

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

Amk

APPEAL FROM ORDER NO. 6 OF 2016

Vijaya Bank .. Appellant
Vs.
The Board of Trustees of the Port of Mumbai .. Respondent

Mr. Balakrishna Adyanthaya for the Appellant.
Mr. A. Fernandes i/b Motiwala & Co. for Respondent No.1.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.
DATE : 6th SEPTEMBER, 2016.

P. C. :

1. This appeal is directed against the order dated 30.09.2015 passed by the City Civil Court, Mumbai in Notice of Motion No. 452 of 2015 in Suit No. 9152 of 1992. By the impugned order, the Trial Court has dismissed the Notice of Motion with costs of Rs.2000/-. The said Notice of Motion was preferred by the appellant herein for condoning the delay in preferring the application under Order 9 Rule 13 of the CPC for setting aside the ex parte decree.

2. The first contention raised by the learned counsel for the respondent herein is to the maintainability of the appeal itself. It is submitted that in view of the provisions of the Order 43 Rule 1(d) an order under Order 9 Rule 13 of the CPC rejecting the application for setting aside the decree passed ex parte is maintainable only when the

application is rejected during the appeal period as can be found out from the contents in the bracketed portion in the Rule 1(d) of Order 43 that is "in a case open to avail".

3. Learned counsel for the appellant has, therefore, relied upon two authorities; one of the Hon'ble Supreme Court in the case of **Bhanu Kumar Jain Vs. Archana Kumar and another, AIR 2005 SC 626** and another in the case of **M. Radheshyamlal Vs. Shailesh, AIR 2005 MADRAS 93**. In both these authorities, it is categorically held that when the application under Order 9 Rule 13 CPC is dismissed, the defendant can only avail a remedy available thereagainst that is to prefer an appeal in terms of Order 43 Rule 1 of the CPC. Herein as the dismissal of application for condonation of the delay has the effect of rejection of the application filed under Order 9 Rule 13 of the CPC, it has to be held that the appeal is very much maintainable.

4. As to the cause for condonation of delay, in paragraph 3 of the application filed before the Trial Court, the cause of the delay was stated to be appellant's Advocate Mrs. Nita Madhawani not informing to the appellant about the progress of the suit after the filing of the written statement. Secondly, it is submitted that due to the transfer of the suit from this Court to the City Civil Court on account of enhancement of pecuniary jurisdiction of the City Civil Court, the appellant lost track of the

suit and as a result thereof, the ex parte decree came to be passed. The appellant came to know about the same only when it was put to execution. Thereafter, various correspondence took place relating to filing of the application for setting aside the decree. It is clearly stated that the delay was neither deliberate nor intentional and in this respect, the reliance is also placed on the decision in the case of **Laxmi Prasad Dubey Vs. Gulam Ali & Ors., AIR 2008 CHHATTISGARH 24** wherein paragraph 13, the Judgment of the Apex Court was relied upon holding that the sufficient cause was made out for condonation of delay. The reliance was also placed on the decision in the case of **Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others, AIR 1987 SC 1353** and urged that the delay in the matter was sufficiently and properly explained, despite that the High Court has rejected the said application.

5. Learned counsel for the respondent has relied upon the decision of **Nandkishor Kanhyalal Agrawal Vs. Dhule Municipal Corporation and others, 2011 SCC OnLine Bom 1228**. However, the facts of this case disclose that there was inordinate delay of 6^{1/2} years. Hence, it was found fit not to condone such a delay.

6. The law is well settled that, if the delay is not intentional or deliberate, then the Court's approach should be liberal while deciding the application of condonation of delay. It is also well settled that the matter

should not be dismissed at the threshold itself on the technical ground but should be decided on merits. In the instance case, as the order passed before the Trial Court of ex parte, it becomes all the more necessary that matter should be decided on merits. Moreover, having regard to the reasons given in the application as sufficient cause is made out, the application filed before the Trial Court for condonation of delay in preferring the application under Order 9 Rule 13 of the CPC should have been allowed by the Trial Court.

7. In view of thereof, this appeal is allowed. The impugned order passed by the Trial Court rejecting the appellant's application for condonation of delay in preferring the application under Order 9 Rule 13 of the CPC is set aside subject to costs of Rs.20,000/- to be paid by the appellant to the respondent within four weeks. On failure of appellant to pay the costs within stipulated time, this order will stand vacated automatically.

[DR. SHALINI PHANSALKAR-JOSHI, J.]