

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1665 OF 2017
IN
APPEAL (L) NO.293 OF 2017**

S. V. Choudhary & Anr

..Applicants

Vs.

S. R. Logistics & Anr

..Respondents

Saeed Akhtar a/w Mr. Rehan Ansari, Ms Pradnya Meshram and Pinny Pathak for the Applicants /Appellants

**CORAM :R. M. SAVANT, &
SARANG V KOTWAL, JJ
DATE : 16th NOVEMBER, 2017**

P.C.

1 The above Notice of Motion has been filed for condonation of delay of about 2922 days in filing the above Appeal. The Affidavit in Support of the Notice of Motion inter alia contains the reasons for the said delay of 2922 days and more especially from paragraph 7 onwards of the said affidavit. The above Appeal is sought to be filed against the decree passed in a Summary Suit as long back as on 28-7-2009. The Learned Single Judge of this Court was constrained to pass the said decree in view of the fact that no reply was filed to the Summons for Judgment. Hence the case of the Defendants in the reply to the Plaintiffs notice that amounts were payable by the Defendants only upon the Defendants being paid by one of its creditors, was not countenanced by the Learned Single Judge.

2 In the Affidavit in Support of the Notice of Motion, it has been stated that the Defendants were informed of the decree passed on 15-2-2010 upon which the Defendants filed Notice of Motion No.822 of 2010 for setting aside the said decree. It seems that the said Notice of Motion was heard by a Learned Single Judge of this Court and when the dictation of the order was to begin that the Learned Counsel for the Defendants sought withdrawal of the Notice of Motion to file appropriate proceedings. The Notice of Motion was accordingly allowed to be withdrawn with liberty to file appropriate proceedings. The proceedings which have been adopted by the Applicants thereafter, have been mentioned in the Affidavit in Support of the Notice of Motion namely the filing of a Review Petition etc. The record discloses that the Appellants were also involved in proceedings under the Insolvency Act being Insolvency Notice No.8 of 2015 which was filed by the decree holders i.e. the Plaintiffs. The Notice of Motion filed by the Applicants / Appellants being Notice of Motion No.41 of 2015 to set aside the Insolvency Notice No.8 of 2015 dated 17-2-2016 and to stay the effect of operation of the notice, was dismissed by a Learned Single Judge of this Court A. K. Menon J., by imposing costs of Rs.5000/- on the Appellants. Though in the Affidavit in Support a reference is made to the various proceedings filed by the Applicants / Appellants, in our view, the filing of the said proceedings and the time spent in prosecuting the said proceedings would not enure to the benefit of the

Appellants so as to constitute sufficient cause for the delay in filing the above Appeal.

3 It is required to be borne in mind that Order XXXVII of the CPC is held to be a self contained code which encompasses within itself, the remedy if any to be availed of in respect of a decree, Rule 4 of Order XXXVII provides for an application to be made for setting aside an ex parte decree. As indicated above, the Appellants had availed of the said remedy by filing Notice of Motion No.822 of 2010, however for the reasons best known to the Applicants / Appellants, they had withdrawn the said Notice of Motion to file appropriate proceedings and thereafter going through the process of filing number of applications etc., have filed the instant Appeal. It is well settled that the consideration of an application for condonation of delay has to be judicious meaning thereby that it has to be considered in the facts and circumstances prevailing in a particular case. In the instant case, we are of the view that the situation is of the Applicants / Appellants own making as they had not filed a reply to the Summons for Judgment as also were not present during the hearing of the said Summons for Judgment in the year 2009. Thereafter though he was made aware of the decree passed in the year 2010 and filed an application for setting aside had withdrawn the same to file appropriate proceedings and it is after a period of almost 7 years that the instant Appeal has been filed. The reasons mentioned in the Affidavit in

Support, we are afraid can hardly be said to constitute sufficient cause for condonation of the said huge delay. Hence no discretion can be exercised in favour of the Applicants / Appellants. The Notice of Motion is accordingly dismissed.

4 In view of the dismissal of the above Notice of Motion, the Appeal which suffers from the said delay of 2922 days does not survive and is accordingly disposed of.

[SARANG V KOTWAL, J]

[R.M.SAVANT, J]