

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

WRIT PETITION NO. 12661 OF 2015

Business Jet India Ltd

Petitioners

Vs

Hymayun Dhanrajgir and Anr.

.. Respondents

Mr. Rahul Narichania, Senior Advocate, a/w Mr. Rohan Cama i/b Parul Bhatia, i/b M/s Mull & Mulla & CB&C, Advocates for Petitioners.

Mr. Riyaz I. Chagla a/w Mr. Neerav B. Merchant a/w Mr. Ishwar Ahuja i/b M/s Thakordas & Madgaonkar, Advocate for Respondent no.1.

CORAM : R.G.KETKAR,J.

DATE : 05/01/2016

PC:

1. Heard Mr. Rahul Narichania, learned senior counsel for the petitioners and Mr.Riyaz Chagla, learned counsel for respondent no.1 at length. Mr. Chagla submits that respondent no.2-Rutton Batlivala has expired. He further submits that respondent no.1 Hymayun represents the estate of Raja Dhanrajgir Estate. He further submits that even in the suit the respondents do not intent to bring other members of the Managing Committee of the said estate on record. Statements made by Mr.Chagla, on instructions, are recorded. In view of the statement of Mr. Chagla that Mr. Rutton Batlivala has expired, Mr. Narichania seeks leave to delete him. Leave to delete, as prayed for, is granted. Amendment shall be carried out forthwith.

2. Rule. Mr.Chagla waives service on behalf of respondent

no.1. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

3. Mr. Chagla also raises another preliminary objection that the petition cannot be instituted under Article 226 of the Constitution of India against a private person. As the petitioner has impugned judgment and order dated 17.11.2015 passed by the learned judge, City Civil Court, Bombay in Notice of Motion No.1210 of 2013 in Summons for Judgment No.140 of 2012 in Summary Suit No.104598 of 2011, petition under Article 226 cannot be entertained. Mr. Narichania seeks leave to delete Article 226 from Cause title of petition. Leave as prayed for is granted. That amendment shall also be carried out forthwith.

4. Mr.Chagla raises preliminary objection as regards maintainability of the petition on the ground that delay in filing reply to Summons for Judgment is not condoned. The petitioner ought to institute substantive Appeal as if decree is passed against the petitioners. In support of this proposition, he relied upon the following decisions:

1. Ramanlal & Co Vs. Chunilal, AIR 1932 Bombay 163;
2. V.S.Saini V D.C.M. Ltd , AIR 2004 Delhi 219;

5. In the case of Ramanlal & Co, (supra) at page 165, it was observed thus:

“ If in a summary suit in which leave to defend is refused and in consequence decree follows as a matter of course in favour of the plaintiff and there is an appeal

against the decree, it is obvious that the Court of Appeal cannot go into the merits of the suit, because the merits have not been tried, and all that the defendant can do in such a case is to challenge the interlocutory order. But in the meantime the plaintiff, having got his final decree, may have levied execution, and it may be too late for practical purposes for the defendant to challenge the interlocutory order. If in substance an appeal lies from an interlocutory order refusing- leave to defend by the process of challenging the order on an appeal from the final order, it is obviously more convenient that there should be a right of appeal direct from the interlocutory order. I think we must look at the substance of this matter and consider what the real effect of the order is, having regard to the provisions of Order XXXVII, Rule 2, and I think we ought to hold that the effect of the order is to determine the rights between the parties, since in substance it entitles the plaintiff to the order claimed in the plaint, That being so, I think such an order is technically a judgment within the meaning of Clause 15 of the Letters Patent...”

Perusal of the above extracted portion shows that the Division Bench of this Court specifically held that if in a summary suit in which leave to defend is refused and in consequence decree follows as matter of course in favour of the plaintiff and there is delay against the decree, it is obvious that the court of appeal cannot go into merits of the suit, because the merits have not been tried. In that case, the Division Bench was considering intra court appeal, namely, Letters Patent Appeal, against the order passed by the learned Single Judge. In that case, leave to defend was refused and, therefore, the consequence is passing of a decree as a matter of course. In the present case, it is an admitted position that Summons for Judgment is still pending. It, therefore, cannot be said that there is a decree passed in favour

of the respondent-plaintiff. In view thereof, that judgment relied by Mr. Chagla does not advance the case of the plaintiff.

6. In the case of V.S.Saini, (supra) in paragraph 5, the learned Single Judge observed thus:

“.. Therefore seldom would such an occasion now occur since if a Defendant neglects to file a Written Statement within the restricted and prescribed period in the Code of Civil Procedure and also fails to put in appearance, a judgment would be pronounced forthwith. Since Order xxxvll Rule 3(6) specifically stipulates that if leave to defend the suit is refused the Plaintiff shall be entitled to judgment, I find no conceivable cause to digress from the established procedure, since this will additionally render Rule 7 of Order xxxvll wholly otiose. This Order constitutes a complete Code in itself. There is no justification for conceptualizing an intermediary stage in summary suits, viz. between this refusal of Leave to Defendant and the passing of a judgment/decreed. Even in those cases where there is a hiatus between the two events, because a decree/judgment is not passed by the Judge simultaneously with the refusal of Leave to Defend, the Defendant should be heard only after the judgment is pronounced.”

In that case, it was held that if leave to defend is refused, the plaintiff is entitled to judgment. In the present case, the petitioners, hereinafter referred to as 'defendants', have filed Motion under Order 37, Rule 3(7) for condoning the delay in filing reply-affidavit. Perusal of Section 104 read with Order 43 shows that order passed under Order 37 Rule 3(7) is not an appealable order. Having regard to proviso to Section 115 of C.P.C. even the remedy of revision is not available. In my opinion, the defendants have rightly instituted Writ Petition under Article 227. I, therefore, do not find any merit in the preliminary objection

raised by Mr Chagla.

7. On 16.3.2011 the respondents, hereinafter referred to as plaintiffs, instituted suit. On 17.11.2011, plaint was served on the defendants. The defendants ought to have filed Vakalatnama on or before 27.11.2011. On 25.1.2012 the defendants filed Vakalatnama. On 13.4.2012, Advocate for the plaintiffs served Summons for Judgment on the defendants. On 12.7.2012, the defendants affirmed affidavit-in-reply and attempted to file the same in this Court as the suit was initially instituted on the Original Side. Office, however, raised objections. Objections were removed on 25.7.2012 and on 26.7.2012 the defendants served affirmed copy of the affidavit-in reply on the plaintiffs' Attorneys. On 27.7.2012 Advocate for the defendants called upon Advocate for the plaintiffs to give their consent on praecipe to file their affidavit in reply to Summons for Judgment. This was followed by letters dated 2.8.2012, 26.9.2012 Mr. Narichania submitted that this is a usual practice followed on the Original Side of this Court to obtain consent of the other side for filing affidavit, in case of delay. In September 2012, suit was transferred from this Court to the City Civil Court Mumbai. For the first time, on 31.10.2012 the plaintiffs Advocate refused to grant consent for defendant to file their affidavit in reply to Summons for judgment. From 26.9.2012, the defendants were making inquiries as to whether the plaintiffs have entered into leave and licence agreement. On

7.11.2012 the plaintiffs admitted that the premises in question were given on leave and licence basis. The matter came on the board for the first time on 3.12.2012 only for fixing a date for direction and it was adjourned to 30.3.2013. On 30.3.2013, present motion was lodged for condonation of delay. By the impugned order, the learned trial Judge rejected the motion mainly on the ground that the defendants did not make out sufficient cause for condoning the delay and sufficient cause must mean that same is beyond control of the party.

8. Mr. Narichania submitted that the fact that the defendants affirmed their affidavit on 12.7.2012 and that they removed office objections on 25.7.2012 and the defendants served affidavit in reply on the plaintiffs on 26.7.2012, is not disputed by the plaintiffs. In fact, the defendants were making inquiries as to whether the plaintiffs have given premises in question on leave and licence basis. In paragraph 3.1 of the affidavit in reply opposing Summons for Judgment, it is specifically asserted that the defendants understand that the plaintiffs had, after waiting for some time, allowed the third party, namely, MATA Securities India Pvt. Ltd to start using and occupying the suit premises. Though at that time, the defendants did not have any evidence to substantiate this plea, the said fact was accepted by the plaintiffs on 7.11.2012. The plaintiffs through their Attorneys stated that the plaintiffs had entered into agreement with third

party in October, 2009. This was in anticipation of the locking period terminating on 29.12.2009 and the said arrangement was done without prejudice to the rights of the plaintiffs to claim compensation for the locking period.

9. Mr. Narichania submitted that while considering the application for condonation of delay the Court has to adopt liberal approach. In support of this submission, he relied upon decision of the Apex Court in the case of Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai, (2012) 5 Supreme Court Cases 157 and in particular paragraphs 14,15 and 17.

10. On the other hand, Mr. Chagla supported the impugned order. He submitted that the Summons for Judgment was served on the defendants on 13.4.2012. They ought to have filed affidavit in reply on or before 23.4.2012. The Notice of Motion was lodged on 22.3.2013. There is delay of nearly 335 days in filing affidavit in reply. He further submitted that though the affidavit in reply was affirmed on 12.7.2012 there is no explanation for the period between 23.4.2012 and 12.7.2012 for not filing motion. That apart, there is no explanation for the period between 12.7.2012 and 30.3.2013 when the motion was taken out. The learned trial Judge, therefore, rightly exercised discretion on the ground that no sufficient cause is made out.

11. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused

the material on record. As noted earlier, the defendants have affirmed affidavit on 12.7.2012. It also appears that office had raised certain objections and those office objections were removed on 25.7.2012. It is also not in dispute that on 26.7.2012, the defendants have served affirmed copy of affidavit in reply to Summons for Judgment on the Attorneys of the plaintiffs. Thus, it is not the case of filing of affidavit along with Motion on 30.3.2013. The defendants have served copy of the affidavit in reply on the plaintiffs. The moot question is whether the learned trial Judge in these circumstances was justified in refusing to condone the delay. In the case of Moniben shah (supra) the Apex Court has observed in paragraphs 14 and 15 thus :

“14. We have considered the respective arguments/submissions and carefully scrutinized the record. The law of limitation is founded on public policy. The Limitation Act, 1963 has not been enacted with the object of destroying the rights of the parties but to ensure that they approach the Court for vindication of their rights without unreasonable delay. The idea underlying the concept of limitation is that every remedy should remain alive only till the expiry of the period fixed by the Legislature. At the same time, the Courts are empowered to condone the delay provided that sufficient cause is shown by the applicant for not availing the remedy within the prescribed period of limitation.

15. The expression 'sufficient cause' used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the Courts to apply the law in a meaningful manner which serve the ends of justice. No hard and fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years this Court has advocated that a liberal approach should be adopted in such matters so that substantive rights of the parties are not defeated merely because of delay.”

In paragraph 17, the Apex Court made reference to its earlier decision in Collector (LA) Vs. Katiji, (1987) 2 SCC 107 wherein the Apex Court has observed thus :

“1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”

12. As noted earlier, in the affidavit in reply to Summons for Judgment in paragraph 3.1, the defendants have specifically asserted that they understand that the plaintiffs allowed third party via. MATA securities India Pvt Ltd to occupy the suit premises and the said assertion, prima facie, appears to be true

as is evident from reply dated 7.11.2012 given by the plaintiffs' Attorneys. It is, however, for the trial Court to look into that aspect. It is also evident that the defendants were making inquiries about this aspect from 26.9.2012. Though the defendants addressed 3 letters viz. 27.7.2012, 2.8.2012, and 26.9.2012 asking consent of the plaintiffs for filing affidavit in reply to the Summons for Judgment, they did not receive response. By letter dated 31.10.2012, for the first time, the plaintiffs refused to give consent. Mr. Narichania submitted that this is usual practice followed on the Original Side of this Court. Mr Chagla was not in a position to either dispute this position or to point out contrary practice followed on the Original side.

13. The Apex Court. while considering the application for condonation of delay, has held that liberal approach should be adopted. In my opinion the learned trial Judge ought to have condoned the delay subject to imposing costs. Though the learned trial Judge observed that liberal approach has to be adopted while considering the application for condonation of delay, he relied upon the decision of Delhi High Court in the case of Nirayu Pvt Ltd Vs. Mohan Lal, 1998 (46) DRJ 337 wherein in paragraph 5 learned Single Judge observed thus:

5. I have heard the learned counsel for the parties at length and have also carefully gone through the documents/material on record. Order xxxvii Rule (3)(7) CPC which is relevant for deciding the above said application reads as under:-

"The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit."

The words 'sufficient cause' occurring in the above said sub-rule are of utmost significance. Though the expression 'sufficient cause' has not been defined but it must mean a cause which is beyond the control of the party invoking the aid of the same. In other words any cause, which prevents a person approaching the Court within time, is sufficient. In doing so it is a test of reasonable man in normal circumstances which has to be applied. The test whether or not a 'cause' is 'sufficient' is to see whether it could have been avoided by the party by the exercise of due care and attention. In other words whether it is a bonafide cause, in as much as nothing shall be deemed to be done bonafide or in good faith which is not done with due care and attention. The quantum or extent of delay has no direct nexus in law with the sufficiency of cause to condone the delay and these two are diverse and independent factors. In a given case if sufficient cause to the satisfaction of Court is not made out, even a relatively small delay cannot be condoned whereas if the Court is satisfied of the sufficiency of cause it may condon even a long delay."

14. The learned trial Judge has, however, picked up one sentence from that paragraph wherein it is observed that though the expression "sufficient cause" has not been defined but it must give a cause which is beyond the control of a party invoking the aid of the same. Relying upon this sentence, the learned trial Judge observed in the impugned order that no sufficient cause is made out by the defendants as no circumstances which were beyond the control of the defendants were brought on record. In my opinion, the learned trial Judge had adopted hyper-technical approach while considering the

application for condonation of delay. 14. In view thereof, subject to the defendants paying costs of Rs.10,000/- within two weeks from today to the plaintiffs, the Motion is allowed and the delay in filing the affidavit in reply is condoned. The plaintiffs are at liberty to file rejoinder within 6 weeks.

15. Rule is made absolute in the aforesaid terms. Order accordingly.

(R.G.KETKAR, J.)