

Nagesh Bandu Potdar and Another Vs Mrs. Prabhadevi Bapusaheb Kumbhojkar and Others

Court: Bombay High Court

Date of Decision: Feb. 17, 2012

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 41 Rule 17, Order 41 Rule 19

Citation: (2012) 4 ALLMR 266 : (2012) 4 MhLj 516

Hon'ble Judges: V. M. Kanade, J

Bench: Single Bench

Advocate: Sukand R. Kulkarni, for the Appellant; Dilip Bodake, for the Respondent

Judgement

V. M. Kanade, J.

Heard the learned counsel appearing for the Applicants and the learned counsel appearing for the Respondents. This

civil application is taken out by the original Appellants in the Second Appeal, for recalling the order dated 9th June, 2011, dismissing the Second

Appeal on merits. The brief facts which are relevant and necessary for deciding the Civil Application are stated hereinbelow

1. The Applicants are the original Appellants who had filed the Second Appeal, challenging the judgment and order dated 27th November, 2002

passed by the learned Additional District Judge, Kolhapur in Regular Civil Appeal No. 92 of 2000 by which order the learned Additional District

Judge had confirmed the judgment and decree passed by the learned Civil Judge, Senior Division, Ichalkaranji, dated 13th January, 2000 in

Regular Civil Suit No. 175 of 1994.

2. The Applicants are original Defendants in Regular Civil Suit No. 174 of 1994 which was filed for partition by the Respondents/Defendants and

the decree of partition was passed on 13th January, 2000 by the trial court. The appeal filed against this order was dismissed. Second Appeal was

admitted by this Court on 7th September, 2004 and stay was granted to the execution of the judgment and decree passed by the District Court.

The Second Appeal was initially dismissed for want of prosecution by an order dated 31st August, 2009. By the said order which was a

conditional order, a direction was given to the Respondents, herein to prepare the paper-book and non-compliance of the said order resulted in

dismissal of the Second Appeal, without reference to the Court. Civil Application No. 387 of 2011 was filed for restoration and the order dated

31st August 2009 was recalled and the Second Appeal was restored to the file. Thereafter the matter was placed on the board and since the

advocate for the Appellants did not appear on two occasions, the appeal was dismissed by the impugned order. Being aggrieved by the said

order, the Applicants have filed this Civil Application for the restoration of the Second Appeal.

3. The learned counsel appearing on behalf of the Applicants, submitted that the Second Appeal was dismissed on merits, and that such an order

could not have been passed, in view of Order 41, Rule 17 (Explanation), of the Code of Civil Procedure, 1908. Reliance is placed on the

judgment of the Supreme Court in the case of - Abdur Rahman & Ors. Vs. Athifa Begum & Ors. [1997(1) Mh.L.J. 566] and judgment of the

learned Single Judge of this Court in the case of - Bhaurao Namdeorao Subhedar since deceased by LRs. Shobha Subhedar and Others Vs.

Abaji Govindrao Gharote since deceased by LRs. Manoramabai Gharote and Others, . It is further submitted that the Advocate has not filed the

Vakalatnama, since it did not reach in time and therefore, this had resulted in passing of the order dated 9th June, 2011, in the absence of the

Advocate for the Applicants. It is also contended that on the earlier occasions, a direction was given to the Advocate for the Appellants to file a

private paper-book. Since the Appellants had not filed the paper-book, Second Appeal was dismissed for want of prosecution and later on it was

restored. It is contended by the learned counsel for the Applicants that he had filed Vakalatname only for the purpose of appearing in the Civil

Application and not in the Second Appeal, and therefore, he was waiting for Vakalatnama and since the Vakalatnama was not received in time, he

could not appear on 9th June, 2011. It is submitted that when he received the Vakalatnama, he tried to file his appearance, but he came to know

about the dismissal of the Second Appeal on merits.

4. On the other hand, the learned counsel appearing on behalf of the Respondents submitted that in the first place, the Civil Application was not

maintainable since the Second Appeal was dismissed on merits and not dismissed for default. The Applicants at the highest could have filed an

application for review and not the present Civil Application. It is then contended that the Applicants initially filed the Appeal through Mr. Amit

Borkar and thereafter they had changed another advocate namely Advocate Mr. Manoj Patil, and thereafter the matter was listed for final hearing.

However, it was adjourned from time to time and again on 7th March, 2011 Advocate Mr. Sukand Kulkarni filed his Vakalatnama and Civil

Application No. 387 of 2011 was allowed by an order dated 11th March, 2011 and a direction was given for placing the appeal on final hearing

board on 17th March, 2011. However, thereafter, the advocate did not appear. It was contended that the statement made in paragraph 4 that the

Applicants had changed the earlier advocate and another advocate was engaged, and that the Vakalatnama was not filed, is a false statement. It is

contended that the Appellants had deliberately changed the advocates and adopted the delaying tactics in order to ensure that the decree could not

be executed. It is contended that the Respondent/original Plaintiff is a senior citizen and is not in possession of the suit property and there is no

execution of the decree passed by both the courts below. The Appellants had adopted various tactics to ensure that the decree is not executed.

5. I have heard both the counsel appearing on behalf of the Applicants and the Respondents. I have perused the record. The record indicates that

Advocate Mr. Sukuad Kulkarni has filed his Vakalatnama and the said Vakalatnama is on record. It does not appear that Vakalatnama was filed

only for appearing in the Civil Application. In spite of this, in paragraph 4 a statement has been made by the Applicants that Advocate appearing

for the Applicants was changed and another advocate was engaged by the Applicants, however, Vakalatnama to that effect remained to be filed as

the same did not reach in time so as to enable the present advocate of Applicants to file it in the matter, which resulted in passing of order dated

9th June, 2011. This statement made in paragraph 4 is palpably false since it indicates that advocate Sukand Kulkarni has filed his Vakalatnama,

when he appeared in Civil Application No. 387 of 2011 which was filed recalling the order dated 31-8-2009. In the said order, it is specifically

mentioned that office has misconstrued the order dated 31-8-2009 and it was clarified that the Second Appeal was not dismissed and was

pending and a further direction was passed, directing that Second Appeal should appear on the final hearing board on 17th March, 2011 and the

matter should be placed high on board. When the said order was passed Advocate Mr. S. R. Kulkarni had appeared for the Applicants and he

was aware of the said order. It cannot be, therefore, said that the Appellants or their Advocate were not aware about the date on which the matter

had appeared. In spite of that, none appeared on behalf of the Applicants on more than one occasion, and therefore, this Court was constrained to

hear Second Appeal on merits. When the Second Appeal was dismissed for want of prosecution, again another application has been filed for

restoration.

6. It is true that in view of the amended provision of Order 41, Rule 17 Explanation, this Court cannot dismiss the appeal on merits on the non

appearance of the appellant or his counsel. The order of dismissal will have to be treated as dismissal of the second appeal for default. In view of

Order 41, Rule 19, appeal can be re-admitted. Order 41, Rule 19 of the CPC 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, 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.

In order to ensure that no injustice is caused to the appellant, the advocate for the applicant was asked by this Court to make his submissions on

merits. He, however, expressed his inability to make submissions and said that he was not ready to make the submissions. An opportunity,

therefore, was given to him to argue the case on merits. However, the advocate for the Applicant declined to make his submissions on merits. This

opportunity was given for two reasons. Firstly, in order to ensure that no injustice is done to the Applicant; and secondly, further time was not

granted since the matter would have remained pending indefinitely. I am informed that as of today second appeals for final hearing do not reach,

and therefore, the Applicant's intention of further protracting the appeal would have been successful. Taking into consideration all the aforesaid

facts, in my view, this is not a fit case where the order dated 9th June, 2011 should be set aside or recalled. Apart from that, even otherwise, if

advocate was under the impression that his earlier Vakalatnama was restricted to the Civil Application for restoration of the Second Appeal, he

could have filed his note of appearance, as envisaged under Rule 6, Chapter IV of the Appellate Side Rules. Even this was not done by the learned

advocate.

7. I am informed by the learned counsel appearing for the Respondents that at one stage, the decree was executed and possession was also

handed over to the Respondent/Plaintiff. However, thereafter the possession had to be handed over to the Applicants after the Second Appeal

was restored. The chronology of events and material on record clearly indicates that every attempt has been made by the Applicants to adopt

delaying tactics and they have gone to the extent of making false statement, which is evident from the record. Even another factor which clearly

establishes this fact is that immediately after the Second Appeal was dismissed on merits on 9th June, 2011, the present Civil Application has been

filed within time and a fresh Vakalatnama was filed on 8th July, 2011. This obviously discloses that the Applicants were watching the progress of

the case and it is obvious that after the matter was dismissed, the application was made for restoration. It is unfortunate that litigants adopt every

possible trick to delay hearing of the case on merits, which fact is clearly established from the record.

8. The proverb "Justice Delayed is Justice Denied" is proved as it is denied to the poorest of the poor. Delayed decisions, piled up files and in

indefinitely extending project never serve their purpose. They are the real road blocks to development of any State or Nations. Generally, delayed

decisions take its maximum toll on the under privileged section. Delay in disposal of case is considered as one of the most vexed and worrying

problem. Mr. Nani Palkhiwala, an eminent jurist opined that Justice in common parlance is considered as blind but in India it is lame too and

hobbles on crutches. It is on the verge of collapse with more than 30 million cases clogging the system. There are cases that takes so much time

that even a generation is too short to get any type of redressal. Procedures must be utilized to advance the cause of justice but in In India it is used

to thwart it. In Anil Rai Vs. State of Bihar case, Sethi J. stated that Delay in disposal of cases facilitates the people to raise eyebrows, sometime

genuinely, which if not checked, may shake the confidence of the people in this judicial system. Thereafter this problem of delay in justice delivery

system had engaged attention of our law commission for a quite a long time. To cope us with this situation they have proposed several

amendments. But the position retains unchanged. One of the reasons for delay in disposal of cases is that one party who is interested in protracting

the proceedings in order to ensure that possession of the property remains with them or the money is not required to be repaid, uses various tactics

to achieve this purpose of ensuring that the party who is successful in the trial court does not enjoy the fruits of its decree. Several seminars are

held and deliberations took place, Alternate Dispute Resolution is suggested, recommendations are made by the Law Commission from time to

time. However, in my view, the problem of delay in disposal of cases cannot be solved unless the litigant who is responsible for causing delay is not

penalized. By imposition of heavy costs, this problem would be solved. I believe that right from the lowest Court to the highest Court, such a

delinquent litigant should be penalized at every stage by imposing heavy costs and only when this message is given to all the litigants and their

advocates they will restrain themselves from adopting delaying tactics. The Respondent is a senior citizen and in spite of having a decree in her

favour in the trial court and in the lower appellate Court, she is not in a position to enjoy the fruits of the decree for the past almost twenty years. I

believe that time has come that the lawyers as a body should discourage such litigants who advise them to adopt the delaying tactics. In my view

this is a fit case where appropriate proceedings for initiating action against the Applicants for making a false statement on oath and for raising a

false plea, but I would like to refrain myself from doing so. Civil Application is, accordingly, dismissed with costs, which are quantified at Rs.

5,000/-.