IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION (LODGING) NO.2529 OF 2015
IN
APPEAL (LODGING) NO.708 OF 2015
IN
COMPANY PETITION NO.772 OF 2014

Bharati Shipyard Ltd., Mumbai …. Applicant

In the matter between

Bharati Shipyard Ltd., Mumbai …. Appellant
V/s.
ABC Infra Equipment Pvt. Ltd., Thane …. Respondent

ALONG WITH

NOTICE OF MOTION (LODGING) NO.2521 OF 2015
IN
APPEAL (LODGING) NO.703 OF 2015
IN
COMPANY PETITION NO.148 OF 2014

Bharati Shipyard Ltd., Mumbai …. Applicant

In the matter between

Bharati Shipyard Ltd., Mumbai …. Appellant
V/s.
Labdhi Enterprises Sole Proprietorship …. Respondent

ALONG WITH

NOTICE OF MOTION (LODGING) NO.2520 OF 2015
IN
APPEAL (LODGING) NO.704 OF 2015
IN
COMPANY PETITION NO.764 OF 2014

Bharati Shipyard Ltd., Mumbai …. Applicant

In the matter between

Bharati Shipyard Ltd., Mumbai …. Appellant
V/s.
Chidambaram Shipcare Pvt. Ltd. …. Respondent

ALONG WITH

NOTICE OF MOTION (LODGING) NO.2523 OF 2015
IN
APPEAL (LODGING) NO.705 OF 2015
IN
COMPANY PETITION NO.814 OF 2014

Bharati Shipyard Ltd., Mumbai …. Applicant

In the matter between

Bharati Shipyard Ltd., Mumbai …. Appellant
V/s.
Usha Martin Corporation …. Respondent

ALONG WITH

NOTICE OF MOTION (LODGING) NO.2524 OF 2015
IN
APPEAL (LODGING) NO.706 OF 2015
IN
COMPANY PETITION NO.126 OF 2014

Bharati Shipyard Ltd., Mumbai …. Applicant

In the matter between

Bharati Shipyard Ltd., Mumbai …. Appellant
V/s.
Super Tug Offshore Services Pvt. Ltd. …. Respondent

AND

**NOTICE OF MOTION (LODGING) NO.2525 OF 2015
IN
APPEAL (LODGING) NO.707 OF 2015
IN
COMPANY PETITION NO.577 OF 2014**

Bharati Shipyard Ltd., Mumbai	….	Applicant

In the matter between

Bharati Shipyard Ltd., Mumbai	….	Appellant
V/s.		
Arihant Lifters	….	Respondent

Dr. Birendra Saraf, Sr. Counsel, a/w. Mr. Pavan Patil, for the Appellants in all Appeals.

Mr. Pradeep Bakhru a/w. Ms. Smiti Verma, i/by M/s. Wadia Ghandy & Co., for the Respondent in Appeal (Lodging) No.704 of 2015.

Mr. Bankim Gangar, i/by M/s. Gangar & Co., for Respondent No.1 in Appeal (Lodging) No.708 of 2015 and Appeal (Lodging) No.707 of 2015.

Mr. V.K. Ramabhadran a/w. Ms. Subra Karmarkar for the Respondent in Appeal (Lodging) No.706 of 2015.

Mr. Sairam Subramanian, i/by M/s. Khaitan & Co., for the Respondent in Appeal (Lodging) No.705 of 2015.

Mr. Zal Andhyarujina a/w. Ms. Samidha Vedpathak, i/by M/s. Maneksha & Sethna, for the Respondent in Appeal (Lodging) No.702 of 2015.

Mr. Sachin Chandrana a/w. Lipsa Unadkaf, i/by M/s. Manilal Kher Ambalal & Co., for the Intervenor (M/s. Eldelweiss Asset Reconstruction & Co.)

CORAM : <u>V.M. KANADE &</u>
<u>DR. SHALINI PHANSALKAR-JOSHI, J.J.</u>

DATE : <u>1ST OCTOBER, 2015.</u>

<u>P.C.</u> :

1. These Notice of Motions are taken out by the Appellant M/s. Bharati Shipyard Limited seeking condonation of delay of 41 days in filing the Appeals. The affidavit-in-reply has been filed on behalf of the Respondents opposing the condonation of delay applications. In para 3 of the affidavit in support of the Notice of Motion (Lodging) No.2524 of 2015, the reasons as to why the delay was caused are mentioned. It is stated in para 3 that the Appellant had given an undertaking to pay an amount of Rs.48,80,000/-, and other amounts mentioned in the other Appeals, in full and final settlement of the Respondents' claims in respect of the Company Petitions. Respondents had agreed to accept the said offer and, accordingly, undertaking of the Appellant was recorded in the orders dated 10th March, 2015 passed in the Company Petitions. The Appellant, therefore, had given an undertaking and consent in each Company Petitions, which was accepted by the learned Single Judge. It is stated

that the Appellant had filed a Reference under the Sick Industrial Companies (Special Provisions) Act, 1985 ***(SICA)*** before the Board of Industrial and Financial Reconstruction ***(B.I.F.R.)***. It is stated that, according to the undertaking given by the Appellant, three installments were paid on 15th May, 2015, 15th June, 2015 and 15th August, 2015. It is thus stated that since the Appellant was over burdened on account of the litigation pending in the Courts, Mr. Satish Gaikwad was transferred in the month of August, 2015 to assist the Appellant in the pending cases. It is stated that, therefore, there was a delay in receiving documents filed before the B.I.F.R. It is further stated that it was the Appellant who realized that the Reference of the Appellant made to the B.I.F.R. was registered as a case, being Case No.87/2015, pursuant to letter dated 14th July, 2015. It is stated that the Appellant further realized only on 10th August, 2015 that the orders which were passed on 10th March, 2015 and 12th June, 2015 recorded an undertaking of the Appellant to be bound and liable to make the payment as per the Consent Terms. In para (3) of the affidavit-in-support of the Notice of Motion, the Appellant Company stated that, "*I say that due to inadvertence, the Appellant was delayed in realization of registration before B.I.F.R. and the undertaking recorded in the said order."* Therefore, the Appellant Company prayed that the delay may be condoned.

2. In the affidavit-in-reply, which has been filed on behalf of the Respondents, the applications for condonation of delay are opposed. It is submitted that the Appellant had obtained the impugned orders dated 10th March, 2015 and 12th June, 2015 by suppression of material facts by misleading the Court and had played fraud on this Court. It is stated in the affidavit-in-reply that the Appellant lacks bonafides in filing the applications for condonation of delay and had abused the process of the Court. Therefore, the delay which was caused was deliberate and ought not to be condoned.

3. The learned counsel appearing on behalf of the Appellant urged that the Appellant had a good case on merits. It is submitted that though an undertaking was given by the Appellant to this Court, it would not preclude the Appellant from challenging the said order. It is submitted that the provision in law is quite well settled by catena of Judgments of the Apex Court. It is submitted that in the applications for condonation of delay, sufficient cause has been shown for condoning the delay and, therefore, the delay of 41 days caused in filing of the Appeals could be condoned and the matter could be heard on merits. It is submitted that the Company had 65 contracts and there are about 1000 workers working in the

Company, who would be rendered jobless if the impugned order is not set aside.

4. On the other hand, Mr. Ramabhadran, learned Senior Counsel appearing on behalf of the Respondent in Appeal (Lodging) No.706 of 2015, pointed out that the Appellant had suppressed material facts from this Court. It is submitted that one Company Petition was filed and it was listed before the learned Single Judge on 10th March, 2015. The Appellant Company had suppressed the said fact from this Court and suppressed a material fact from the learned Single Judge, namely, that the application has been filed by the Appellant Company under the SICA Act and was seeking registration of the case under Section 15(1) of the said Act and that the said application was to be considered on 10th April, 2015. It is submitted that on this fact the Company Judge may not have permitted the Appellant to give the offer of payment of dues of the Respondents by installments. It is submitted that the Appellants could have moved the learned Single Judge, before whom the Consent Terms and undertaking were given by the Appellant, seeking modification of the order. It is submitted that the Appellant deliberately waited till the order of registration of their case under SICA Act was passed under Section 15(1) on 14th July, 2015. It is further submitted that even when an application for modification

was made before the learned Single Judge on 12th June, 2015, these facts were not brought to the notice of the learned Single Judge. It is submitted that, on the other hand, in the affidavit-in-support of the Notice of Motion, which was taken out by the Appellant in June, 2015, it was stated that the Company wanted to restructure its debts and were likely to receive finances and, therefore, extension was sought to make the payment of installments. Therefore, the order was modified on 12th June, 2015. It is submitted that, therefore, even the learned Single Judge before whom the modification application was filed, was misled by the Appellant. It is submitted that the entire exercise of making an offer and giving a solemn undertaking was a well planned scheme to ensure that admission of the Company Petition is not passed and in the meantime to get registration of their case before the B.I.F.R. It is submitted that one of the creditors, whose Appeal has been admitted by this Court, filed an Appeal against the Consent Terms and the undertaking which was given by the Company and obtained stay to clause (vi) of the undertaking. Clause (vi) of the undertaking was that in the event, there was a breach in the payment of installments, the Company Petition would stand admitted without further reference to the Court. It is submitted that the said Appellant, namely, Edelweiss Asset Reconstruction Co. Ltd. had given a proposal before the B.I.F.R. to reconstruct the Appellant Company. It is submitted that there was obviously the joint efforts made by the Edelweiss Asset Reconstruction Co. Ltd. and the Appellant Company to ensure that the amounts are not distributed to other creditors, so that the said Edelweiss Asset Reconstruction Co. Ltd. would get larger amounts in its booty at the time of reconstruction. It was further submitted that the Apex Court in the recent Judgment had clearly held that the application for condonation of delay should not be allowed in a casual manner and facts of each case were required to be considered. He has relied on the Judgment of the Apex Court in the case of ***Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Ors., (2013) 12 SCC 649***. It is submitted that the Apex Court had laid down guidelines, which are to be followed by the Courts while considering an application for condonation of delay.

5. Mr. Zal Andhyarujina, learned counsel appearing on behalf of another Respondent, also made similar submissions and submitted that the reasons given by the Appellant Company in para 3 of the affidavit-in-support of the Notice of Motion was not genuine. He submitted that it was inconceivable that the Appellant Company would not know that they had given an undertaking to this Court for payment of installments and that, in fact, installments were paid on three dates i.e. May, 2015, June, 2015 and

August, 2015. It is submitted that the Appellant Company could not have forgotten that it had given an undertaking and it could have promptly approached the learned Single Judge seeking modification or for discharge of the undertaking, which was given by them. It is submitted that whenever a party gives an undertaking to the Court, it is a solemn assurance given to this Court and any breach of undertaking should not be lightly construed and on that ground alone, application for condonation of delay ought to be dismissed.

6. We have heard all the counsels at length. Before we deal with the rival submissions, it is necessary to take into consideration the brief facts, which are relevant, for the purpose of deciding these Notice of Motions. The Appellant Company was facing financial difficulties for quite some time; in fact, for a period of one year. On account of a Maharashtra Relief Undertaking (Special Provisions) Act, 1958, liquidation proceedings could not be filed. After the period of one year, Company Petitions were filed by the eight creditors. It is an admitted position that the amount, which was due and payable to the creditors, was not repaid after the service of statutory notice and, therefore, the debt has become due and payable and hence Company Petitions were filed. Since on account of failure by the Appellant Company to make the payment within the statutory period, after

service of the statutory notice, it is presumed that the Appellant Company is unable to pay its debt. The Appellant Company thereafter gave a proposal to the learned Single Judge that it was willing to pay dues of all the creditors in equal installments and amount of installments was fixed. The Appellant Company had already filed an application under the SICA Act for registration of their case under Section 15(1) of the said Act. However, this fact was not disclosed by the Appellant Company either to the learned Single Judge or to the other creditors. It is an admitted position that the B.I.F.R. had refused registration on 10th April, 2015 on valid grounds. In this background, the undertaking, which was given by the Appellant Company assumes importance. Apart from giving an undertaking of making payment in installments in Clause (v) and Clause (vi), an undertaking was given that even if application is made before B.I.F.R. under the SICA Act, the Appellant Company would continue to pay the installments. In Clause (vi), an undertaking was given that in the event the installments are not paid, the Company Petitions would stand admitted without further reference to the Court. Clauses (v) and (vi) of the undertaking read as under :-

> “(v). The Company undertakes to this Court that the Company shall continue to be bound and liable to

pay the amounts as agreed herein, even if the Company seeks and obtains protection under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) or under the Bombay Relief Undertaking Act. The Company further undertakes that such protection shall also not preclude the Petitioner to pursue the winding up proceedings in case of default. The Company shall forward a copy of this order to the appropriate authorities before whom a reference or application is already filed or is desirous of filing. The undertaking is accepted.

(vi). In the event of the Company committing any default in payment of the aforesaid amounts, the Company Petition shall without reference to this Court be revived, stand admitted, made returnable within six weeks from the date of default and advertised in two local newspapers i.e. Free Press Journal (in English) and Navshakti (in Marathi) and in the Maharashtra Government Gazette. The Petitioner shall deposit an amount of Rs.10,000/- with the Prothonotary and

Senior Master of this Court towards publication charges, within two weeks from the date of default, with intimation to the Company Registrar failing which the Petition shall stand dismissed for non-prosecution. In the event of any default, the Official Liquidator shall forthwith stand appointed as provisional liquidator and shall immediately take charge of the records as well as the movable and immovable properties of the Company. Notice under Rule 28 of the Companies (Court) Rules, 1959 shall also stand waived on behalf of the Company."

7. After the said undertaking was given, the application before the B.I.F.R., which was already fixed on 10th April, 2015, was heard and registration was not granted. Thereafter, the Appellant Company paid the first installment in May, 2015. However, in June, 2015, application for modification was made and it was mentioned in the said application that the Appellant Company was not in a position to pay the installment in July and the time for payment of the said installment should be extended till August. Relying on the representation made by the Appellant Company, the learned Single Judge was pleased to extend the time. In the

meantime, the Appellant Company had quietly moved the B.I.F.R. and obtained registration, which was communicated to them on 14th July, 2015. It is obvious that the Appellant Company, therefore, deliberately waited till the outcome of the B.I.F.R. registration and only thereafter filed the Appeal to get out of the undertaking, which it had solemnly given to this Court on the specious ground that even though an undertaking is given, an Appeal is still to be decided. Taking into consideration the said facts, it will have to be seen whether sufficient cause was shown and whether there was a deliberate suppression of material facts on the part of the Appellant Company, which would dis-entltle them to obtain an equitable relief of condonation of delay.

8. At this stage, it would be profitable to take into consideration recent Judgment of the Apex Court in the case of ***Esha Bhattacharjee (supra).*** The Apex Court has laid down guidelines, which are to be followed by all the Courts while considering an application for condonation of delay. The Apex Court has observed that no straight jacket formula can be devised for the purpose of condoning delay and the facts, if any, would have to be considered separately. However, it has observed that lackadaisical approach should be avoided and application for condonation of delay should not be considered in a casual manner and delay should not be

condoned for the asking. In the said case, though the delay is of seven years, the fact remains that the guidelines, which have been given, are applicable even in a case where the delay may be of few days, which is apparent from the guidelines, which are framed by the Apex Court. It will be relevant, therefore, to reproduce the guidelines, which read as under :-

"(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration of few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the court should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts care to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

(xiv) An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(xv) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(xvi) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(xvii) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."

9. From the aforesaid guidelines, it can be seen from clauses (i) to (xvii) that where the Court comes to a conclusion that the application is not filed bonafide, but there has been a suppression of fact or fraud is committed on the Court, then in such cases the Court should not condone the delay. The Apex Court has also observed that the words "sufficient cause" has to be interpreted in the light of the said guidelines.

10. Keeping in mind the aforesaid principles of law and guidelines laid

down by the Apex Court, we are of the view that in the present case the delay of 41 days, which is caused in filing each of the Appeals, deserves not to be condoned.

11. Firstly, from the facts, which are narrated here-in-above, it is obvious that the Appellant Company had given an undertaking with an intention from the outset of not complying with the undertaking. The Appellant Company obviously, on one hand, had given undertaking and, on the other hand, was taking steps to ensure that the undertaking is rendered infructuous by getting the registration under Section 15(1) of the SICA Act. At the same time, extreme care was taken to ensure that neither the Court nor the creditors are aware about the proceedings, which were being filed before the B.I.F.R. Only one of the creditors, obviously, was made aware of the intention of the Appellant, namely, Edelweiss Asset Reconstruction Co. Ltd., who appears to be a party to the said fraud, since in the application before the B.I.F.R., a proposal for reconstruction was to be given by Edelweiss, which was an asset reconstruction company. This becomes self evident from the fact that Edelweiss Asset Reconstruction Co. Ltd., after the undertaking was given by the Appellant Company, challenged the only two clauses of the undertaking by filing an Appeal. The Division Bench of this Court, relying on the representation

made by Edelweiss Asset Reconstruction Co. Ltd., granted stay to the said two clauses, which would come in the way of the Appellant Company after their case was registered before the B.I.F.R.

12. All these facts clearly reveal that this was done in a preplanned manner. We have no hesitation, therefore, in coming to the conclusion that the Appellant Company has committed fraud on this Court and has tried to take this Court for a ride by giving a false undertaking, which was never meant to be complied.

13. At this stage, we must mention here that normally in the cases, such as, Rent Act proceedings, where the High Court dismisses Writ Petitions on merit and confirms order of eviction passed by the lower Courts, then very often accepts undertaking given by the tenants that they would vacate the premises within a particular period. In such cases, the Apex Court has held that, in spite of the said undertaking, the statutory rights of the tenants to challenge the impugned Judgment and Order passed by the High Court and lower Courts are not taken away.

14. In the present case, the situation is some what different. Here undertaking was given and an order of admission of the winding up

Company Petition was delayed by giving a false representation to the Court about payment of the money in installments. If such a proposal of undertaking had not been given in all probabilities, the Company Petition would have been admitted on 10th March, 2015 itself and Provisional Liquidator would have been appointed and also an advertisement would have been issued. This conduct, which is also very relevant for the purpose of considering the application for condonation of delay, clearly dis-entitles the Appellant Company from seeking condonation of delay caused in filing the Appeals.

15. In our considered view, there is a clear abuse of the process of Court by the Appellant Company. If the intention of the Appellant Company was bonafide, they would not have acted in the manner in which they have done in these proceedings.

16. Coming to the actual cause, which is shown by the Appellant Company in their affidavit-in-support of the Notice of Motion, it is quite clear that the reason which is given that due to inadvertence and due to pressure of litigation work, the Appeals could not be filed in time, is also unacceptable. As we have mentioned here-in-above, there is much substance in all the submissions made by Mr. Ramabhadran and Mr.

Andhyarujina, learned counsel for the Respondents, which submissions we accept. Therefore, we are of the view that the delay which has been caused was deliberate, because if the Appeal has been filed within the period of limitation, the cat would have been out of the bag and the Court and the parties would have come to know that they had been taken for ride, since the creditors would have come to know about the registration of the proceedings before the B.I.F.R. of the Appellant Company. If we consider the said reason, which is given, it is clear that, in fact, no valid and plausible reason has been given for the delay, which is caused. No particulars have been given and, therefore, each and every day's delay has to be explained becomes squarely applicable to the facts of the present case.

17. We are of the considered view that no sufficient explanation has been given by the Appellant Company. We are, therefore, of the view that, from any angle, this is not a fit case where the application for condonation of delay should be allowed, though the delay is only of 41 days and not several months or several years. Hence, the Notice of Motions seeking condonation of delay are dismissed. Appeals, therefore, do not survive and the same are dismissed.

18. At this stage, learned Counsel appearing on behalf of the Appellant Company submitted that the operation of the order of this Court may be stayed.

19. We had granted interim protection only because of the paucity of time at our disposal, when the matter was listed before us, and only till that time, stay was continued for a couple of days. Under the facts and circumstances of the case, we are not inclined to stay our order or continue the interim order, which was granted by us. Hence, the request for stay made by the learned counsel for the Appellant Company is rejected.

[DR. SHALINI PHANSALKAR-JOSHI, J.] **[V.M. KANADE, J.]**

CERTIFICATE

Certified to be true and correct copy of the original signed Order.