

**IN THE HIGH COURT OF BOMBAY AT GOA****FIRST APPEAL No. 65 OF 2015**

Mr. Deepak Shah,  
son of Shri N. Shah,  
major of age, businessman,  
resident of 307-N,  
Airport Road, Behind Sea Scan Maritime Academy,  
Chicalim, Goa- 403 711.  
Through his constituted attorney Shri Knubhai Patel  
R/o. Mala, Panaji-Goa.

**...Appellant.**

V/s.

1. M/s. Shah Builders,  
a partnership firm registered  
having its office at  
403, S. V. Patel Street,  
Camp, Pune – 411 001.
2. Union of India,  
Through the Commander Works  
Engineer (Navy)  
Vasco-da-Gama, Goa 403 802.
3. Garrison Engineer (Gomantak)  
Military Engineer Service (MES)  
Opposite Gurudwara, Mangor Hill,  
Vasco-da-Gama, Goa 403 802.
4. The Union of India,  
through The Secretary and  
The Engineer in Chief (MES),  
Army Headquarter, Kashmir House,  
DHQ, P.O. New Delhi 110 001

**... Respondents.**

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. V. Korgaonkar, Advocate  
for the Appellant.

Mr. Mahesh Amonkar, Central Government Standing Counsel for the  
Respondents no. 2, 3 and 4.

Mr. V. A. Lawande, Advocate with Ms. P. Kaur, Advocate for the Respondent  
no. 1.

**CORAM:- F.M. REIS, J**

**RESERVED FOR JUDGMENT ON: 12.08.2016**  
**JUDGMENT PRONOUNCED ON: 02.12.2016**

**JUDGMENT:**

Admit.

2. Heard forthwith with the consent of the learned Counsel. Learned Counsel appearing for the respondents waive service.

3. The above appeal challenges the Order and Decree passed by the learned Additional District Judge I, Fast Track Court-I, Margao whereby the suit filed by the Appellant came to be dismissed for non-prosecution as well as the Order dated 29.11.2014 whereby the application filed by the Appellant to set aside the Order closing the evidence be set aside and the Appellant be permitted to lead further evidence came to be dismissed.

4. Briefly, it is the case of the Appellant that he is a Civil Contractor and in the course of his business undertakes building constructions and other constructions. It is further contended that the Respondent no. 1 is a registered Partnership firm which carries out works through the Appellant and that the Respondent no. 1 was assigned work contracts by the Respondent No. 2 and 3. It is also their case that the works were completed by the Respondent no. 1. As the amounts payable were delayed by the

Respondents no. 2 and 3, civil proceedings came to be initiated which came to be concluded by a award passed on 19.05.1997 whereby the Appellant requested the Respondent no. 1 to effect payment of Rs.60,00,000/- which was not paid by the Respondent no. 1 . Thereafter, after a settlement signed between the parties which was reduced in a agreement dated 06.07.1999, the Appellant filed a suit before the learned District Judge being Civil Suit No. 40/12, inter alia, for a Judgment of recovery of the said amount due and payable by the Respondent no. 1 to the Appellant and for an injunction restraining the Respondent no. 1 from taking the proceeds of the award and for other reliefs.

5. The written statement came to be filed by the Respondent No. 1 disputing the contentions of the Appellant. It is the case of the Appellant in the above application that he is of advanced age and is not keeping well and also has to look after his daughter in Mumbai and, as such, could not depose in the matter and had sought time on that count. It is further their case that on 26.09.2014 the Advocate for the Appellant sought time on the ground that he needs instructions from the Appellant which came to be rejected on the ground that the Appellant had sought time on six earlier occasions. After the said Order dated 26.09.2014 closing the evidence of the Appellant, the application for recalling the said order was filed on the ground that during the said period he was residing temporarily in Pune with his family to look after

his daughter who got into complications during her delivery and there was no other person to look after her. The application was opposed by the Respondents on the ground that several opportunities were given to the Appellant to lead evidence. Learned Judge by the impugned order dated 26.09.2014 dismissed the said application and proceeded to dismiss the suit for non-prosecution by passing the decree accordingly. Being aggrieved by the said Order and Decree the Appellant has filed the above Appeal.

6. Shri J. E. Coelho Pereira, learned Senior Counsel appearing for the Appellant pointed out that the Appellant is a senior citizen and on account of the delivery and subsequent complications to his daughter at the time of the delivery, the Appellant and his wife had to proceed to Pune to take care of his daughter. Learned Senior Counsel further pointed out that a certificate from the concerned hospital has been produced by the Appellant to substantiate his contention that his daughter had been admitted. Learned Senior Counsel has taken me through the impugned order to point out that the learned Judge failed to note the evidence on record and proceeded to dismiss the application filed by the Appellant. Learned Counsel further pointed out that though the Respondents had disputed the correctness of the said averments, nevertheless, there is no material on record produced by the Respondents to contend that the Appellant had deliberately delayed the disposal of the suit. It is further pointed out that considering the old age of the appellant and in the interest of

justice it was incumbent upon the learned Judge to give an opportunity to the Appellant to lead evidence. It is further submitted that in case there was serious dispute with regard to the allegations in the application it was incumbent upon the learned Judge to hold an inquiry and proceed in accordance with law. Learned Senior Counsel has taken me through the impugned order to point out that the learned Judge erroneously dismissed the application and consequently passed the decree dismissing the suit for non-prosecution.

7. Shri V. A. Lawande, learned Counsel appearing for the Respondent No. 1 vehemently argued that the Appellant has deliberately delayed the proceedings thereby causing grave prejudice to the Respondent. Learned Counsel further pointed out that the certificate produced by the Appellant does not justify the contention of the Appellant that his daughter had any complications during her delivery. Learned Counsel further submits that there is no cogent evidence provided on record to substantiate the contention of the Appellant that on account of the illness of his daughter during her delivery, the Appellant had proceeded to Pune for the purpose of looking after her. Learned Counsel further pointed out that the learned Judge has rightly pointed to the evidence on record that the Appellants have failed to show any cause for recalling the order closing the evidence of the Appellant. Learned Counsel in support of his contention has relied upon the judgment of the

Apex Court reported in (2011)9 SCC 678 in the case of ***Shiv Cotex v/s. Tirgun Auto Plast (P) Ltd.***, and the judgment reported in (2010)8 SCC 685 in the case of ***Balwant Singh v/s. Jagdish Singh***. Learned Counsel also raised the plea of the maintainability of the appeal by contending that the impugned order though dismissed the Suit for non-prosecution is not a decree and as such no First Appeal would lie. Learned Counsel has taken me through the definition of a decree and pointed out that the appeal itself is not maintainable and as such the appeal be rejected.

8. I have considered the submissions and I have gone through the records.

9. Based on the rival contentions the following points arise for determination:

(i) Whether the appeal itself is maintainable.

(ii) Whether the learned Judge was justified to pass the Impugned order refusing to recall the Order closing the evidence and dismissing the suit for non-prosecution.

10. With regard to the contention of Mr. Lawande, learned Counsel appearing for the Respondent that the appeal itself is not maintainable, I find that on perusal of the impugned order, the learned Judge has dismissed the suit for non-prosecution and passed a decree accordingly. In such circumstances, the question of contending that the appeal itself is not maintainable as there is no decree drawn by the learned Trial Judge cannot be

accepted. The effect of such Order will preclude the Appellant from filing the same suit on the same cause of action and considering that the learned Judge has drawn the Decree, it would determine the rights of the parties accordingly.

11. In such circumstances, such a decision can have the status of a Decree and, as such, such determination shall conclusively put to rest the rights of the parties with regard to the cause of action raised by the Appellant. The contention raised by the Respondent is accordingly rejected.

12. With regard to the second point for determination, I find that issues were settled on 18.01.2014. The matter was adjourned for plaintiff's evidence on 03.03.2014 and fixed on 26.03.2014. On 26.03.2014 the plaintiff was present in person but however, the matter was adjourned at the request of the Appellant and fixed for evidence on 06.05.2014. Thereafter, on 21.06.2014 learned Judge sought clarification from the learned Advocate appearing for the Appellant in view of the discrepancy in the cause title. The matter was thereafter adjourned on 25.07.2014 and 04.08.2014 on account of administrative reasons. The matter was thereafter posted for clarification on 19.08.2014 and on 10.09.2014 as the discrepancy in the cause title was cleared, the matter was adjourned and fixed for evidence on 26.09.2014. On 26.09.2014 an adjournment was sought by the learned Advocate appearing for the Appellant which was objected by the Respondent. The evidence of

the Appellant was accordingly closed and the matter was posted for defence evidence. On 23.10.2014 an application was filed to set aside the order closing the evidence and ultimately by the impugned order dated 29.11.2014 the application as well as the suit was dismissed and decree was accordingly drawn.

13. On perusal of the records of the learned Trial Court, though no doubt the Appellant had sought two adjournments on earlier occasions, but, thereafter the matter was adjourned in view of the clarifications sought by the learned Judge. The matter was also adjourned on two occasions on account of administrative reasons which cannot be attributed to the Appellant. The roznama entries disclose that on 10.09.2014 the matter was posted for clarification and not for evidence of the plaintiff. The clarifications were given by the learned Counsel for the respondent no. 3 stating that he was also appearing for the respondent no. 4. The matter was thereafter posted on 26.09.2014 which led to the closing of the evidence of the Appellant in view of his absence. Learned Trial Judge whilst examining the application filed by the Appellant to recall the order closing the evidence, has noted that in the application dated 26.09.2014 the Advocate for the Appellant sought three weeks' adjournment stating that he wanted to intimate the Appellant that he desires to withdraw his appearance. The learned Judge noted from the roznama entries that the Appellant was not at all interested or diligent in

pursuing his case. Learned Judge also found that the reason given in the application for adjournment was as the Advocate wanted to withdraw his appearance whereas, in the application to recall the order, the reason is that the Appellant had to temporarily proceed to Pune to look after his daughter. Learned Judge found that no medical certificate has been produced on that count to show that the daughter was advised bed rest from 01.10.2014. It is further found by the learned Judge that the contentions are without any proof produced by the Appellant. Learned Judge also noted the information produced by the respondent no. 1 that the daughter of the Appellant was admitted to the concerned hospital in Pune on 04.09.2014 with labour pain and she delivered a child on 04.09.2014 which was a normal delivery. Learned Judge also noted the contents of the discharge certificate that the mother and daughter were found to be in good health. Learned Judge doubted the contention of the Appellant that he was not in proper frame of mind in view of the complications in the birth of the child which occurred to his daughter. The learned Judge as such dismissed the application filed by the Appellant.

14. On perusal of the findings in the impugned order, I find that the learned Judge failed to note that on two occasions the matter was adjourned on account of administrative reasons. These adjournments cannot be attributed to the Appellant. Apart from that, the matter was fixed for clarification at the

instance of the learned Judge and ultimately though the matter was adjourned at the instance of the Appellant to lead evidence on 10.09.2014, the matter was posted on the said date for clarification. The matter was thereafter posted on 26.09.2014 when the order came to be passed closing the evidence of the Appellant in view of the objections raised by the respondent.

15. Though it is well settled that adjournment cannot be granted at the asking of the parties but the fact remains that the adjournment sought in the present case, i.e., on 26.09.2014 was as the Advocate desired to withdraw his appearance on behalf of the Appellant. The fact that there was a delivery in the family of the Appellant and, in fact, a child was born during the first fortnight of September, 2014 on 04.09.2014 cannot be disputed. The fact that the Appellant was in Pune in connection with the delivery of his daughter has also not been disputed. Though the learned Judge has taken into consideration the information produced by the Respondent no. 1 that the delivery of his daughter was normal, that by itself cannot exclude a situation when complications can occur subsequent to the delivery. There is no positive material produced by the Respondent to suggest that the contention of the Appellant that the delivery resulted in some complications to his daughter is patently false. In any event, in case the respondents were seriously disputing the averments on the grounds which the application was filed, the Court could have proceeded to hold an inquiry and an opportunity

given to the parties to support their respective contentions in terms of the provisions of the Civil Courts Manual. In the present case the records cannot suggest that the Appellant was not diligent and was only bent on delaying the matter. Though the learned Advocate for the Appellant before the Trial Court sought adjournment for three weeks on the subject dates, the learned Judge in view of the objections raised by the Respondents could have granted a shorter adjournment subject to payment of costs or other terms. In such circumstances, I find that the learned Judge was not justified to dismiss the application filed by the Appellant for recalling the order of closing of the evidence. It would be material to note that the application itself was filed within 30 days and an affidavit was sworn by the Appellant on the said date. This would further suggest that the Appellant was in Goa to proceed with the evidence in case the learned Judge had permitted him to do so. Rules of procedure are meant for facilitating the cause of justice and not to defeat it.

16. The Judgment of the Apex Court relied upon by Mr. Lawande, learned Counsel appearing for the Respondent no. 1, would be applicable to the facts of the present case. Considering the old age of the Petitioner and the facts that the ground raised by the Petitioner to justify his absence on the relevant date are plausible as admittedly his daughter had delivered a few days prior to such date and looking into the roznama of the Court proceedings, it cannot be said that the Petitioner has been deliberately seeking adjournments in

recording his evidence.

17. In the Judgment of this Court relying on the Judgment of the Apex Court reported in **2015(1) Bom. C. R. 702** in the case of **Anandrao @Amrut Krushnarao Tirmanwar & ors., versus Prashant Madhukar Patil & ors.**, it has observed at para 9, 10, 11, and 13 thus:-

9. Thus, for non-availability of Counsel another Counsel was engaged to defend the suit. The applications were made for adjournments. He prayed for an opportunity to cross-examine the witness examined on behalf of the plaintiffs subject to reasonable costs while on behalf of the respondents/plaintiffs reference is made to leading ruling in the case of (*Shiv Cotex Vs. Tirgun Auto Plast Private Limited and others*)<sup>1</sup>, reported at (2012) (4) Bom. C.R.722(S.C.): (2011)9 S.C.C. 678 in which the Honourable Supreme Court considered Cap of three adjournments in view of Order XVII, Rules 1 and 3(a) of the Civil Procedure Code as also relaxation of rule of adjournments only when there is sufficient cause or justifiable cause under the circumstances. It cannot be disputed that unnecessary and repeated adjournments are deprecable and ought not to be encouraged. But imposing appropriate costs may prevent the repeated adjournments. The reference was also made to the ruling in the case of (*Noor Mohammed Vs. Jethanand and another*)<sup>2</sup>,

reported at (2013) 5 S.C.C. 202 in which non-appearance of Counsel for the appellants for long period and repeated adjournments for that reason was considered as abuse of procedure. Of course, each case need to be examined in the facts and circumstances attending the case.

10. In the case of (Rasiklal Manikchand Dhariwal and another Vs. M. S.S. Food Products)<sup>3</sup>, reported at (2012)4 Bom. C.R. 730 (S.C.): (2012)2 S.C.C. 196 principles of natural justice was also considered apart from the procedural provision under order XVII of the Civil Procedure Code. The Apex Court had deprecated the repeated adjournments observing that a party to the suit is not at liberty to proceed with the trial Court at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. It is expected by the Supreme Court that the parties to a suit whether it is plaintiff or the defendant must co-operate with the trial Court in ensuring effective work on the date of hearing for which the matter has been fixed for hearing. If the party fails or avoids to cooperate, they can do so at their own peril.

11. To my mind, therefore, considering the rulings cited (*supra*) there is no doubt that repeated adjournments are deprecable particularly when there is no just and sufficient cause for seeking

adjournments by either of the parties to the suit. The adjournments are bound to be discouraged at least by imposing the costs sufficient enough to compensate the other party who sacrifices its time and money to engage Counsel for to proceed with the trial while it is the duty of the trial Court to ensure the progress in the suit and expeditious trial so that the suit can be disposed of as early as possible. At the same time, one cannot forget in the larger interest of justice so that if any application for adjournment is rejected, the effect of such refusal or rejection can also be borne in mind while granting or refusing the permission to cross-examine the witness already examined; subject to reasonable costs. The trial Court can ensure that other side to the suit trial is reasonably compensated while defaulting party is made to pay sufficient and reasonable costs for indulging in adjournment, before drastic action of closure of the evidence.

13. In such cases, refusal to grant permission to cross-examine the witness on the ground that repeated applications were made for adjournments may be harsh particularly when it has to be considered that litigant shall not suffer due to sudden absence of his Counsel or due to the fact that Counsel was not sufficiently instructed to proceed with the cross-examination. In such cases,

I feel that other side can be compensated with reasonably sufficient costs so that if the party seeking permission to proceed with the trial can go ahead with the trial while at the same time, it must compensate the other side with costs. This can be done before harsh decision to close the evidence in the case.

18. The Apex Court in the Judgment reported in **(2000) 8 SCC 532** in the case of ***State Bank of India V/s. Chandra Govindji (KM)*** has held that considering Order XVII, Rule 1 of the Code of Civil Procedure and proviso thereto in respect of adjournments, held that, in ascertaining whether a party had reasonable opportunity to put forward his case or not, one should not ordinarily go beyond the date on which adjournment is sought for. Earlier adjournments, if any, granted would certainly be for reasonable grounds and that aspect need not be once again examined if, on the date on which adjournment is sought for, the party concerned has a reasonable ground. The mere fact that in the past adjournments had been sought for would not be of any materiality. If the adjournment had been sought for on flimsy grounds, the same would have been rejected.

19. Considering the said observations, I find that in the present case when the evidence of the Appellant was closed, some dates prior to such date the daughter of the Appellant had delivered. The Advocate appearing for the

Appellant had sought time to withdraw his appearance there is no urgent matter on record to establish that the Appellant was intimated of the date in question when the matter was posted for evidence. Though seeking successive adjournments has to be deprecated, nevertheless, Court can always grant exemplary cost to deter the parties from seeking adjournments. In the present case considering the factual aspects, I find that the Appellant who is stated to be a senior citizen could have been given another opportunity to proceed with the case subject to payment of cost on the concerned date.

20. Looking into the circumstances of the case, I find that the learned Judge was not justified to pass the impugned order and decree dismissing the suit filed by the Appellant. No doubt the inconvenience and prejudice caused to the Respondents in view of the adjournment sought by the Appellant would have to be adequately compensated. The costs are accordingly quantified at Rs.25,000/- to be paid to the Respondent no. 1 as condition precedent. The points for determination are answered accordingly.

21. In view of the above, I pass the following order:

### **ORDER**

- i) The impugned order dismissing the suit for non-prosecution of suit and Decree is quashed and set aside.

- ii) The impugned order dated 29.11.2014 dismissing the application to recall the order closing the evidence of the Appellant is quashed and set aside.
- iii) The Civil Suit is restored to the file of the learned District Judge subject to the payment of Rs.25,000/- as condition precedent to the Respondent no. 1.
- iv) The learned Judge is directed to dispose of the suit after giving an opportunity to both the parties to lead evidence in accordance with law.
- v) The Appeal stands disposed of accordingly.

**F. M. REIS, J.**

msr.