

Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 35 OF 2014

Meherunnisa Hussein Vahanvaty	...Applicant
<i>Versus</i>	
The Board of Trustees of The Port of Bombay	...Respondent

Mr Chandrakant N Chavan, *for the Applicant.*
Mrs Meherunnisa Hussein Vahanvaty, *Applicant present.*
Mr Vishal Talsania, *a/w Ms Sneha Pandey, i/b Motiwalla & Co., for*
the Respondent.

CORAM: G.S. PATEL, J
DATED: 7th November 2017

PC:-

1. Heard.
2. Civil Revision Application No.35 of 2015 assails a decision of 11th December 2013 of the Appellate Bench of the Small Causes Court. The Applicant was the Appellant and the original Defendant. The Applicant suffered an *ex parte* decree on 2nd February 2008. The Plaintiff is the Bombay Port Trust.
3. The Defendant entered a the written statement in the Plaintiff's LE & C Suit No.251/264 of 1986. That suit was decreed on 2nd February 2008. But this only tells us part of the story. What is of

importance is this. In the suit filed in 1986, the Defendant did not enter a written statement for two years until 17th October 1988. That done, the suit remained in that state for an entire decade till 1998 when, on 29th December 1998, issues were framed. The matter then went into another long hibernation for yet another decade till 2008 when, on 29th January 2008 trial began. It is also not as if the Trial Court immediately decreed the suit. It set down the matter for admission and denial of documents and cross-examination on 31st January 2008. The Defendant was unrepresented. The matter was adjourned to 1st February 2008 for the Defendant's evidence. Again the Defendant was absent. The matter was then closed and it was then listed on 2nd February 2008 when the suit was ultimately decreed. There followed another long hiatus of at least 16 months and 28 days when the Defendant did nothing. It only applied for setting aside the *ex parte* decree on 28th July 2009.

4. What is the explanation for all of this? To begin one must remember that these are office premises and not a residence. The case of the Plaintiff was that the litigation was entrusted to an employee, one Nilesh Shah, who left the Defendant's employment. This is hardly a credible reason. If an employee is entrusted with a supervising a litigation, and that employee leaves, surely the employer is not entitled to assume that the litigation has succeed in his favour. This is, as the Appellate Court correctly said, all the more important when it comes to immovable properties of great value in cities like Mumbai. On the one hand the Applicant says that she was illiterate and on the other she says she was attending to this business. Then there is the usual tactic of blaming an advocate, as if this is a panacea for curing all manner of defaults and excusing all negligence. There are no particulars at all and

nothing whatever to show that the Advocate was in any way negligent. The Advocate in question is actually a well known firm in Mumbai. It is true that a party should not suffer for the default of the advocate. But that default must be shown. It cannot be assumed. And it is equally true that the court will not indulge the negligent and the indolent.

5. Then there is the second ploy of claiming illness and here the Applicant produced medical certificates. Unfortunately every one of these relates to a period from June 2009 onwards and not to the period of delay in question let alone the period when the suit was being decreed.

6. As a general rule Courts, acting in equity, do make allowance and grant an indulgence but they will refuse to do so when the delay is insufficiently explained and appears to be nothing more than an afterthought, an excuse based on frivolous and untenable grounds. Of course, if the conduct is such as would shock the conscience of the Court, for instance where statements are made that are false, then apart from an order of dismissal an order of costs will also follow.

7. I cannot lose sight of the fact that what is before me is a Civil Revision Application brought under Section 115 of Code of Civil Procedure 1908. I am not here entitled in law to substitute a plausible view with one of my own. I must see whether there is a jurisdictional error or whether the Court below in exercise of its jurisdiction acted with material irregularity, and I will take that to include perversity, i.e. arriving at a completely implausible view, one that no Court could ever arrive at. It is not possible to accept the submission that the impugned order is of the kind that calls for any interference whatsoever. There

was simply no material before both the Courts below to hold in favour of the Applicant. There was no explanation worth the name. Everything that was said was in generalities and what little material was produced was entirely irrelevant. It seems inconceivable that even from the date of the decree a party should wait for nearly one and half years to make an application to set aside that decree.

8. The Defendant has to explain on the basis of some compelling material why she in the first place did not attend to the trial of the suit and of this we have no material at all. Second, she must also explain why there was this delay of so many months when dealing with commercial office premises.

9. There is, as I have said no calls for interference whatsoever. I make it clear that I am unwilling to interfere on merits.

10. At this stage, on instructions taken from the Applicant, who is personally present in Court, Mr Chavan states that the Applicant offers to pay costs of Rs.5,00,000/- to the Plaintiff within two weeks. Having regard to the relative positions of the parties, I will accept this, and grant the Defendant one further, and final opportunity, but I do so as an indulgence and not because there is the slightest merit in her application.

11. But even costs alone will not suffice having regard to the delay. The Applicant will also be held to a stringent time schedule. She will file her evidence Affidavit and documents by 20th November 2017. Parties will appear before the Trial Court on 21st November 2017. For this purpose the *ex parte* decree is set aside and the suit is restored to

file. The Trial Court is requested to take up the matter for admission and denial of the Defendant's documents if any by 30th November 2017. The Applicant is not entitled to ask for a single adjournment on any ground whatsoever. The Trial Court is requested to schedule cross-examination commencing from 4th December 2017 at its convenience and to conclude this if possible by 15th December 2017. It will then list the matter at its convenience for final arguments. Again the convenience of the Applicant's/Defendant's counsel is not to be considered under any circumstances and the Applicant and her Advocate will remain present on all dates. The Trial Court is requested to dispose of the suit on merits after hearing both sides as soon as possible thereafter and, if practicable, by 2nd February 2018. Any extension of time will be at the request only of the Trial Court and will be made on the administrative side of this Court.

12. In addition to all of these requirements I expect the Applicant to remain personally present in Court on every single occasion without exception. The Trial Court will be entitled if the Applicant is absent to forthwith decree the suit.

13. It is clarified that the setting aside of the *ex parte* order is not because there is any defect in the order rejecting the application for setting aside the *ex parte* decree or the Appellate order but only by way of a final indulgence to the Applicant.

(G. S. PATEL, J.)