

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 2789 OF 2016

IN

FIRST APPEAL NO. 2269 OF 2007

Oriental Veneer Product Ltd.

**...Applicant/
Appellant**

Versus

**Chagan Thema Shinde (since deceased) &
Ors.**

...Respondents

Mr. A. Karandikar, i/b Khandeparkar & Asso., for the
Applicant/Appellant.

Mr. S.B. Chandan, for the Respondents No. 1A to 1C.

CORAM : R.M. SAVANT, J.

DATE : 12th August 2016

P.C. :

1. The above Civil Application has been filed for restoration of the above First Appeal by condoning the delay of 7 years and 5 months in filing the above Civil Application. The above First Appeal takes exception to the decree passed by the learned Joint Civil Judge, Senior Division, Kalyan which decree is in the sum of Rs. 3,00,000/-

in favour of the original Plaintiffs i.e. the Respondents herein. The above First Appeal came to be admitted on 4th December 2007 and by the same order, the Applicant who is the Appellant was directed to file private paper book along with the decree forms within a period of one year from the date of the order. On default being committed by the Applicant, the said order dated 4th December 2007 which was a conditional order became operative and resultantly, the First Appeal stood dismissed for non prosecution. It is long after the said dismissal that the Applicant has filed the instant Civil Application on 8th June 2016. The reasons for the said delay of 7 years and 5 months has been sought to be explained by way of averments in the above Civil Application and especially in paragraphs 4, 5, 6 and 7 of the above Civil Application. It has been averred in paragraph 4 that the Associate Advocate of the Advocates for the Appellant one Shri. Brijesh Dwivedi, who was looking after the matter had left the office in the year 2008 and started independent practice. It is thereafter, averred in paragraph 5 that on account of want of communication that the said order dated 4th December 2007 remained unnoticed and therefore, remained to be complied with on account of which the above First Appeal has stood dismissed.

2. It is averred in paragraph 6 that the dismissal of the above First Appeal by the order dated 4th December 2007 became known to the Applicant after the attachment warrant in the Execution Proceedings No. 32 of 2007 came to be issued in respect of the property of the Applicant. It is averred that thereafter, the Applicant took steps by contacting it's advocate and making enquiries about the First Appeal and thereafter, the instant Civil Application has been filed on 8th June 2016. Resultantly, the delay of 7 years and 5 months has occurred in filing of the same. It is averred in paragraph 7 that the delay is not intentional or deliberate, but has occurred on account of the circumstances mentioned herein above.

3. On behalf of the Plaintiff i.e. the Respondents herein, an Affidavit in Reply has been filed by his heir who is his daughter as the Plaintiff has expired on 28th December 2012. In the said Affidavit in Reply the case of the Applicant is sought to be questioned. To the said Affidavit in Reply, the Application made by the heir i.e. Smt. Sanjivani Khambe has been annexed for being joined as a party to the Execution Proceedings in place of the original Respondent, the order dated 11th November 2014 passed by the Executing Court allowing the said Application is annexed as also the Roznama of the

Execution Proceedings, as also the Application for attachment and the order passed thereon. It is the case of the Respondent that the Applicant was knowing about the dismissal of the above First Appeal, in view of the averments made in the Application filed by the Respondent for being joined as party to the Execution Proceedings. The fact that the Applicant was represented in the Execution Proceedings right from the year 2014 has been sought to be substantiated by referring to the said documents. It is therefore, the case of the Respondent that no indulgence can be shown to the Applicant, as the instant case is a case of gross negligence and carelessness in prosecuting the proceedings. The Respondent therefore, has prayed for dismissal of the above Civil Application.

4. Heard the learned Counsel appearing for the parties. The learned Counsel appearing for the Applicant/Appellant Shri. Karandikar would seek to reiterate the case of the Applicant as set out hereinabove. The learned Counsel would therefore, pray for restoration of the above First Appeal on such terms and conditions as this Court deems appropriate.

5. Per contra, the learned Counsel appearing for the Respondents Shri. Chandan would oppose the Civil Application on

the grounds mentioned in the Affidavit in Reply and which have been broadly referred hereinabove.

6. Having heard the the learned Counsel appearing for the parties, I have considered the rival contentions. In the instant case, it is required to be noted that the order dated 4th December 2007 was passed in the presence of the learned Counsel appearing for the Applicant and therefore, knowledge would have to be attributed to the Applicant as regards the said order being a conditional order. As usually in First Appeal such an order is passed directing the parties to file a private paper book, so that the hearing of the Appeal is not unduly delayed. Hence, though the contentions urged on behalf of the Applicant that the Applicant became aware of the dismissal of the First Appeal after the attachment warrant was issued appears to be attractive in the first blush, but does not hold water, in the light of the material placed on record by the Respondents. It is required to be noted that the Application to bring herself on record was filed by the heir of the Respondent i.e. the original Plaintiff in the Execution Proceedings, the said Application is dated 23rd September 2014 and it is stated in paragraph 2 that the Writ Petition (instead of First Appeal) filed by the Judgment-Debtor, has been dismissed. The said

Application was served upon the Applicant pursuant to which an Advocate had also appeared. In spite of the said appearance and knowledge of the fact that the original Respondent had expired and an Application for bringing herself on record is made by his heir, no steps were taken to find out the status of the above First Appeal. The said Application was allowed by the Executing Court i.e. the learned Joint Civil Judge, Senior Division, Kalyan by order dated 11th November 2014. It has been recorded in the said order that the Judgment-Debtor has already appeared through Counsel, but no reply has been filed. The Respondent thereafter, has filed Caveat in this Court in respect of any proceedings that the Applicant would file against the said order dated 11th November 2014. The said Caveat was also served on the Respondent. Thereafter, the Application for issuance of attachment warrant Exh.28 came to be filed by the Respondent on 20th February 2016, wherein the Applicant is the Judgment-Debtor and in which the order dated 18th June 2016 came to be passed allowing the said Application. It is during the pendency of the Application Exh.28 for attachment that the instant Civil Application has been filed by the Applicant on 8th June 2016. The aforesaid facts are therefore, reflective of the manner in which the Applicant has prosecuted the instant First Appeal. It is not the case of

the Applicant that it has made enquiries with its Advocate at any time after the filing of the First Appeal till filing of the instant Application for restoration of the First Appeal. The delay is sought to be attributed to the fact that the Applicant got knowledge of the dismissal of the above First Appeal after it received the attachment warrant. In the light of the fact that an appearance was put up on behalf of the Applicant who is the Judgment-Debtor in the Execution Proceedings from the year 2014, the aforesaid case does not inspire confidence. It is required to be borne in mind that the delay is not for a few years or few months, but is of 7 years and 5 months. The reasons mentioned in the Application apart from the fact that they do not inspire confidence can hardly justify the said delay of 7 years and 5 months. However, since the Appeal has been dismissed for a technical reason of non filing of the private paper book, it would be just and proper and the interest of justice requires that the Applicant is shown a final indulgence to prosecute its remedy on merits, but the same would obviously be at the pains of imposing costs. Hence, the following order :-

- (i) The above Civil Application is accordingly allowed.

Resultantly, the above First Appeal is restored to file.

- (ii) The Applicant to pay costs of Rs. 50,000/- (Rupees Fifty Thousand) to the Respondents within four weeks from date. Payment of the said costs is a condition precedent. If the costs are not paid as directed by the instant order, the benefit of this order would not enure to the Applicant and resultantly, the above Civil Application would be deemed to have been dismissed.
- (iii) If the costs are paid as directed by the instant order, the First Appeal would stand restored to file. The Applicant is granted 12 weeks time to file a private paper book.
- (iv) On restoration of the First Appeal the interim reliefs would also stand restored and would stand vacated if the costs as directed by the instant order are not paid.
- (v) The above Civil Application is accordingly disposed of.

[R.M. SAVANT, J.]