



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 3651 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE DEVAN M. DESAI

Approved for Reporting	Yes	No

LR OF SARDAR HIMMATBHAI KHOKAR & ORS.

Versus

LR OF JESANGBHAI AMTHABHAI & ORS.

Appearance:

A R KADRI(7330) for the Petitioner(s) No. 1,1.1,1.2,1.3,1.4,1.5,1.6,1.7
 DECEASED LITIGANT THROUGH LEGAL HEIRS/ REPRESENTATIVES for

the Respondent(s) No. 1.1,1.2,1.4

DS AFF.NOT FILED (N) for the Respondent(s) No. 1.5

MR SP MAJMUDAR(3456) for the Respondent(s) No. 2

NOTICE SERVED for the Respondent(s) No. 1.3

SERVED BY AFFIX(N) for the Respondent(s) No. 1.5

CORAM: HONOURABLE MR. JUSTICE DEVAN M. DESAI

Date : 09/02/2026

ORAL JUDGMENT

- By way of this petition, under Articles 226 and 227 of the Constitution of India, 1950, the petitioners have prayed to quash and set aside the order dated 28.10.2021 passed by learned 5th Additional Civil Judge, Vadodara in Civil Misc. Application (Delay) No.1 of 2020 and further prayed to restore Regular Civil Suit No.794 of 2002 to its original status.



2. Heard learned advocate Mr. A. R. Kadri for the petitioners and learned advocate Mr. S. P. Majmudar for the respondent No.2. Perused the record.
3. The brief facts of the case are as under:
4. The petitioners herein has filed a Regular Civil Suit No.794 of 2002 for the relief of cancellation of sale deed dated 30.1.1970 registered with the Office of Sub-Registrar Baroda at Sr. No.387 being bogus, concocted and fraudulent. Petitioner - plaintiff, after framing of issues on 26-12-2016, did not remain present to lead evidence. Resultantly, the learned trial Court dismissed the suit by invoking the provisions of Order 9 Rule 8 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') on 15.10.2018. Therefore, the plaintiffs filed a composite application under Section 5 of the Limitation Act, 1963 and Order 9 - Rule 13 of the Code for condonation of delay and for setting aside the dismissal of the suit respectively. The Civil Misc. Application came to be



rejected by Learned Trial Court, against which the present petitioner is before this Court.

5. Learned advocate for the petitioner contended that learned advocate, who appeared for the plaintiff before the learned trial Court, did not remain present during the trial and also did not inform plaintiffs regarding the progress of the suit. Resultantly, for want of knowledge, plaintiff could not remain present. The suit came to be dismissed for default. It is submitted that for the fault of the Learned Counsel for the Plaintiff, the plaintiff should not be penalised. The plaintiff has a good case on facts and there are every chance of success in the trial. In the interest of justice, the chance may be given to the petitioner to put his case by way of evidence. Learned Advocate, for the petitioner, has placed reliance upon the averments made in the memo of the petition and contended that the petitioners approached their Learned Advocate through various modes only when the defendants started the procedure for selling the land in question. In support of his submissions, he has placed



reliance upon a decision of the Coordinate Bench of this Court in the case of ***Aiyubhai Ajitkhan Sipai v. Kanjibhai Dhanjibhai Ilariya reported in 2025 (o) AIJEL - HC - 251786***. Paragraph No.15.1 was pressed into service. The same is reproduced hereunder for the sake of convenience.

"15.1. Likewise, in a case of Collector, Land Acquisition, ***Anantnag V/s. MST Katiji reported in 1987 2 SCC 107***, wherein it has been held thus :-

"1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on



technical grounds but because it is capable of removing injustice and is expected to do so."
(emphasis supplied)"

6. In the case before the Coordinate Bench, delay was of one year, six months and five days in filing restoration application under Order 9 - Rule 9 of the Code. It is submitted that in the said decision, Coordinate Bench has observed that emphasis has to be given on substantial justice and not on technicalities. Refusal to condone delay can result in meritorious matters being dismissed at threshold, Court must consider explanation for delay in pragmatic manner.
7. No other submissions are made except the above.
8. Per contra, learned advocate for the respondent has supported the order and contended that the issues in suit were framed on 26-12-2016 and, thereafter, a notice was issued to the plaintiff which was duly received by him. Thereafter, for at least 16 adjournments, the plaintiff was accommodated by the Learned Trial Court and gave



chance to lead evidence. However, on all adjournments, the plaintiff remained absent. It is contended that there is no sufficient cause explained by the applicant for condoning delay of 14 months and 15 days. It is further contended that the petitioner has prayed for composite reliefs, of setting aside dismissal of the suit as well as for condonation of delay in one application. Such composite prayers in one application is not entertainable. Learned Advocate for the respondent has relied upon the decision in the case of this Court in the case of ***Samusunisha Begaum W/o Dr Nasarullakhan Dhanian v. Vishnukumar Ambelal Patel reported in 2012(o) alJEL - HC 226913***. Paragraph Nos.25, 26 and 31 were pressed into service which are reproduced hereunder :

“25.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 Civil Procedure Code 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 at least 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.

26. 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. & M. C. Private Ltd reported in (1993) 2 SCC 185.***

“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 [AIR 1981 SC 1400] 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.”

31.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.”

9. I have heard learned advocates for both the parties and also perused the papers.



10. The petitioner is aggrieved by an order dated 28.10.2021 rejection of an application under Order 9 Rule 13 of the Code. The main contention of the learned advocate for the applicant for condonation of delay and for restoration of the suit is that the learned advocate for the plaintiff did not remain present and did not inform about the dismissal of the suit which has resulted into delay. On appreciation of the application, nowhere in the application, the petitioner has revealed the source of information regarding dismissal of suit. The petitioner has also not stated as to on which date he received the information regarding dismissal of the suit. However, in the memo of petition, a different stand is taken by the petitioner. In paragraph Nos.3.4 and 3.5, of the memo of application which are reproduced hereunder:

“3.4 The petitioner-plaintiff on that states 15.10.2018, petitioner-plaintiff advocate did not remain present, whereas defendant advocate was present, the Ld. Civil Court, thereby passed the impugned order dated 15.10.2018, dismissing petitioner-plaintiff suit on the grounds of non-appearance of petitioner plaintiff advocate. The petitioner-plaintiff states that the said aspect of dismissal of suit of petitioner-plaintiff, was never communicated by their Advocate to them. The petitioner-plaintiff states that is only when respondents-defendant started procedure for selling the land in question, petitioner-plaintiff



approached their Advocate through various mode, but their Advocate did not respond and kept hiding himself from petitioner-plaintiff.

3.5 The petitioner-plaintiff states that, upon through some other advocate, petitioner-plaintiff realized that their suit came to be dismissed on the grounds of non-appearance of their advocate before Ld. Civil Court a year back i.e. on 15.10.2018. The petitioner-plaintiff thereafter immediately condonation application retained new Advocate and upon his advice, after procuring certified copies of impugned order, immediately filed Order IX application on 01.01.2020, seeking restoration of suit, along-with delay seeking condonation for delay occurred due to non-passing of information by their Advocate with regards to dismissal of suit.”

11. None of the above averments are made by the petitioner in the application before the learned trial Court. Petitioner has not been able to show from record of suit that, after framing of issues on 26.12.2016 (Exh.23), the petitioner - plaintiff has remained vigilant about his rights and started with his evidence. After framing issues, though plaintiffs were not required to be issued a notice, learned trial Court vide Exh.24 issued notice which was duly served upon plaintiffs. Despite notice being received, plaintiffs remained negligent and allowed the proceedings *ex parte*. The suit has been dismissed for non-appearance of plaintiff on 15.10.2018. Record reveals that the learned trial Court, it



appears that has granted more than sufficient time to plaintiffs to lead evidence. Against the submissions of learned advocate for respondent that as many as 16 adjournments were given to plaintiffs after framing of issues was not controverted by learned advocate for the petitioners - plaintiffs.

12. This Court is fully conscious about the fact that when an application for condonation of delay is under consideration, a lenient and justice-oriented view is required to be adopted. It is also to be considered by the Court that a bonafide and a genuine litigant should not suffer for the want of inaction or absence on the part of learned counsel. The bonafides of a litigant has to be surfaced on the record. The conduct of the litigant can also be ascertained from the records of the case. The Learned Trial Court, while deciding the application, has observed that after framing of issues on 26-12-2016, (Exhibit 23), a notice Exhibit 24 was issued to the plaintiff inviting him to proceed with the suit. However, the record indicates that till the dismissal of the



suit, i.e., on 15-10-2018, the plaintiff did not remain present and except seeking adjournments, the plaintiff has done nothing to show any inclination to proceed with the suit. The conduct is sufficient for the learned trial Court to dismiss the suit. The petitioner - plaintiff is not disclosing his source of information and the date of knowledge about the impugned order from whom he found that suit is dismissed for default. Therefore, Court can draw an inference that plaintiffs had the knowledge about dismissal of the suit on 15.10.2018. A litigant who does not state exact date of knowledge and source of knowledge regarding passing of an order, and in cases where there is no other material found from record to arrive at a conclusion regarding knowledge of impugned order passed against a person, the Court has no other option but to presume that applicant had due knowledge about the passing of impugned order. The litigant who is a fence-sitter, does not deserve any sympathy from Court, especially, a discretion has to be exercised.



13. This Court does not have any reason to believe in the contention of the applicant that the applicant was not aware about the suit proceedings.
14. The submission of the Learned Advocate for the Plaintiff that the Learned Advocate for the Plaintiff who appeared before the learned trial Court, never called upon plaintiffs to remain present. In the present case on hand, if the contention of the petitioners are taken on the face value, any vigilant litigant would immediately issue a notice to the Learned Advocate who remained negligent, by not issuing any notice or calling upon the Learned Advocate for the Plaintiff, seeking explanation regarding his non-appearance in the matter as well as non-informing the plaintiff regarding dismissal of the suit, the reasons assigned in the application are not only misconceived but are false and does not require any sympathy to be shown to the plaintiffs. Hence, in my view, blaming learned advocate by a litigant without any evidence / base is nothing but shirking from the responsibilities to remain present in the



case and getting updates about proceedings. In the modern era, all judgments and orders are uploaded on the Web-Sites of all Courts. Therefore, no litigant can be permitted to find excuse on the ground that he was not appraised of the judgment and order.

15. In the case of ***Aiyubhai Ajitkhan Sipai (Supra)***, reasons made out by petitioner in not filing application for condonation of delay was Covid-19 situation. Petitioner No.1 fell ill and petitioner No.2 being in the service of ST Corporation, delay took place. Thus, the aforesaid decision would not help the case of the petitioners.

16. In view of the aforesaid facts, no case is made out by the petitioner for disturbing the findings of the learned trial Court below. The petition lacks merit and deserves to be dismissed and accordingly, it is dismissed. Interim Relief, if any, stands vacated forthwith. No order as to costs.

(D. M. DESAI,J)

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