissal of the suit for non prosecution. Even if I assume for a moment that the

same is true by itself would be no ground to condone such a long and inordinate delay as the litigant owes a duty to be vigilant of his own rights and

is expected to be equally vigilant about the judicial proceedings pending in the Court initiated at his instance. The litigant, therefore, should not be

permitted to throw the entire blame on the head of the advocate and thereby disown him at any time and seek relief. I regret to state that in the

present case, learned advocate of the plaintiff Shri Upadhyay for some reasons has taken up the entire blame on his head and it appears that the

same has been done only with a view to get the delay condoned. Over a period of time there is a growing tendency on the part of an advocate to

file affidavit trying to explain the circumstances, under which, delay has occurred be it in preferring an appeal or filing an application for restoration

of suit like in the present case etc. I am of the view that the practice of an advocate filing his affidavit in an application filed under Order 9 Rule 9 of

CPC is totally wrong and deserves to be deprecated. I have noticed in many cases that even though an advocate is not at fault, he would file an

affidavit taking the entire blame upon himself only because the lethargic and negligent litigant wants him to file such an affidavit so that the Court

concerned in the name of substantial justice would condone the delay. Affidavit of an advocate may come on record in the rarest of rare

circumstances and not as a matter of course. Let me assume for a moment that in the present case, concerned advocate of the original plaintiff

could not remain present on 20/9/1999 the day on which the Trial Court dismissed the suit for non prosecution and thereafter he was not able to

keep a track of the suit but was it not the duty of the original plaintiff to keep watch on the proceedings and inquire once atleast with his advocate

as regards the status of the suit? This could have been done even if the original plaintiff and his family was in U.S.A. I do not blame the original

plaintiff in going to U.S.A. but being a litigant in the Court of Law he is expected to keep a close watch on the proceedings as well as on the status

of such proceedings. After filing a civil suit a litigant can not go off to sleep and wake up from a deep slumber after 5 years as if the Court is a

storage of suits filed by such negligent litigants. If that be so, then Court would be quite justified in dismissing the suit for non prosecution and

should be loathe enough to restore the suit unless strong grounds are made out by the party concerned. There is one more reason why I am very

serious in commenting on the practice of advocates filing affidavit. There is a general impression in the mind of the litigants that if a lawyer would file

an affidavit saying that he was unable to attend the Court or because of his negligence the suit or appeal came to be dismissed then the Court

would very willingly accept such explanation and condone the delay. This impression needs to be eradicated. Advocates at time forget that in the

zeal to help the client by filing such affidavit they would land up in difficulty if a litigant would file proceedings for compensation on the ground of

deficiency in service.

13. At this stage, I deem fit and proper to quote para 8 of the Supreme Court decision in case of Salil Dutta Vs. T.M. and M.C. Private Ltd., .

8.The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the

principal i.e. the party who engage him. It is true that in certain situations, the court may, in the interest of justice, set aside a dismissal order or an

ex parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there

is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognized. Such an

absolute rule would make the working of the system extremely difficult. The observations made in Rafiq and Another Vs. Munshilal and Another,

must be understood as an absolute proposition. As we have mentioned hereinabove, this was an on-going suit posted for final hearing after a lapse

of seven years of its institution. It was not a second appeal filed by a villager residing away from the city, where the court is located. The defendant

is also not a rustic ignorant villager but a private limited company with its head office at Calcutta itself and managed by educated businessmen who

know where their interest lies. It is evident that when their applications were not deposed of before taking up the suit for final hearing they felt

piqued and refused to appear before the court. May be, it was part of their delaying tactics as alleged by the plaintiff. Maybe not. But one thing is

clear they chose to non-cooperate with the court. Having adopted such a stand towards the court, the defendant has no right to ask its indulgence.

Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings

is a theory which cannot be accepted and ought not to have been accepted.

14. Mr. Shelat, learned senior counsel appearing for the respondents has relied upon the decision of the Supreme Court in case of Rafiq (supra).

As it can be seen from the above passage of the Supreme Court that Rafiq (supra) has been considered in Salil Dutta (supra) and considering the

judgment of Rafiq (supra) the bench observed that the observations made in Rafiq (supra) must be understood in the facts and circumstances of

that case and can not be understood as an absolute proposition.

15. In my opinion, the judgment of the Honourable Supreme Court in Salil Dutta (supra) can be made applicable with full vigour.

16. In the decision of AIR 1972 1935 (SC) , Honourable Supreme Court held as under:

The necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period, firstly to assure the availability of

evidence documentary as well as oral to enable the defendant to contest the claim against him; secondly to give effect to the principle that law does

not assist a person who is inactive and sleeps over his rights by allowing them when challenged or disputed to remain dormant without asserting

then in a Court of law. The principle which forms the basis of this rule is expressed in the maximum vigilantibus, non dermientibus, jura sub-veniunt

(the laws give help to those who are watchful and not to those who sleep). Therefore, the object of the statutes of limitations is to compel a person

to exercise his right of action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims.

17. I also have to my advantage a very erudite and lucid judgment rendered by learned Single Judge of this Court (coram: Honourable Mr. Justice

D. H. Waghela). In case of Magandas Bechardas (supra) appeal was dismissed for default under order 41 Rule 17 of Civil Procedure Code. The

order dismissing the appeal for default was challenged on the ground that at the time of hearing of the appeal, the advocate of the appellants could

not proceed for sufficient reasons and that the appellants, who were poor agriculturist should not be made to suffer for the fault, if any, on the part

of their advocates. In this context learned Single Judge observed as under:

Here in the facts of the present case, assuming as correct the averments that the appellants are poor agriculturists, it cannot be believed that all of

them were totally ignorant and inexperienced litigants in view of the fact that they have been involved in a litigation lasting over three decades, and

non-cooperation by them or on their behalf is writ large on the record.

18. As observed by the Hon''ble Supreme Court, albeit in a different context, in State of West Bengal Vs. Pranab Ranjan Roy, : ""Order 41 Rule

17 of the Code deals with the consequence when the appellant in an appeal does not ""appear"". In all such instances, ""appearance"" would include

appearance by the advocate, because it is made so clear in Order 3 Rule 1 of the Code that any appearance required by law to be made in any

court may be made ""by the party in person, or by his recognized agent or by his pleader on his behalf"". Therefore, if these provisions are strictly

applied, it would be illogical to ascribe plurality to a party in the matter of appearance according to its convenience.

19. In the Scheme of the Code of Civil Procedure, the appearance of an advocate is treated as the appearance of the party who has engaged the

advocate. Thus, the party gets all the benefits and advantages of its appearance through an advocate. In a given case, a party may be enjoying the

fruits of an interim order and delay in the final disposal of a litigation. Then, conversely, when a party has to suffer an ex parte or adverse order due

to a deliberate default on the part of his advocate, it can hardly be allowed to detach itself from its advocate and say that the default was on the

part of his advocate for which it ought not to be made to suffer. It is not always true that a party which is aggrieved by an ex parte order is bound

to be suffering injustice. The party on the other side who might be languishing in the court for years or decades can be the party who was suffering

injustice. The discretion of the court, even in the exercise of its inherent powers, to restore a case by setting aside an ex parte order ought not to be

exercised to undo justice.

20. The relevant provision of the C.P.C., i.e. Order 41 Rule 19, reads as under:

19.Re-admission of appeal dismissed for default. Where an appeal is dismissed under Rule 11, sub-rule (2) or Rule 17 or Rule 18, the appellant

may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from

appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as

to costs or otherwise as it thinks fit.

21. It becomes clear from the reading of this provision that, for re-admission of appeal, the appellant is required to prove the cause of his being

prevented from appearing and such cause is required to be sufficient. Such cause may not be required to be proved beyond reasonable doubt, but,

at the same time, a mere assertion or averment which does not inspire any confidence in the facts and circumstances of the case, would not be

sufficient. Similarly, sufficiency of the cause would also be examined in the particular facts and circumstances of each case. Although, no strict cut

and dried rule can be laid down and the question of sufficient cause demands a generous approach, it is equally important that the judicial orders

are not casually made or cancelled necessarily resulting into further delays - defeating the cause of justice. In the facts of the present case, as seen

earlier, the appellants have, in fact, appeared through the advocate but practically refused to participate in the proceedings for reasons which are

neither proved nor sufficient. Although the earlier attitude and demeanours of the appellants may not be relevant if sufficient cause were proved for

absence on the day of dismissal of the appeal, they have to be taken into account while examining the probative value of the assertions and

averments advanced as sufficient cause. As observed by the Hon''ble Supreme Court in SALIL DUTTA (supra), if a party has adopted a non-

cooperative stand, it has no right to ask its indulgence. Also, where the party has failed to prove any sufficient cause, no order of restoration ought

to be made on any conditions as was lastly suggested by the learned advocate for the appellant.

22. In Ram Nath and Others Vs. Dy. Director of Consolidation and Others, , where a petition was filed for recalling the order even on the ground

that the learned counsel was busy in another court on the date of hearing, Their Lordships of the Supreme Court have observed as under:

We are not sure as to who is making this application and whether the appellant is at all aware of these events. We find no justification for recalling

the order on the plea that the counsel was busy somewhere. We were not inclined to act upon this kind of plea but on the basis that otherwise the

appellant would suffer loss for no fault of his, we have decided to hear the counsel. This practice should not be permitted in this Court any further.

23. These observations are respectfully accepted as guidelines and are required to be abided by the Bar and the Bench generally in all legal

proceedings.

Thus, I have no hesitation in coming to a conclusion that the discretion exercised by the Court below can be termed as arbitrary or fanciful vitiated

by patent illegality resulting in exercise of jurisdiction not vested in law. Such being a case it would be my duty to exercise my supervisory

jurisdiction under Article 227 of the Constitution and correct the error. To say that even in such gross cases like the present one Court should not

interfere and disturb the order in exercise of supervisory jurisdiction under Article 227 of the Constitution, will amount to giving premium to such

negligent litigants and will also amount to overlooking and ignoring grave dereliction of duty and abuse of powers on the part of the Court below

resulting in grave injustice to the other party.

24. In fact, powers under Article 227 casts a duty upon the High Court to keep the inferior Courts and Tribunals within the limits of their authority

and see that they do not cross the limits ensuring performance of duty by such Courts and Tribunals in accordance with law conferring powers

within the ambit of the enactment creating such Courts and Tribunals.

25. I shall now look into the judgments, which have been relied upon by learned senior counsel Mr. Shelat and consider whether they are helpful in

any manner for the purpose of rejecting this petition.

26. In Raj Mineral case, the Division Bench of this Court speaking through this very Court (Honourable Mr. Justice J. B. Pardiwala), in facts and

circumstances of this case held as under:

7.5 The powers conferred by Article 226 of the Constitution of India on the High Courts are certainly very wide and confer on them discretion of a

most extensive nature. That discretion, however, must, necessarily be exercised in accordance with judicial considerations and well established

principles. The High Court will certainly not hesitate in issuing an appropriate direction, order or writ when necessary, but no person can claim to

be entitled to such an order or writ, as a matter of course, without satisfying the High Court that the case is suitable one for the issue of such an

order or writ. Thus, mere fact that an order is without jurisdiction or that, there is an error apparent on the face of the record, is not sufficient to

justify the issue of a writ. In addition to that, it must be established that the order has resulted in manifest injustice. It is, therefore, open to the High

Court to refuse to issue writ, if it feels that if the writ prayed for is issued, it will clearly effectuate an injustice in the case.

7.7 The law in this regard, is well settled. It is a settled principle of law that remedy under Article 226 of the Constitution of India is a discretionary

in nature and in a given case, even if some action or order, challenged in the petition, is found to be illegal and invalid, the High Court, while

exercising its extraordinary jurisdiction thereunder, can refuse to upset it with a view to doing substantial justice between the parties.

Relying on this judgment of the Division Bench, Mr. Shelat, learned senior counsel submitted that in the present case also the Court below thought

fit to condone the delay and thereby has merely advanced the cause of substantial justice and therefore this Court may not disturb such order in

exercise of supervisory jurisdiction under article 227 of the constitution even if it be termed as erroneous.

The aforesaid judgment, in my view, will not help the respondents in any manner but on the contrary to a certain extent will support the case of the

petitioners.

27. In Raj Mineral (supra), taking into consideration the peculiar facts of the case, the Division Bench held that assuming for a moment that the

Collector had no jurisdiction to pass the impugned order under the provisions of Mines & Minerals (Regulation and Development) Act, 1957,

interference was not warranted in public interest as the subject matter was mining operation. In para 7.5 of the judgment, the Bench has observed

in so many words that for the High Court to issue an appropriate direction, order or writ, it must be established that the order has resulted in

manifest injustice. I have no doubt in my mind that the order of the Court below condoning delay of 5 years and 189 days in a most arbitrary

manner has resulted in manifest injustice to the petitioners.

28. In case of Ramkumar (supra), Honourable Supreme Court in the facts of that case held that apart from considering the fact that the appellants

had been prosecuting the litigation since 1982 diligently and there was no lapse on their part till the writ petition was dismissed for non prosecution

and also considering the fact that a lawyer was engaged by them to contest the matter in the High Court who, however, subsequently was

designated as an Additional General of the State and, therefore, could not be present at the time of writ petition was taken up for hearing, we can

not but hold that it would be improper that the appellant should be punished for non appearance of the learned counsel for the appellants at the

time as we are of the view that the appellants were suffering injustice merely because their chosen advocate had defaulted. In Rafiq and Another

Vs. Munshilal and Another, , this Court has also drawn the same conclusion while considering the application for restoration of a writ application

when the learned counsel for the appellant could not be present at the time of hearing of the application.

29. This judgment will also not help the respondents as no absolute proposition of law has been laid down. In the peculiar facts of that case, the

Court was convinced to hold that it would be improper that the appellant should be punished for non appearance of the counsel for the appellant at

the time of hearing.

30. In Radhey Shyam (supra), Honourable Supreme Court held in para 31 that under Article 227 of the Constitution, the High Court does not

issue a writ of certiorari. Article 227 of the Constitution vests the High Courts with a power of superintendence which is to be very sparingly

exercised to keep tribunals and courts within the bounds of their authority. Under Article 227, order of both civil and criminal courts can be

examined only in very exceptional cases when manifest miscarriage of justice has been occasioned. Such power, however, is not to be exercised to

correct a mistake of facts and of law.

31. In Smt. Lachi Tewari (supra), Honourable Supreme Court in para 26 held as under:

26.The two other counsel were busy in other courts when the matter was called for hearing and a request was made to pass over the matter. This

ground did not find favour with the Judges of the High Court and the application for recalling the order was rejected. The Honourable Supreme

Court further held that the petitioner had taken extra care to engage three lawyers. Nothing more could be expected of him. Further he had taken

steps to file an early application to avoid being thrown out unheard.

32. The facts of Lachi Tewari (supra) were altogether different. In Lachi Tiwari (supra) the appellant had engaged three lawyers and two counsels

out of three were busy in other Courts when the matter was called for hearing and request was made to pass over the matter. This ground did not

find favour with the Judges of the High Court and the application for recalling the order was rejected. Honourable Supeme Court further held that

the petitioner had taken extra care to engage three lawyers. Nothing more could be expected by him. Further he had taken steps to file an early

application to avoid being thrown out unheard. The aforesaid judgment was also in the facts of the case not laying down any absolute proposition.

33. In Rafiq (supra) Honourable Supreme Court held that where an appeal filed by the appellant was disposed of in absence of his counsel, so

also his application for recall of order of dismissal was rejected by the High Court, the Supreme Court in appeal set aside both the orders of

dismissal on ground that a party who, as per the present adversary legal system, has selected his advocate, briefed him and paid his fee can remain

supremely confident that his lawyer will look after his interest and such a innocent party who has done everything in his power and expected of him,

should not suffer for the inaction, deliberate omission or misdemeanour of his counsel. This judgment will also not help the respondents as I have

discussed this judgment in the earlier part while referring to the Supreme Court decision in Salil Dutta (supra).

34. In my opinion, the judgments, which have been relied upon for and on behalf of the respondents do not lay down any absolute proposition of

law but are delivered in the facts of each case.

35. I may only say that Law Courts never tolerate an indolent litigant since delay defeats equity - the Latin maxim vigilantibus et non dormentibus

jura subveniunt (the law assists those who are vigilant and not those who are indolent). As a matter of fact, lapse of time is a species for forfeiture

of right. Wood, V.C. in Manby v. Bweicke (1857) 3 K&J 342. The litigant does not stand to benefit by approaching the Court of law with an

appropriate application at a belated stage. The legislature has in this, as in every civilized country that has ever existed, though fit to prescribe

certain limitations of time after which persons may suppose themselves to be in peaceful possession of their property, and capable of transmitting

the estates of which they are in possession, without any apprehension of the title being impugned by litigation in respect of transactions which

occurred at a distant period, when evidence in support of their own title may be most difficult to obtain.

36. Since I have come to the conclusion that the order of the Trial Court deserves to be quashed on the ground that the delay of 5 years and 189

days ought not to have been condoned in the facts and circumstances of the case as narrated above, as such it would not be necessary for me to

deal with the second contention of Mr. SB Vakil, learned senior counsel appearing for the petitioners to the effect that the respondents could not

have preferred an application for restoration of civil suit under Order 9 Rule 9 of the CPC with an application for condonation of delay without

being impleaded first in the suit as the original plaintiff passed away. However, having regard to the importance of the issue in question, I propose

to even deal with this contention as decision of this issue may be helpful to the subordinate Courts and more particularly when I am exercising my

supervisory jurisdiction under Article 227 of the Constitution.

37. The contention is to the effect that as soon as limitation period of 90 days as postulated in Article 120 of the Limitation Act expires from the

date of death of one of the parties to the suit or appeal, as the case may be, if no substitution of legal heirs or representative of the deceased party

is brought about by filing an application in this regard, then under the Code, abatement takes place automatically without any judicial order.

According to Mr. Vakil, learned senior counsel, in the instance case, the plaintiff died on 9/6/2004 and then 90 days as prescribed under Article

120 of the Limitation Act expired on 9/9/2004 from the date of death of original plaintiff but no application was preferred by the respondents for

substitution as legal heirs and therefore the suit automatically stood abated on 9/9/2004. The question that falls for my consideration is as to

whether the respondents herein as legal heirs of the original plaintiff were entitled to prefer an application under Order 9 Rule 9 of CPC for

restoration of the civil suit along with an application for condonation of delay without being first impleaded in the suit in place of the original plaintiff.

The original plaintiff had preferred civil suit for specific performance of contract based on agreement to sell. Thus, on the demise of the original

plaintiff rights of the original plaintiff under the Agreement to Sell came to be vested in favour of the respondents by devolution or assignment. I am

of the view that the suit cannot be said to have abated because there cannot be any abatement of a suit, which has been dismissed for non

prosecution. I cannot ignore the fact that when the suit came to be dismissed for default the original plaintiff was alive. Therefore, the suit which has

been dismissed for non prosecution cannot be termed as having abated on the ground that the legal heirs are not substituted within the period of

limitation. Section 146 of the CPC is the answer to the contention of Mr. Vakil, learned senior advocate, Section 146 reads as under:

146.Proceedings by or against representatives. - Save as otherwise provided by this Code or by any law for the time being in force, where any

proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or

against any person claiming under him.

Section 146 of the CPC was introduced for the first time in the CPC 1908 with the object of facilitating the exercise of rights by persons in whom

they come to be vested by devolution or assignment, and being a beneficent provision should be construed liberally and so as to advance justice

and not in a restricted or technical sense. If the contention as canvassed by Mr. Vakil, learned senior counsel is accepted, then in that case it may

put a legal representative on the horns of a dilemma. It has been held by the Madra High Court in I. L. R., 38 Madras at page 442 that the legal

representative must come within 30 days of her knowledge of the decree under Article 164 of the Limitation Act so if the legal representative waits

till proceedings are completed under S. 50, his application for rehearing would be time barred. On the other hand if he hastens to Court before the

usual dilatory proceedings in Court are completed, he is told that he must wait outside. This cannot possibly be the law. The provision of S. 146

are very wide. If any proceedings may be taken or application made by or against any person, then the proceedings may be made by or against

any person, claiming under him. There is no reason why an application under Order 9, rule 9 should be exempted from this general provision

relating to procedure.

I hold that the application for restoration of suit dismissed for default along with an application for condonation of delay was maintainable and the

respondents were entitled to be heard without first being actually brought on the record as legal representatives. My view is further fortified by

decision of the Supreme Court in case of Smt. Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Anr reported in AIR 58 SC 395, where

Supreme Court held as under:

But it is contended for the first respondent that even if Suit No. 158 of 1935 is considered as pending when the transfer in favour of the appellant

was made, that would not affect the result, as no application had been made by her to be brought on record in the original court during the

pendency of the suit. Nor could the application made to the appellate Court be sustained under O. 22, R. 10, as, the transfer in favour of the

appellant was made prior to the filing of that appeal and not during its pendency. This contention appears to be well-founded; but that, however,

does not conclude the matter. In our opinion, the application filed by the appellant falls within S. 146 of the Civil Procedure Code, and she is

entitled to be brought on record under that section. Section 146 provides that save as otherwise provided by the Code, any proceeding which can

be taken by a person may also be taken by any person claiming under him. It has been held in Sitharamaswami Vs. Lakshmi Narasimha, ILR 41

Mad 510 : AIR 1919 Mad 755(2) (C) that an appeal is a proceeding for the purpose of this section, and that further the expression ""claiming

under"" is wide enough to include cases of devolution and assignment mentioned in O. 22 R.

This decision was quoted with approval by this Court in Jugalkishor Saraf V. Raw Cotton Co., Ltd., 1955 - 1 SCR 1369 : ((S) AIR 1955 SC

376) (D), wherein it was held that a transferee of a debt on which a suit was pending was entitled to execute the decree which was subsequently

passed therein, under S. 146 of the CPC as a person claiming under the decree- holder, even though an application for execution by him would

not lie under O. 21, R. 16, and it was further observed that the words ""save as otherwise provided"" only barred proceedings, which would be

obnoxcious to some provision of the Code. It would follow from the above authorities that whoever is entitled to be but has not been brought on

record under O. 22, R. 10 in a pending suit or proceeding would be entitled to prefer an appeal against the decree or order passed therein if his

assignor could have filed such an appeal, there being no prohibition against it in the Code, and that accordingly the appellant as an assignee of the

second respondent of the mortgaged properties would have been entitled to prefer an appeal against the judgment of P. B. Mukharji, J.

39. The reliance placed by Mr. Vakil, learned senior advocate, on the judgment rendered by learned Single Judge of Rajasthan High Court in case

of M/s. Rashtriya Yuva Udhyog Vs. Smt. Dheeraj, Kanwar [2000 Raj 353] will not be of any help in the facts and circumstances of the case.

40. Thus, in my view, the second contention will not hold good in light of the provision of section 146 of the Civil Procedure Code.

41. However, this petition must succeed on the first contention that delay of 5 years and 189 days has been condoned by the Trial Court in a very

arbitrary and capricious manner.

In the result, the petition succeeds. The Special Civil Application No. 23728/2007 is hereby allowed. The order passed by second Additional

Senior Civil Judge, Surat dated 3/9/2007 in Delay Condonation Application No. 24/2004 below exh 1 is hereby quashed and set aside. Rule is

made absolute.