

MHSCA20000392019



IN THE COURT OF SMALL CAUSES MUMBAI

MARJI APPLICATION NO.18 OF 2019

IN

R.A.D. SUIT NO.486 OF 2007

Deshbhushan Co-operative Housing
Society Ltd.

... Original defendant
(Prop. Plaintiff)

Versus

Dilipbhai Jivraji Jain

... Original Plaintiff
(Prop. Defendant)

Advocate for the Applicant : B. S. Mehta

Advocate for the respondent : S.M. Shaikh

Coram : Revati M. Kante
Judge, C.R. No.13
Date : 16.07.2022

ORDER :

The applicant i.e. Deshbhushan Co-operative Housing Society Limited filed present application for condonation of delay if any caused to it to file Marji Application for setting aside consent decree dated 04.04.2007 passed in RAD Suit 486 of 2007. It is its contention that one Seema Prakash Patil and Prakash Patil has filed suit in the month of April 2018 bearing Suit No.117 of 2018 before Hon'ble High Court against applicants society wherein for the first time, applicant got knowledge about RAD Suit 486 of 2007. The applicant believes that in said RAD suit, consent decree dated 04.04.2007 was passed by this

Court based on purported consent terms. Said consent decree is not lawful and it is void as the consent decree is obtained by fraud and liable to be quashed and set aside. The applicant has made application for obtaining certified copy on 24.07.2018 which were made available to it on 27.09.2018.

2. Its further contention is that applicant society has consulted many lawyers to find the way to set aside consent decree however, owing to peculiarity of the matter and circumstances of the case, none could help them with legal guidance. The society has made its level best efforts to find out appropriate legal practitioner who can advice in the case but, it remains unsuccessful for much time. The intention was to intervene in the matter at earliest possible. At last, it finds an advocate and thereafter, Marji application is filed. However, if at all any delay is there to file Marji application in the Court, same may be condoned as the delay is neither deliberate nor intentional. Lastly, applicant prayed that the delay of 4187 days in filing Marji application may be condoned and main Marji application be taken on record.

3. The respondent has filed his reply at Exhibit 8 and denied the contentions of applicant made in present application. It is his contention that the application is grossly barred by law of limitation. The applicant is guilty of suppression of material facts. It has also not come before this Court with clean hands and therefore, it deserves no relief. The applicant nowhere mentioned the date of knowledge of the consent terms. The consent terms are executed by and between the applicant itself and the respondent. The applicant cannot turn around and say that

it was not aware about the consent terms. Therefore, the knowledge of the consent terms ought to be attributed to the applicant since the date of consent terms dated 04.04.2007. The limitation for setting aside consent terms is three years from the date of knowledge i.e. from 04.04.2007. The present application is filed almost after 10 years of the consent terms. The applicant was itself a signatory to the consent terms and this fact has been suppressed by the applicant.

4. It is his further contention that the applicant has suppressed from this Court that original defendant filed SC Suit No.1524 of 2007 before Hon'ble City Civil Court and in that suit original defendant had filed Chamber summons No.233 of 2011 to which original plaintiff had filed reply dated 12.03.2011 and in that reply in para 15 stated that in suit property there are 241 tenants existing on suit property i.e. Plot No.654-D, at that time applicant had knowledge about the said fact. So also, the DDR Co-operative had issued one letter under RTI Act dated 26.02.2009 giving information that old Deshbhushan Co-operative Housing Society committee i.e. Suresh Patil and others was existing from the period 2007 to 2012. The statements of chairman of applicant society Shri. Babu Raoji Shah and secretary Shashikant Vasant Jadhav were recorded in Gawdevi Police Station in CR 157 of 2016. In that statement, they both have stated that they have knowledge in the year 2007 about said forgery i.e consent terms and other transaction. The old Deshbhushan Co-operative Housing Society submitted the letter of assessment of tenant to the Assist. Assessor and Collector and Assessment and Collection department of MCGM along with list of 241 tenants. The

applicant society and old Deshbhushan Co-operative Housing Society filed consent terms before Cooperative Appellate Court vide Appeal No. 171 of 2013 on 26.09.2013. Thereafter, one tenant Seema Vardhani and five others had filed arbitration application No.188 of 2014 before the Hon'ble High Court against applicant's society. On 28.08.2014, said Arbitration applications were withdrawn.

5. It is his further contention that the reasons given by the applicant for condonation of delay are not just vague but in fact ridiculous. Searching for an Advocate and/or not finding an advocate for 10 years is no ground for delay to be condoned in this matter. There is cogent reason given by the application for condonation of delay for 10 years. Applicant made to make out bonafide case to condone the delay. There is no due diligence shown by the applicant. The present application is nothing but an after thought attempt to defeat the rights of original plaintiff. The applicant is acting in concert and at the behest of developer. The application is misuse and abuse of process of law and liable to be dismissed.

6. The applicant has filed rejoinder at Exhibit 9 and denied all the contentions and allegations made by respondent against it in reply at Exhibit 8. It has submitted that he has mentioned all the things in main Marji application. The present application is not barred by law of limitation and society has not suppressed any facts and came before the Court with clean hands. It has denied that the application is made after 10 years from the date of knowledge of consent decree. It has pleaded in the application about its knowledge of consent decree and obtaining

certified copies. It has submitted that a copy of plaint in High Court Suit No.117 of 2018 filed by Seema and Prakash Patil praying that society and two others be decreed to specifically performed agreement dated 18.07.2013 and for other reliefs was served to applicant's society on 18.04.2018. On perusal of said plaint, society learnt about consent decree dated 04.04.2007 in RAD Suit 486 of 2007. Thereafter, society took search on the website of this Court and learnt that in 59 RAD Suits filed against society, decrees have been passed. The applications for certified copies of each suit were filed and in August-September 2018 received copies of said 59 RAD suits including RAD Suit 486 of 2007. Thereafter society filed application for setting aside for consent decree. The delay is not deliberate. It has further submitted that one Mr. B. Shrinivas Nayak has signed consent terms dated 04.04.2007 for and on behalf of and in the name of society. It was further revealed that Mr. Nayak has purported to accept letters and has signed and issued letters in the name of society. Said Mr. Nayak falsely representing that he is authorized by society, attended this Court and signed the consent terms and prayed for passing consent decree. It has further submitted that with effect from 01.01.2005, said Mr. Nayak was not the member, managing committee member or office bearer of society and/or he was not authorized by the society. From 01.01.2005, he was in no way concerned with society and has no right/locus to act and/or represent society. It has given details about resignation given by members of society on 29.12.2004 and further incidence occurred in that regard. The society did not pass any resolution purportedly dated 03.04.2007 or

of any other date resolving to settle and enter into consent terms and/or authorizing said Mr. Nayak or Mr. Prakash Uttekar to sign consent terms, vakalatnama or any other document and/or authorizing them to represent society and/or to attend the Court. Mr. S.B. Patil, Mr. Prakash Uttekar and Nayak have misused the letter head of society by playing fraud. The consent terms dated 04.04.2007 are not signed by authorized officer of the society.

7. On the basis of rival contentions of both the parties, following points arise for my determination to which I have recorded my findings for the reasons stated below :-

Sr. Nos.	Points	Findings
1	Whether delay is caused to the applicant to take out main Marji Application ? If yes, what is the period of delay ?	In the negative and there is no delay.
2	Whether applicant is entitled for reliefs as prayed for ?	In the affirmative.
3	What order ?	As per final order.

REASONS

8. Both the parties have filed documents on record. I heard arguments of both sides. Learned Advocate for the applicant has filed written notes of argument at Exhibit 15 and the learned advocate for the respondent has filed written notes of argument at Exhibit 19 in Marji Application No.74 of 2019.

As to Points No.1 and 2 :

9. These points are interconnected with each other hence taken together for discussion. The Learned Advocate for applicant argued as per written notes of arguments at Exhibit 15 and Learned Advocate for the respondent as per written arguments at Exhibit 19 filed in Marji Application No.74 of 2019.

10. The applicant has taken out this Marji application to condone the delay, if any caused to it to file application to set aside consent decree dated 04.04.2007 passed in RAD Suit 486 of 2007. In prayer clause, applicant has prayed that delay of 4187 days, if any be condoned. Applicant is Deshbhushan Co-operative Housing Society Ltd. It is the contention of the applicant that the consent decree dated 04.04.2007 has been obtained by playing fraud upon the Court as well as upon the applicant. It's further contention is that, one Mr. B. Shrinivas Nayak has signed consent terms dated 04.04.2007 for and on behalf of and in the name of society by preparing forged authority letter. The consent decree is not lawful and it is obtained by fraud as from 01.01.2005 said Mr. Uttekar was not member, managing committee member, office bearer of society and he was in no way concerned with society or not having any right or locus or authority to act on behalf of society.

11. Regarding the delay, it is the contention of applicant that suit summons was not served to the applicant and applicant came to know about RAD Suit 486 of 2007 for the first time by the Suit No.117 of 2018 filed on April 2018 before the Hon'ble Bombay High Court by one Seema Prakash Patil and Prakash Patil against present applicant in

which reference was made about RAD Suit 486 of 2007. Thereafter, applicant has took the search in Small Causes Court and found that 59 suits were filed against the applicant society and in all these suits, consent decree came to be passed. On 24.07.2018, applicant applied for certified copies which were given to him on 27.09.2018 by concerned department of this Court. Thereafter, applicant society consulted many lawyers to find a way to set aside said consent decree. However, owing to peculiarity of the matter and circumstances of the case, none could help it with legal guidance. Applicant was unsuccessful for much time to find appropriate legal practitioner for legal advice and at last, it finds one advocate and thereafter, this application was filed on 26.12.2018. It's further contention is that there is no delay at all as the application is taken out within the period of four months from obtaining certified copies and within the period of eight months from the date of knowledge but with abundant precaution, applicant has filed present application for condonation of delay and prayed that the delay if any or delay of 4187 days if any, be condoned.

12. On the other hand, respondent has submitted that there is no sufficient ground/reason to condone the delay. The applicant had knowledge of consent decree since the date of passing it and there is delay of 10 years which is not explained properly. Mr. Nayak was concerned with society at that time. So also, applicant has filed SC Suit No.1524 of 2007 of Chamber Summons No.233 of 2011 was filed in that suit before Hon'ble City Civil Court. Original plaintiff had filed reply dated 12.03.2011 to said chamber summons in which, it was stated that

there are 241 tenants in suit property. So also, statements of chairman Babu Raoji Shah and secretary Shashikant Vasant Jadhav, recorded by Gawdevi Police Station in C.R. No.157 of 2016 show that they have stated that, “they have knowledge in the year 2007 about said forgery i.e. consent terms of other transactions.” All these incidents show that applicant has knowledge of consent decree since 2007. The reasons given by applicant to condone delay are vague. Searching an advocate or not finding an advocate for 10 years is no ground for condonation of delay. No cogent reason is mentioned in the application and delay is not liable to be condoned.

13. The questions arise whether applicant got knowledge of RAD Suit in the month of April 2018 and consent decree in the month of July/September 2018 or whether it was having knowledge of it since the consent decree was passed ?. To answer these questions, documents filed by both parties are to be seen. Both parties have relied on number of documents. Only few of those are important to decide present application of delay condonation and others are for main Marji Application. At this stage, Court is not expected to investigate where consent decree is lawful or unlawful or it is obtained by playing fraud or not and whether it is liable to set aside. At present, the question before the Court is whether there is any delay and whether it can be condoned or not ?.

14. The applicant has filed on record receipt dated 26.09.2018 by which applicant was provided certified copies by this Court. The respondent has not denied specifically the contention of applicant of

filing suit No.117 of 2018 in the month of April 2018 by Seema and Prakash Patil before the Hon'ble High Court and mention of RAD Suit 486 of 2007 in it. It is seen that the applicant has shown that it has got knowledge about RAD Suit and consent decree passed in it in the year 2018 more particularly in the month of April and September 2018. Now, coming to the documents of respondent for this point. In reply at Exhibit 8 respondent has relied on four documents i.e. reply given by him in chamber summons No.233 of 2011 dated 12.03.2011 and police statements of Babu Shah and Shashikant Jadhav dated 06.01.2017 and 06.02.2017 respectively and letter given by old Deshbhushan Society to Asst. Assessor and Collector M.C.G.M. along with list of 241 tenants. Other documents mentioned in para 7 of Reply (Exhibit 8) are relating to main Marji Application. At the time of arguments, Learned Advocate for respondent was much harping on the point that applicant has knowledge that there are 241 tenants of applicant society in the property situated on plot No.654-D. The respondent and his Learned Advocate have not clarified how this knowledge of applicant will help them to show that applicant was having knowledge of consent decree since 2011 i.e. when it was passed. On perusal of police statements of Babu Shah and Shashikant Jadhav dated 06.01.2017 and 06.02.2017, it is seen that nowhere they have stated that applicant society or they themselves in the capacity of office bearers of applicant society were having knowledge in the year 2007, about consent decree or consent decree was obtained by playing fraud. The respondent has wrongly mentioned in reply in inverted commas that, 'they have knowledge about

consent terms in the year 2007'. It is seen that respondent has mentioned said contents without supporting documents and it is a vague statement. It is the inference drawn by respondent as per his convenience including word 'consent terms' in the police statement regarding forgery. The other documents filed by both parties nowhere show that applicant was having knowledge about said RAD Suit since beginning or of the consent terms since those were passed. Therefore, it can be said that respondent failed to show that applicant was having knowledge about it in the year 2007 or 2011 and delay of 10 years is caused to applicant.

15. Now, coming to legal position. Article 59 of Limitation Act 1963 provides limitation period of three years to cancel or set aside an instrument or decree or for the rescission of contract, when the facts entitling the plaintiff to have the instrument or decree canceled or set aside or the contract rescinded first become known to him. Article 137 of said Act provides for any other application for which no period of limitation is provided elsewhere in this division. The period of limitation provided by this Article is three years, when the right to apply accrues. According to applicant, suit summons was not served against applicant who was defendant in that suit. On perusal of plaint in RAD Suit 486 of 2007, it is seen that said suit was filed on 23.03.2007. The Consent decree is passed on 04.04.2007 i.e. within the period of 12 days from the date of filing of suit. Considering this time period, prima facie some substance finds in the contention of the applicant that suit summons was not served against it. At the time of deciding main Marji application, it

can be seen whether the suit summons was validly served against the applicant who was defendant in that suit and whether Mr. Nayak was having any authority to appear in the suit on behalf of applicant i.e. defendant in that suit. According to applicant, in the year 2018, applicant society came to know that the consent decree is passed and it is obtained by playing fraud upon the Court and applicant. Therefore, it can be said that in the year 2018, facts entitling applicant to cancel or set aside decree first become known to it or right to apply accrues. Accordingly, present application along with main Marji Application filed in the year 2018 is well within limitation period.

16. So also, Section 17 (1) (a) to (d) of the Limitation Act 1968 says that :

(1) where, in the case of any suit or application for which a period of limitation is prescribed by this Act.

(a) The suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such persons as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake ; or

(d) where any document necessary to establish the right of plaintiff or applicant has been fraudulently concealed from him ;

the period of limitation shall not begin to run until the plaintiff or the applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered or in the case of concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production.

17. If above mentioned provision is applied to the case on hand, it can be said that the period of limitation begun to run from August 2018 when applicant obtained certified copies of suit and consent decree and till that time limitation period was not begin to run. Considering all above discussion, there is no delay caused to applicant to file main Marji Application to set aside consent decree dated 04.04.2007.

18. Even though, I came to the conclusion that there is no delay to file main Marji application to set aside consent decree, for removal of doubt and in order to determine all objections of respondent, point of sufficient cause is being discussed. As mentioned earlier, applicant stated that, time was lapsed in searching advocate. On the other hand, respondent has contended that it is not the sufficient reason and the counsel who argued application on behalf of applicant is acting as an advocate for applicant since beginning from several years. The respondent has not filed documentary evidence to support his said contention. On perusal of various documents on record by both parties, it is seen that voluminous things were happened and voluminous litigation was there regarding resignation of members of applicant society and transfer of their shares and for other grounds between

members of applicant society and applicant society and between applicant society and others, which seems prima facie started from the year 2004 and ends in the year 2013. Considering this, the ground mentioned by applicant that time was lapsed in searching suitable advocate who can give proper advice and guide applicant to find out the way to set aside consent decree, in my opinion, is the sufficient ground to condone the delay, if at all caused to the applicant to file main Marji Application.

19. So also, in case of **N. Balkrishnan Vs. M. Krishnamurthy, 1998 (7) SCC 123**, relied on by applicant, the Hon'ble Apex Court has held in para 9, 11 and 12 as under :

Para 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 a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory.....

Para 11 : Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the Courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim *interest reipublicae up sit finis litium* (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their

remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

Para 12 – A Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the Court is always deliberate. This Court has held that the words “sufficient cause” under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain Vs. Kuntal Kumari and State of W.B. Vs. Administrator, Howrah Municipality*.

20. The ruling relied on by respondent in case of **Gopal Laxman Rajendra Vs. Municipal Corporation of City of Nashik And others,, 2022 (3) Mh.L.J. 675**, relied on by respondent, is not helpful to the respondent with high respect as in that case Municipal Corporation Nashik has given reason for delay as it occurred on account of administrative reasons and Hon'ble Bombay High Court by rejecting the ground as it is not sufficient held that, *“When the present application is perused by which the respondent-corporation has sought condonation of delay, it just depicts a perfunctory approach of the officers of the Department with an assumption that merely throwing an excuse that delay has been accounted on part of administrative reason, the Court is likely to be condone the delay. The explanation, which is tendered in paragraph 3, does not even make an attempt to explain the delay, but the reason stated is that there was a transfer of an officer and the post was vacant for a long time and the work was looked after by some other in-charge officer. The Government and its authorities must be treated as any other ordinary litigant and the due diligence on the part of the individuals to approach the Court would apply with equal force to the Government and its officers. The*

habit of awakening out of slumber, one fine hour of the day and throwing jargon of scanty reason justifying the delay must be discouraged and, particularly, when the Government and its officers are in lis with its own citizens, since it is the fundamental duty of the State to protect the rights of the citizens. Such a callous approach on part of the Government and its officers has to be deprecated. ”

21. In the case on hand, there is no delay and if there is any delay, applicant has shown sufficient ground to condone it and same is liable to be condoned. Accordingly, I answer point No.1 in the negative and point No.2 in the affirmative.

As to Point No.3 :

22. On the basis of all above discussions, I came to the conclusion that application deserves to be allowed. As there is no delay caused to the applicant to file main Marji Application and it is well within limitation period and there is no need to award cost for this application but, as the applicant has reopened the litigation which was closed for the respondent in the year 2007, the respondent is entitled for the compensation/cost caused to defend this application. Hence, in answer to point No.3, I pass following order.

ORDER

1. Marji Application No.18 of 2019 is hereby allowed subject to cost of Rs.1000/- (Rupees One Thousand Only) to be paid to respondent.

2. Main Marji Application be registered and separate number be given to it, subject to scrutiny.
3. Applicant can pay cost amount directly to the respondent or applicant can deposit it in the Court.

Mumbai
Date : 16.07.2022

(Revati M. Kante)
Judge, C.R.No.13