

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

NOTICE OF MOTION NO.720 OF 2016

IN

SUIT NO.2713 OF 1991

Bashir I. Motiwala

....Applicant/Org. Def.

IN THE MATTER BETWEEN :

Bombay Dyeing & Manufacturing Co. Ltd.

....Plaintiff

Vs.

Bashir I. Motiwala

....Defendant

Mr. Zal Andhyarujina a/w. Ms. Jyoti Sinha i/b. Negandhi Shah and Himayatullah for the plaintiff.

Mr. Haresh Jagtiani, senior advocate a/w. Mr. Yashpal Jain, Ms. Mitali Harish and Ms. Sonali Mishra i/b. Yashpal Jain for the applicant/defendant.

CORAM : K.R.SHRIRAM, J.

DATE : 15th DECEMBER, 2016

P.C.

1 This notice of motion is taken out by the defendant to condone the delay of 3190 days in filing this notice of motion and upon condoning the delay recall the ex-parte decree and order dated 12th July, 2006 and thereafter permit the defendant to file written statement.

2 The defendant was an employee of the plaintiff and joined the plaintiff some time on or about 15th October, 1969. In 1973 the plaintiff proposed a Scheme for providing residential accommodation to its eligible employees on ownership basis in two buildings which the plaintiff was

proposing to construct. The defendant was one of the applicant for the flat. The plaintiff also extended a loan to its employees to purchase the flat at a very nominal rate of interest of 4% p.a. An Agreement for Sale dated 25th August, 1977 was executed between the plaintiff and the defendant whereby the plaintiff agreed to sell to the defendant a flat on the 3rd Floor on one of the two buildings. Clause 23 (e) of the said agreement reads as under :

“(e) If the purchaser shall cease to be in the service of the company, either by resignation or termination of his services by the company within a period of seven years after the repayment of the amount of the loan advanced by the company to the purchaser together with interest he shall sell back the said premises to the company at the original purchase price at which the company has sold the said premises to the purchaser; and the purchaser shall hand over and deliver to the company vacant possession of the said premises.”

3 It is the case of the defendant that this clause was an onerous clause which was inserted after the defendant had agreed to a draft and at variance with the earlier circulars that the plaintiff had issued and defendant being an employee was coerced into agreeing to the said clause. The counsel for the defendant submitted that the clause in any event is contrary to Section 10 of the Transfer of Property Act and will not stand the scrutiny of law. Admittedly, the defendant repaid the entire loan amount of the company together with interest and as on 1st April, 1989 there was no dues outstanding.

4 On 13th April, 1990 the defendant resigned from the services of the plaintiff pursuant to which the plaintiff vide their letter dated 22nd June, 1990 called upon the defendant to sell the flat back to the plaintiff in accordance with clause 23(e) of the said agreement. The defendant claims to have not received the letter and the said letter was resent by the plaintiff to the defendant alongwith another letter dated 22nd October, 1990. The defendant by his advocate's letter dated 22nd November, 1990 brought to the notice of the plaintiff that the circulars that were issued before the agreement was entered into did not provide for such an onerous clause and the plaintiff by exercising undue influence and coercion upon the defendant made the defendant to sign the Sale and Loan Agreement and hence the clause was not binding upon him. The defendant also informed the plaintiff that the clauses based on which the plaintiff had called for the defendant to re-sell the flat to the plaintiff were contrary to the provisions of MOFA, the Co-operative Societies Act, Public Policy, etc.

5 As the defendant was not re-selling the flat to the plaintiff, the plaintiff filed this suit inter alia praying for the following reliefs :

“(i) Specific performance of clause 23(e) of the said Agreement for Sale dated 25/8/1977;

(ii) In the alternative, an amount of damages be paid by the defendant to the company;

(iii) Pending the hearing, a Court Receiver be appointed;

(iv) An injunction be granted restraining the defendant from dealing with, disposing of, alienating, transferring in any manner the said flat.”

6 The writ of summons was issued on 30th July, 1997 (6 years later) and served upon the defendant on 12th August, 1997. The defendant did not enter appearance either in person or through an advocate and the suit came to be decreed ex-parte on 12th July, 2006, little less than 9 years after service of the writ of summons and about 15 years after the suit was filed.

 The present notice of motion has been taken out on 5th May, 2015 which is almost 9 years after the ex-parte decree was passed.

7 Order 9 Rule 13 of the Code of Civil Procedure reads as under :

13. Setting aside decree ex parte against defendant.- In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an Order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an Order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendant also:

Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

8 Since the defendant, admittedly, has been served with the writ of summons, what is required to be considered is, whether the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing.

9 The aspect of delay and as to whether there is a sufficient cause for setting aside the ex-parte decree can be dealt with together.

10 It should be noted that the ex-parte decree was passed on 12th July, 2006. The plaintiff, however, served execution notice under Order 21 Rule 22 of the Code of Civil Procedure (CPC) upon the defendant only on 10th March, 2015 after almost 9 years and this notice was received by the defendant only on 6th April, 2015. The present notice of motion has been taken out on 5th May, 2015, within one month.

11 Mr. Andhyarujina, counsel appearing for the plaintiff submitted that the defendant ought to have known that the decree has been passed against him because he should have been keeping track of the proceedings. At the same time, the plaintiff had no explanation as to why they waited for almost 9 years to serve the execution notice under Order 21 Rule 22 of CPC.

12 Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea

and to shut the door against him. If the explanation does not smack of malafides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the applicant. At the same time, while condoning the delay the court should remember the opposite party is the loser and he too would have suffered prejudice by the delay.

In this present case, the plaintiff themselves have not moved with alacrity. Though the plaintiff obtained an ex-parte decree on 12th July, 2006, the notice under Order 21 Rule 22 of CPC was served only on 6th April, 2015 and the present notice of motion was taken out on 5th May, 2015, within one month. This court also asked the counsel for the plaintiff as to whether the plaintiff atleast wrote to the defendant soon after the ex-parte decree was passed and called upon the defendant to comply with the decree. The answer was negative.

In my view, therefore, no malafides or dilatory tactics can be attributed to the defendant and the court should show some consideration to the defendant. I, therefore, hold that the delay has been sufficiently explained and required to be condoned.

13 Coming to the point as to whether sufficient cause has been shown, the Apex Court in *Balwant Singh vs. Jagdish Singh & Ors.*¹ has while holding that there is no straight jacket formula applicable to all cases

1. 2010 (8) SCC 685

and explained what the expression “sufficient cause” would mean.

Paragraph 35 of the said judgment reads as under :

“35. The expression ‘sufficient cause’ implies the presence of legal and adequate reasons. The word ‘sufficient’ means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plentitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated.”

Therefore, sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one.

14 The applicant, in the affidavit in support, has stated that after the writ of summons was received by him, the applicant contacted one Mr. G.S. Sudrik, who was a senior employee of the plaintiff and also Secretary of the society in which the flat is and one Mr. P.A. Kudav, another senior employee of the plaintiff to find out what should be done and both these persons assured and advised him that since he has already repaid the loan the company will not proceed against him. It is also stated that the applicant also approached Advocate (Late) Mr. P.L. Nain, who after going through the papers agreed to defend his case and advised that the defendant need not to worry about the case and he will be called to the office or to the court as and when required. Relying on the assurances of

Mr. Nain, the applicant handed over all the papers to Mr. Nain and he was under the impression that Mr. Nain would complete necessary formalities to defend his case. The applicant also states that thereafter he never heard anything further from Mr. Nain and, therefore, he was under the impression that the suit was either withdrawn or the suit may have been dismissed by the court based on the conversation that he had with Mr. Sudrik and Mr. Kudav, both of whom have since expired. The applicant states that for the first time he got to know about the ex-parte decree was only when the notice under Order 21 Rule 22 of the Code of Civil Procedure was served upon him on 6th April, 2015.

15 One more point that was raised by Mr. Jagtiani, senior counsel appearing for the applicant was they had absolutely no clue at all about the pendency of the suit. Infact Mr. Jagtiani pointed out that by a praceipe dated 17th November, 2003 the plaintiff's solicitors filed an affidavit of documents dated 16th October, 2003 and in the praceipe it was stated "a copy of the said affidavit to be sent to the other side" but such affidavit was never served upon the defendant. Mr. Jagtiani further submitted that if only that affidavit had been served, the defendant would have immediately contacted Mr. Nain.

16 Mr. Jagtiani submitted that the court, while considering such an application, should only see whether the party is resorting to dilatory

tactics. It is also possible for the court to feel that the applicant should have been more vigilant than as he was but yet, if his conduct does not on the whole warrant to castigate him as an irresponsible litigant, the court should accept the explanation as sufficient cause. Mr. Jagtiani also submitted that while deciding the application for setting aside the ex-parte decree, the court should keep in mind the judgment impugned, the extent of the property involved and the stake of the parties. Mr. Jagtiani relied upon the judgment of the Apex Court in the matters of *N. Balakrishnan vs. M. Krishnamurthy*² and *M.K. Prasad vs. P. Arumugam*³ to buttress this point.

17 Mr. Jagtiani submitted that the subject matter of the suit is a flat in which the defendant is residing even today and the defendant has no intention to sell the flat. Mr. Jagtiani also submitted that if the ex-parte decree is not recalled, the situation will be that the defendant will be out of his only roof, whereas, if allowed to defend, the defendant will have good case on merits particularly, in view of the provisions of Section 10 of the Transfer of Property Act. Mr. Jagtiani submitted that it is not the case that the defendant did not repay the loan that he had taken or was trying to sell the flat to a third party. The defendant has repaid the entire loan with interest and upon payment of the loan with interest had become the owner

2. 1998 (7) SCC 123

3. 2001 (6) SCC 176

of the premises. Can the plaintiff ask the owner of the premises to return the property on the basis of a condition that if he resigned from his employment within seven years of repayment of the entire amount, he should sell back the flat at the price at which it was purchased? This, Mr. Jagtiani submitted would amount to absolute restraint on alienation and the clause was not enforceable.

18 Mr. Andhyarujina, counsel for the plaintiff submitted that the explanation cannot be accepted because conveniently the defendant is relying upon what he was told by three persons. who are not alive today and cannot be called to confirm what the defendant is saying is true or not. Mr. Andhyarujina also submitted that if the defendant knew Ms. Nichani was the junior of Mr. Nain, the defendant should also be aware and infact he has stated that he was aware that the company is pursuing similar action against the other residents of the same building who have either resigned on similar circumstances or almost similar circumstances.

To this Mr. Jagtiani submitted that the similar suits which were pending in City Civil Court have been dismissed while holding that such a clause is not enforceable. This is one more factor which is in favour of the applicant. Mr. Andhyarujina, however, submitted on instructions that appeals have been admitted against the said orders.

19 While considering an application for recalling the ex-parte decree courts do not really go into the merits of the matter and I am not making observations on these points which Mr. Jagtiani submitted but certainly these are points which require to be looked into and this court while passing the ex-parte decree has simply stated as under :

“1. This is an undefended suit against the defendant. The suit is for specific performance of the agreement dated 25th August, 1977 between the plaintiffs and the defendant. The allegations made in the plaint have gone uncontroverted. The claim of the plaintiff is supported by the compilation of documents produced on record.

2. Under the circumstances the suit deserved to be decreed by virtue of the provisions of Order VII Rule 10 of the Code of Civil Procedure.

3. Suit is decreed in terms of prayer clause (a).

4. Decree be drawn up accordingly.”

20 While passing ex-parte decree, the court has stated that the claim of the plaintiff is supported by the compilation of documents produced on record. But such compilation, admittedly, was never served upon the defendant. Moreover, the defendant has filed a praceipe with the Prothonotary and Senior Master, in which they have informed the court that a copy of the affidavit of documents “was to be sent” to the other side, which they never did. Infact there is a lot to be said on the conduct of the plaintiff who first takes 6 years to serve the writ of summons, then 9 years to serve notice under Order 21 Rule 22 of CPC, then tells the court that it would serve the affidavit of documents upon the defendant but does not

and then obtains an ex-parte decree relying on documents that were not served upon the defendant.

It should also be noted when the writ of summons has been issued only on 30th July, 1997 the plaintiff have obtained two orders, one dated 22nd March, 1996 passed by the Prothonotary and Senior Master, High Court, Bombay and the other dated 20th March, 1997 passed by this court in which it is recorded “the defendant absent though served”. The plaintiff had a duty to inform the court that the writ of summons was not served.

21 I am satisfied that the applicant's conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. Ofcourse, one may say that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. When everybody is fully occupied with his own avocation of life, an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities and to visit him with drastic consequences. Length of delay is no matter, acceptability of the explanation is the only criterion.

22 The court has not made any mention about the service of writ of summons probably because the writ of summons was served almost 9 years prior to the order was passed. But I must note, it was more the

conduct of the plaintiff, that has persuaded me to lean in favour of the applicant.

23 Another point that would come to mind is in a suit which was filed in 1991 and where an ex-parte decree is passed in July, 2006 and ex-parte application is taken out in May, 2015 and in December, 2016 if the court passes an order recalling the ex-parte decree, would it not cause prejudice to the plaintiff. On the face of it, it will. At the same time, the plaintiff itself has not been diligent in prosecuting the matter and since the ex-parte decree amounts to throwing out the defendant from the only dwelling that he has for which he paid the entire consideration to the plaintiff, in my view, the court has to accept, while striking a balance greater prejudice will be caused to the defendant if the ex-parte decree is not recalled.

24 Therefore, the notice of motion is allowed and accordingly disposed. The delay is condoned. The ex-parte decree and order dated 12th July, 2006 recalled.

25 Mr. Jagtiani states that the defendant will file written statement and serve a copy thereof upon the plaintiff on or before 23rd January, 2017.

26 The defendant to pay a sum of Rs.25,000/- as cost to the plaintiff. This amount has to be paid by way of cheque drawn in favour of the advocate on record for the plaintiff within four weeks from today.

27 Since the claim in the suit is valued at Rs.82,320/-, the suit be transferred to the City Civil Court. The Registry to take steps to transfer the papers to City Civil Court within four weeks from today. The matter to appear before the City Civil Court on 30th January, 2017.

(K.R. SHRIRAM, J.)