

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

**APPEAL FROM ORDER NO. 633 OF 2017
WITH
CIVIL APPLICATION NO. 797 OF 2017
IN
APPEAL FROM ORDER NO. 633 OF 2017**

M/s. Maksells Hardwares ...Appellant

Versus

Mr. Saif Ebrahim Merchant ...Respondent

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Mr.S.Shamin i/b. Shamin & Co. for the Appellant.
Mr.Reshant Shah i/b. Lex Councilor for the Respondent.

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**CORAM: MRS.MRIDULA BHATKAR, J.
DATED: OCTOBER 30, 2017**

P.C. :

1. This Appeal is directed against the order dated 15.06.2017 passed by the learned Judge, City Civil Court, Gr. Bombay, in Notice of Motion No. 4384 of 2015 in Suit No. 9079 of 1994 thereby dismissing Notice of Motion No. 4384 of 2015.

2. The respondent/plaintiff has filed a money recovery Suit i.e. Summary Suit against the appellant/defendant in which the defendant appeared and granted unconditional leave to defend the Suit. This order of granting unconditional leave was passed on 08.10.1996, however, the defendant did not file a written statement within a period of eight weeks as per direction of the Court. Subsequently, the Suit was decided ex-parte against the defendant on 31.03.2015 and the defendant was directed to pay the decretal amount and, therefore, Notice of Motion was taken out by the defendant for setting aside the ex-parte order dated 31.03.2015 and also seeking permission to allow him to file the written statement.

3. Learned counsel for the appellant submits that the Suit was defended by his father in the year 1994 and his father was appeared in the matter. He further submits that the father of the appellant died on 05.07.2002. Thereafter, the advocate who was on record was also expired on 11.07.2006. He further submits that the matter was transferred to the Commercial Court and thereafter,

it was transferred to the City Civil Court from High Court. He further submits that he never appeared in this matter, as he was not aware about the matter. He further submits that he became aware of this litigation on 11.09.2015 when he received a letter from the advocate of the respondent/original plaintiff. He further submits that these facts ought to have been considered by the trial Court while deciding the Notice of Motion. He relied on the judgment of this Court in the case of ***Mount Blanc Properties and Industries Ltd. V/s. Mont Blanc Co-operative Housing Society Ltd. & Anr.***¹

4. Learned counsel for the respondent opposes this Appeal and submits that the father of the appellant could not file written statement nearly for eight years.

5. In the case of ***Mount Blanc Properties and Industries Ltd. (supra)***, while condoning the delay of 10 years for setting aside the ex-parte decree, the defendants were directed to file written statement on payment of costs of Rs. 50,000/- to the plaintiffs.

1 2009 (2) Bom. C.R.505

6. I have considered these submissions so also the impugned order passed by the learned Judge, City Civil Court, Gr. Bombay. The suit claim for principal amount is Rs. 56,000/- in the year 1994 and the unconditional leave was granted by the trial Court with a direction that the defendant shall file the written statement within a period of eight weeks, however, the written statement was not filed by the defendant. The father of the appellant i.e. the original plaintiff expired on 05.07.2002. The Suit was filed against the appellant/defendant i.e. a partnership firm of which the father and the present appellant were partners. As on today, the partnership firm exists and, therefore, it is difficult to accept that the present appellant was not aware of the business of the partnership firm. However, as the Suit shuttled from High Court to City Civil Court, in all fairness, I set aside the ex-parte order dated 15.06.2017 passed by the learned Judge, City Civil Court, Gr. Bombay and restore the Suit to its original file. The appellant is not allowed to file the written statement considering the delay caused in moving the Notice of Motion, but reply, if any, filed by the appellant is to be considered as written statement, subject to payment of costs of

Rs. 20,000/-. The said amount is to be deposited by the appellant in the City Civil Court, Gr. Bombay on or before 06.11.2017. The said amount is allowed to be withdrawn by the respondent/plaintiff. The trial Court to proceed with the matter and as the matter is old one, no adjournments are to be granted. Parties to appear before the trial Court on 06.11.2017 and to co-operate with the trial Court. The trial Court shall dispose of the Suit on or before 28.02.2018.

7. Appeal from Order is disposed of accordingly.

8. In view of the disposal of the Appeal, nothing survives in the Civil Application and the same is disposed of as such.

(MRIDULA BHATKAR, J.)