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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.1526 OF 2015
WITH
CIVIL APPLICATION (ST) NO.11334 OF 2015
WITH
CIVIL APPLICATION (ST) NO.11335 OF 2015
WITH
CIVIL APPLICATION (ST) NO.11338 OF 2015
IN
FIRST APPEAL (ST) NO.11333 OF 2015**

M/s.Om Shanti Commercial Premises
Co-operative Society Limited.

...Applicant/Appellant

v/s.

M/s.Arcade (India) Private Limited
Through its Managing Director
M.G.Ramchandra.

...Respondent.

Mr.Shriram S. Kulkarni i/b Mr.R.M.Pethe, for the Applicant/Appellant.

Mr.Puthenpurail O. Varghese, for the Respondents.

**CORAM: A. S. OKA &
REVATI MOHITE DERE, JJ.**

DATED : 5th AUGUST, 2015.

P.C.

1. Civil Application No.1526 of 2015 is filed for grant of leave to prefer an appeal against Judgment and Decree dated 17th July, 2010 passed

by the Civil Judge (Senior Division) on a Suit filed by the Respondent. The decree is for Specific Performance of Contract directing the defendants in the suit (Shree Om Shanti Co-operative Housing Society Limited and M/s.Om Shanti Construction Company through Shri Pyarelal R. Prajapati) to place the respondent herein (original plaintiff) in possession of 27 shops. The decree was passed for execution of a conveyance in terms of the Suit Agreement dated 11th May, 1987. The present applicant – Appellant obstructed the execution of the Decree by making an application at Exhibit – 28 in Special Darkhast No.104 of 2010 filed by the Respondent – Plaintiff. It was contended that first defendant – Society was not in existence on the date of the decree passed in the suit as its registration was cancelled by order dated 24th February, 1998 and this fact was brought to the notice by the first defendant – Shree Om Shanti Co-operative Housing Society Limited to the Trial Court by filing a pursis on 7th March, 1998. In the said application for obstruction, the present applicant stated that it became aware of the Judgment and Decree dated 17th July, 2010 on 11th September, 2012. After becoming aware of the decree on 11th September, 2012 the application for obstruction was filed on 6th February, 2013. In paragraph 41 it was contended by the applicant that it has got an independent right over subdivided plot and the construction

standing thereon and therefore, the applicant is not bound by the Decree passed in the suit. It was specifically contended that the decree cannot be executed against the Applicant – Society and its members.

2. On the basis of the application at Exhibit – 28, adjudication was made by the Executing Court. By the Judgment and Order dated 21st March, 2014, the contentions raised by the applicant were negatived. The Executing Court rejected the prayer, for holding that obstructionist (Applicant herein) has independent right over the subdivided plots and the construction thereon and that it is entitled to use and occupy the premises subject matter of the decree. The applicant preferred an appeal being First Appeal No.468 of 2014 before this Court against the said Judgment and Order. By Judgment and Order dated 16th January, 2015, the said Appeal was dismissed by a Division Bench. A Special Leave Petition preferred by the applicant against the Judgment and Order passed by the Division Bench of this Court was dismissed by the Apex Court by order dated 1st April, 2015. Subsequently on 17th April 2015, the present application along with an application for condonation of delay in filing the Appeal against the Judgment and Decree dated 17th July, 2010 have been preferred by the applicant.

3. The submission of the learned counsel appearing for the applicant is that in view of the finding recorded by the Executing Court that the applicant is bound by the impugned decree, the applicant is entitled to challenge the said decree by preferring an appeal as the applicant and its members will be affected by it. He urged that as the original first defendant – Society was not in existence, the decree cannot be executed. The learned counsel appearing for the applicant has tried to make several submissions on the merits of the decree and on the merits of the rights claimed by the applicant.

4. The question is whether the delay should be condoned. Only if a case is made out for condonation of delay, then the merits of the application for grant of leave to prefer an appeal can be gone into. It will be necessary to make a reference to the application at Exhibit – 28 filed by the applicant in the Execution Application filed by the original plaintiff. As is stated earlier, there is a specific averment made therein that on 11th September, 2012 the applicant became aware of the impugned decree dated 17th July, 2010. The application raising obstruction to the execution was filed on 6th February, 2013. Perusal of the application shows that specific contentions were raised that the first defendant was not in

existence. In paragraph 31, it is contended that on 7th March, 1998 a pursis was filed by the Advocate for first defendant stating that the registration of the first defendant was cancelled on 24th February, 1998 during the pendency of the suit. A specific contention was raised in paragraph 41 that the applicant has an independent right over the subdivided plots and the construction standing thereon and that the applicant is not claiming any right through any of the original defendants. Thus, a contention was raised that the applicant is not bound by the decree.

5. An opportunity was granted by the Executing Court to the applicant to adduce evidence. Accordingly, oral and documentary evidence was adduced. After considering the evidence, a categorical finding was recorded by the Executing Court that the decree was binding on the applicant. In paragraph 13 of the order of the Executing Court, the specific contention raised by the applicant was noted that the decree was not executable. Infact during the execution proceedings, a contention was raised by the applicant that issue of limitation ought to have been framed by the Trial Court. A categorical finding was recorded by the Executing Court that the applicant has no independent right. Thereafter, in First Appeal preferred before the Division Bench of this Court, several

contentions were raised on behalf of the applicant which are noted by the Division Bench in paragraphs 5 and 6 of its Judgments. It was contended that the applicant was an independent entity. It was contended that the decree holder was trying to seek the execution in variance of the decree itself. It was submitted that after the subdivision of the original society (first defendant), the decree holder/plaintiff has not availed the option of continuing the suit against the applicant which was a newly formed society. It was submitted that the Executing Court was not justified in holding that the impugned decree is binding upon the applicant. The Division Bench has recorded the findings from paragraph 7 onwards. One of the findings clearly recorded in para 7 based on appreciation of evidence recorded before the Executing Court is that it cannot be accepted that the applicant was not aware of the passing of the decree till 11th September, 2012. It will be necessary to make a reference to what is held by the Division Bench in para 7 which reads thus :-

7. On hearing the learned Counsel for the parties and on perusal of the record, we find that the appeal is devoid of any merit. Admittedly, Special Civil Suit No.224 of 1992 was filed on the basis of the booking memo, dated 11.5.1987 in which there was an agreement to deliver the possession of the shop premises by 31.12.1998. The Special Civil Suit was filed some time in April, 1992. It would appear from the record that it was on the basis of an application by the original society/JD

No.1, filed under the Rules, that the division of the original society into seven different societies (which includes the appellant) was effected. On registration of these seven societies, the registration of the original society was cancelled. It would further appear that the original defendant No.3/JD No.3 – Pyarelal Prajapati was the chairman of the original society and a partner of the construction firm (original defendant No.2). The witness Sanjeev Prajapati, who was examined before the Executing Court, is also a member of the present appellant, as has been admitted by him in the cross-examination. He is the son of the Pyarelal Prajapati. He further admitted that he alongwith his brother Rajesh, father Pyarelal and uncle Pradeep, were Directors of the partnership firm (defendant No.2) which is said to be subsequently converted into a private limited company. All these are closely held by the members of the family of Pyarelal Prajapati. Thus, in the first place, it cannot be accepted that the appellant was not aware of the passing of the decree till 11.9.2012”.

(Underline added)

6. Thus, the finding of the Division Bench is that the contention of the applicant that till 11th September, 2012 it was not aware of the decree is not correct and infact the applicant was aware of the decree earlier.

7. Thereafter, the Division Bench considered the provisions of Section 17 of the Maharashtra Co-operative Societies Act, 1960 and ultimately the Division Bench proceeded to dismiss the Appeal. The said

order has become final.

8. Thus, the applicant came to this Court with a case that it was not aware of the decree till 11th September, 2012. That contention has been specifically negated by the Division Bench of this Court. It is also held that on the basis of an application of the original society (first defendant), the division of the original society was made into seven different societies. It is held that the original defendant no. 3 – Pyarelal Prajapati was the chairman of the original society (first defendant) and a partner of the construction firm (original defendant No.2). Infact one Sanjeev Prajapati, was examined before the Executing Court, who is also a member of the applicant. As has been admitted by him in the cross-examination, he is the son of the Pyarelal Prajapati, who is party defendant no.3 to the suit.

9. Thus, the case of the applicant that it is not bound by the decree has been negated by the Trial Court and the Division Bench of this Court. Even the case that the applicant was not aware of the decree till 11th September, 2012 has not been accepted. After having raised a contention that the impugned decree was not binding on the applicant and after failing to establish the said contention upto the Apex Court, now in the

year 2015 it is not open for the applicant to contend that as it is bound by the decree and therefore, an opportunity may be granted to the applicant to challenge the decree by condoning the long delay.

10. Even according to the case of the applicant, it was aware of the decree on 11th September, 2012. Instead of immediately challenging the decree, the applicant obstructed the execution of the decree by contending that it has an independent right and that the decree was not binding on it. After having failed upto the Apex Court to establish the contention that the decree was not binding on it, now the applicant cannot be allowed to urge that an opportunity deserves to be granted to the applicant to challenge the decree.

11. Considering the conduct of the applicant, no case is made out for condonation of delay of more than four and half years. No case is made out for grant of leave to prefer an appeal. Accordingly, both the applications are rejected.

12. Civil Application for interim relief does not survive. As a result of this order, the Appeal cannot be entertained. If the applicant has paid

Court Fees on the appeal, it will be entitled to refund of Court Fees in accordance with the Rules.

(REVATI MOHITE DERE,J.)

(A.S. OKA,J.)