

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

CIVIL APPLICATION NO.2853 OF 2016

IN

FIRST APPEAL NO.381 OF 2012

Shri. Jayant Maniklal Lunawat

.. Applicant/Appellant

Versus

Smt. Kamal Arjan Hingorani and others

.. Respondents

Ms. Rajani Iyer, Senior Advocate a/w Mr. V. R. Dhond, Senior Advocate, Mr. Vishal Kanade, Mr. Saket Mone i/by Vidhi Partners for the Applicant/Appellant.

Mr. D. D. Madon, Senior Advocate a/w Mr. Astaad Randeria, Mr. R. K. Satpalkar, Mr. Mihir Nerurkar i/by Mulla & Mulla & CBC for the Respondent Nos.1 and 2.

Mr. Fredun De Vitre, Senior Advocate a/w Mr. Karl Tamboly i/by Harish Joshi & Co., for the Respondent Nos.3 and 4.

CORAM : R.M. SAVANT, J.

DATE : 11th JULY 2016

PC.

1 The above Civil Application has been filed for restoration of the above First Appeal being No.381 of 2012 and Civil Application No.852 of 2012 and for condonation of delay in filing the above Civil Application. The Applicant is the original Appellant in the above First Appeal. The above First Appeal is directed against the decree of dismissal of the Suit filed by the Appellant for specific performance. The above First Appeal was admitted on 11.04.2012 by a Division Bench of this Court and in so

far as interim reliefs are concerned, in the Civil Application filed by the Appellant/Applicant a Division bench of this Court passed an order of status-quo, with certain directions issued in respect of the Respondent Nos.3 and 4 herein. The First Appeal came to be dismissed for non-prosecution on 05.05.2016 in view of the fact that none had appeared on behalf of the Appellant when it was listed before a Learned Single Judge of this Court on the said day. The Appellant/Applicant is represented by a firm of Advocates.

2 The absence of the advocate appearing on behalf of the Appellant is sought to be explained by the averments made in the above Civil Application. The sum and substance of the case of the Applicant can be found in paragraph 15 and in the subsequent paragraphs of the Civil Application. The said paragraph 15 has been preceded by facts antecedent to 05.05.2016 on which day the First Appeal came to be dismissed for non-prosecution. The Applicant has adverted to the orders passed in the above Civil Application filed in the above First Appeal including the Civil Application filed by the Respondent Nos.3 and 4 for their impleadment. In so far as paragraph 15 is concerned, it has been stated therein that the Applicant/Appellant has diligently pursued the suit from the date of its filing till the final judgment delivered by the Trial Court. It has further been averred that the above First Appeal was listed on 28 occasions and

that the record indicates that never has the matter been unattended by the advocates for the Applicant. It has thereafter been averred in paragraph 17 that on 04.01.2016 when the above First Appeal last reached, prior to its dismissal on 05.05.2016 the advocate for the Appellant appeared and the interim orders have been extended by this Court from time to time. It has further been averred that in view of the interim relief expiring applications have been made for its continuance from time to time. Thereafter in paragraph 18, it has been averred that one Mr. Vishesh Kalra, advocate working with the firm representing the Applicant was assigned the task of keeping track of the matter. It is further averred that on 05.05.2016, Mr. Vishesh Kalra gathered an impression that the matter had not reached and left without making further inquiries. Thereafter it is averred in paragraph 20 that the Applicant/Appellant routinely checked the status of the matter on 13.01.2016 when it was realized that the First Appeal has been dismissed for default on account of his advocate not being present. It has further been averred that Applicant/Appellant immediately called upon the office of his advocates and informed them of the First Appeal being dismissed, upon which they were surprised to know of the said fact. In paragraph 22, it has been averred that the Applicant/Appellant resides in Pune and relies upon his advocates to attend all his matters before this Court. It has been lastly averred in paragraph 23 that on learning of the

dismissal of the matter on 05.05.2016, the Applicant/Appellant has instructed his advocates on 13.06.2016 itself to take urgent steps to get the matter restored. The averments relating to condonation of delay are in paragraph 25. The condonation of delay of 10 days is sought on the ground that the Applicant learnt of the dismissal of the matter on 13.06.2016 and has filed the instant application thereafter. The above Civil Application and the submissions made therein have been sought to be supported by the affidavit of the advocate Mr. Vishesh Kalra dated 16.06.2016 and an affidavit-in-rejoinder filed by the Applicant/ Appellant.

3 On behalf of the Respondent Nos.1 and 2 as also the Respondent Nos.3 and 4 affidavits have been filed replying to the averments made in the above Civil Application as well as the affidavit of advocate Mr. Vishesh Kalra. The reasons put forth on behalf of the Applicant/Appellant are sought to be questioned by both the sets of Respondents.

4 The Respondent Nos.1 and 2 have contended in their reply that the Applicant has not disclosed that the above First Appeal was listed on 21.04.2016 and thereafter on 28.04.2016 under the caption for dismissal and again listed on 05.05.2016 for dismissal. It is therefore their case that on account of the said conduct the Applicant is not entitled to

any equitable reliefs in the above Civil Application. It is also their case that the Applicant has not explained the delay from 6th May 2016 to 19th June 2016 when the above application was filed. The case of the Applicant/Appellant for restoration is sought to be questioned on the ground that the Applicant/Appellant is having number of proceedings in this Court and that he is a builder by profession. In so far as the Respondent Nos.3 and 4 are concerned, their reply to the above Civil Application is on the same lines as the Respondent Nos.1 and 2. The two sets of Respondents in their replies have also sought to bring on record the facts which have transpired post the dismissal of the above First Appeal.

5 This in short is the factual foundation laid by the parties on the basis of which the Learned Senior Counsel appearing for the Applicant/Appellant and the Learned Senior Counsel appearing for the two sets of Respondents urged their contentions.

6 The Learned Senior Counsel appearing on behalf of the Applicant/Appellant Ms. Rajani Iyer would reiterate the case of the Applicant/Appellant urged in the Civil Application. It was the submission of the Learned Senior Counsel that the advocate who was asked to keep the track of the matter has in his affidavit owned up his mistake. It was her submission that on the ground of the mistake of the advocate, the

Applicant/ Appellant should not suffer.

7 Per contra, the Learned Senior Counsel Mr. D. D. Madon and Mr. Fredun De Vitre appearing for the Respondents would make submissions opposing the grant of any relief in the above Civil Application, namely the restoration of the First Appeal. The Learned Counsel would reiterate the case of the respective Respondents as set out by them in the reply affidavits filed by them in the above Civil Application.

8 It is sought to be contended by Mr. D. D. Madon the Learned Senior Counsel appearing for the Respondent Nos.1 and 2 that though the above First Appeal was listed on two dates i.e. on 21.04.2016 and 28.04.2016 and reached hearing, it has been wrongly mentioned in paragraph 17 of the Civil Application that after 04.01.2016, the First Appeal for the first time reached hearing on 05.05.2016. It is sought to be contended by the Learned Senior Counsel that the above First Appeal was listed for hearing on 21.04.2016, since no appearance was put up on behalf of the Applicant on the said day, it was adjourned and listed on 28.04.2016 for dismissal when it did not reach. The First Appeal was thereafter listed on 05.05.2016 and shown for dismissal and since no appearance was put up on behalf of the Applicant, it came to be dismissed for default. It was therefore the submission of the Learned Senior Counsel

that there is a persistent default on the part of the advocates for the Applicant. The Learned Senior Counsel would contend that there is also inconsistency between what is stated by Mr. Vishesh Kalra in his affidavit and what is stated by the Applicant in the affidavit in rejoinder.

The Learned Senior Counsel Mr. Fredun De Vitre appearing on behalf of the Respondent Nos.3 and 4 would support the contentions urged by Mr. D. D. Madon, in addition he sought to draw the attention of this Court to the events which have transpired post the dismissal of the First Appeal.

9 Having heard the Learned Senior Counsel for the parties. The question that arises in the instant case is whether indulgence is required to be shown to the Applicant/Appellant in the matter of restoration of the above First Appeal. As indicated above, the above First Appeal came to be admitted by a Division Bench of this Court on 11.04.2012 and on account of the pecuniary jurisdiction of the Learned Single Judge having been increased had been transferred to the Court of a Single Judge. It seems that prior to 05.05.2016 i.e. the date on which the First Appeal came to be dismissed for non-prosecution, the First Appeal along with the Civil Application was listed from time to time as the interim order which was operating in the above First Appeal was being continued

from time to time. In view of the order passed by the Apex Court expediting the hearing of the above First Appeal, it was shown on the final hearing board of the Learned Judge taking up First Appeals at the said relevant time. As indicated above, it is the case of the Applicant that on 05.05.2016 the advocate who was keeping track of the matter had from the information he derived in the Court gathered an impression that the matter had not reached and had therefore left the concerned Court without making inquiries. It later on transpired that the above First Appeal came to be dismissed for non-prosecution on the said day itself i.e. on 05.05.2016. In so far as the two dates in April i.e. 21.04.2016 and 28.04.2016, admittedly no appearance was put up on behalf of the Applicant/Appellant on the said days. In so far as 21.04.2016 is concerned, it seems that the First Appeal had reached hearing however since no appearance was put up on behalf of the Applicant/Appellant, it was adjourned to 28.04.2016 for being shown under the caption of dismissal, but did not reach hearing. The question is whether the Applicant is required to suffer on account of the non-appearance of his advocates on 21.04.2016 and as a consequence of which it was listed on 05.05.2016 for dismissal, on which day also no appearance was put up on behalf of the Applicant as a result of which the First Appeal came to be dismissed for default. In so far as the advocate Mr. Vishesh Kalra is

concerned, he has filed his own affidavit where he has owned up his mistake and accepted that it was wrong on his part to leave the Court. The said affidavit can be said to be apologetic and regretful in its tenor. It is well settled that a client should not be made to suffer on account of the acts of his advocate. In the instant case, though it is contended on behalf of the Respondents that the Applicant/Appellant has a number of proceedings going on, he cannot be expected to keep track of the matter on a day to day basis when he has engaged an advocates firm to appear for him. In my view, though there can be said to be some negligence and carelessness on the part of the advocates appearing for the Applicant/Appellant, the Applicant/Appellant cannot be made to suffer for the said negligence and carelessness. It seems that the advocate Mr. Vishesh Kalra from the firm of advocates who are appearing for the Applicant is at the threshold of his career and it is only with experience he would learn. Some indulgence on the said ground would not be out of place. It is also required to be borne in mind that the above First Appeal had already stood admitted when it was dismissed for non-prosecution, and in fact was listed for final hearing. Hence, having regard to the dictum that a litigant should be allowed to prosecute his/her remedy on merits rather than being thrown out on technicalities. In my view, having regard to the averments made in paragraph 25, the delay of 10 days in filing the

above Civil Application is required to be condoned, for the reasons aforestated the relief of restoration of the First Appeal is also required to be granted. In so far as inconvenience if any that is caused to the two sets of Respondents is concerned, in my view, they can be adequately compensated by way of costs. Hence, the above Civil Application is allowed in terms of prayer clauses (a) and (b). Resultantly, the First Appeal would stand restored to file. It would be just and proper to direct the Applicant/Appellant to pay costs of Rs.25,000/- each to the Respondent Nos.1 and 2 represented by Learned Senior Counsel Mr. D. D. Madon and the Respondent Nos.3 and 4 represented by Learned Senior Counsel Mr. Fredun De Vitre. The same to be done within two weeks from date.

10 This Court in the above Civil Application has only considered the prayer for restoration of the First Appeal and not considered the prayer for restoration of the interim reliefs in the First Appeal. Since a separate Civil Application being No.2926 of 2016 has been filed by the Applicant for the said relief, needless to state that it is in the said Civil Application that the said prayer would be considered. With the observations as above the Civil Application for restoration is disposed of.

[R.M. SAVANT, J]