

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO. 345 OF 2017**

Anil Bhupendranath Kapur	..Appellant
Vs.	
Ayodhyanath Harichand Kapoor @ Pappy Kapoor (deceased) & Ors	..Respondents

**WITH
NOTICE OF MOTION (L) NO.1751 OF 2017
IN
APPEAL (L) NO.345 OF 2017**

Anil Bhupendranath Kapur	..Applicant
Vs.	
Ayodhyanath Harichand Kapoor @ Pappy Kapoor (deceased) & Ors	..Respondents

Mr. N. H. Shukla for the Appellant / Applicant
Mr. M. K. Tanna for the Respondent Nos.1(a) to 1(d), 2, 5 & 6
Mr. P. M. Shah a/w Mr. Meetal Savla a/w Mr. Dishang Shah and Ms Jigna Shah for the Respondent Nos.3 and 4

**CORAM :R. M. SAVANT, &
SARANG V KOTWAL, JJ
DATE : 5th OCTOBER, 2017**

P.C.

1 The above Appeal is directed against the order dated 7-8-2017 passed by a Learned Single Judge of this court K. R. Shiram, J., by which order the Notice of Motion filed by the Respondents herein for recall of the order dated 10-12-2013 transferring the Suit to the list of undefended Suits, seeking condonation of delay in filing the Written Statement and the Written

Statement to be taken on record, came to be allowed.

2 The Appellant herein is the original Plaintiff in Suit No.718 of 1997 filed by him for seeking damages to the tune of Rs.5 crores against the Defendants. The Plaintiff and the Defendants are closely related. The Suit is of the year 1997 and the summons came to be served in the same year. It seems that the Defendants had engaged Advocate Mr. Sanjeev P. Kadam to appear for them in the said Suit. This was done by the Defendants through Advocates Mr. Jagtap who was appearing for them in a Criminal Case. It is their case that Advocate Mr. Kadam did not communicate to them the status of the said Suit and neither did he give any updates regarding the said Suit. It is their case that ultimately the Defendant No.5 who was in charge of the said Suit on behalf of the Defendants became aware of the filing of the said Suit on 23-8-2009 as a consequence of the said Suit being listed before a Learned Single Judge of this Court Dr. D. Y. Chandrachud J. (as his Lordship then was) on 18-6-2009 for the purpose of bringing the heirs of the Defendant No.1 who had expired, on record. It is thereafter that the Learned Judge directed the Plaintiff to serve the Defendant No.5 who was present in Court a complete set of papers and proceedings of the Suit within one week so as to enable the Defendants to take necessary steps in the matter. The Defendants were accordingly served with the papers and proceedings on 8-10-2009 and accordingly in the year 2009 they engaged the present Advocate Mr. P. M. Shah

after seeking NOC of Advocate Mr. Kadam through Mr. Jagtap Advocate appearing for the Defendants in a Sessions Case. It is therefore their case that till the year 2009 they were not aware of the status of the said Suit. It is further their case that they got drafted the Written Statement to be filed on their behalf and lodged the same in the department on 17-10-2009. They attributed the non filing of the Written Statement to the non communication of any information to them by their earlier Advocate Mr. Kadam. The aforesaid facts which was the foundation of the Affidavit in Support which was filed in the Notice of Motion seeking condonation of delay commended acceptance to the Learned Single Judge who by the impugned order set aside the order passed by the Learned Prothonotary and Senior Master of this Court directing the Suit to be placed in the list of undefended Suit and also permitted the Defendants to file their Written Statement by condoning the delay.

3 The Learned Counsel appearing on behalf of the Appellant Mr. Shukla would make two fold submissions. It was the submission of Mr. Shukla that the earlier Notice of Motion filed by the Defendants i.e. the Respondents herein being Notice of Motion No.1506 of 2015 being withdrawn, the instant Notice of Motion for the same relief was not maintainable. The next contention of the Learned Counsel was that in similar circumstances where the delay had occasioned on the part of the Appellant the Apex Court in Special Leave Appeal No.32251-32252 of 2011 had set aside the order on the ground

that no sufficient case was made out by the Appellant herein in filing the application for setting aside an ex parte decree. Hence on a parity the Learned Counsel would contend that the Learned Judge having come to a conclusion that there was no satisfactory explanation for non filing of the Written Statement between the period 1997 and 2009, ought not to have condoned the delay and permitted the filing of the Written Statement. The Learned Counsel Mr. Shukla sought to rely upon the affidavit of the earlier Advocate engaged by the Defendants to buttress his submission that the Defendants are making the earlier Advocate a scape goat when the Defendants themselves have to be blamed as they had not made any inquiries with the said Advocate. The Learned Counsel sought to place reliance on the judgment of the Apex Court in the matter of **Katari Suryanarayana & Ors. Vs. Koppiseti Subba Rao & Ors.**¹, in that regard. The Learned Counsel would contend that the case as set out in the affidavit in support can hardly constitute sufficient cause for condonation of the huge delay in filing the Written Statement.

4 Per contra, the Learned Counsel Mr. Shah appearing for the Respondent Nos.3 & 4 would support the impugned order passed by the Learned Single Judge of this Court. The Learned Counsel would seek to draw this courts attention to the facts which have been narrated hereinabove especially the factum of the amended plaint being served in the year 2009 and

¹ (2009) 11 Supreme Court Cases 183

the oral directions given by the Learned Single Judge to serve the Defendant No.5 with the papers and proceedings in the Suit in question. The Learned Counsel also draws this courts attention to the averments made in the affidavit in support of the Notice of Motion wherein in paragraph 16 it has been stated that the Written Statement was lodged by the Defendants in the department on 17-10-2009.

5 Having heard the Learned Counsel for the parties, the issue that arises whether the Defendants are entitled to the exercise of discretion in their favour as done by the Learned Single Judge by the impugned order. No doubt the Suit is of the year 1997 and the writ of summons was served in the same year, however, the fact remains that the Suit was listed before a Learned Single Judge of this Court on account of the fact that one of the Defendants i.e. the Defendant No.1 had expired and his heirs were to be brought on record. It is at the said stage that the Plaintiff's Advocate was directed to serve the papers and proceedings in the said Suit which was the amended plaint on the Defendant No.5 who was present in court on the said day i.e. 24-8-2009. The aforesaid fact in a way would undoubtedly have an impact on the delay which has occasioned in filing the Written Statement.

6 It is required to be noted that after the papers and proceedings were served on the Defendant No.5, the Defendants had lodged their Written

Statement in the department on 17-10-2009, meaning thereby that the Defendants had affirmed the Written Statement immediately after the papers and proceedings were served and had lodged the Written Statement in the department. That the Written Statement was not taken on record is another matter, but the Defendants cannot be faulted with on the ground that they had not taken any steps to file the Written Statement. The instant case is therefore obviously not a case where the conduct of the Defendants can be said to be suffering from carelessness and indolence.

7 In so far as the earlier Notice of Motion is concerned, no doubt the order passed by the Learned Single Judge discloses that on the application made by the Defendants the Notice of Motion was allowed to be withdrawn and the said order does not disclose any liberty granted to the Defendants to file their Written Statement. The said fact is sought to be explained on behalf of the Defendants by contending that the said Notice of Motion was withdrawn in view of the fact that it did not contain any prayer for setting aside the order of the Prothonotary and Senior Master directing the Suit to be placed in the list of undefended Suit. In our view, the said explanation can be said to be a plausible reason for withdrawal as otherwise no party would withdraw a Notice of Motion which has been filed by it for taking its Written Statement on record which withdrawal would obviously have a deleterious effect on the prosecution of the Suit by it. Hence we are of the view that the second Notice

of Motion that is the Notice of Motion in which the impugned order was passed, was maintainable.

8 In so far as the order of the Apex Court in SLP No.33351-32252 of 2011 is concerned, the said SLP arose out of an order passed by the Learned Single Judge of this Court whereby the Appeal filed by the Respondent No.1 was allowed and the ex-parte decree passed in favour of the Plaintiffs in Suit No.1249 of 1995 came to be set aside. The Learned Single Judge had allowed the Appeal after the Trial Court had rejected the application for setting aside filed by the Defendant No.1. A reading of the said order discloses that the said order was founded on the facts as prevailing in the said case. In the said case the Apex Court found that the statement made in the application seeking condonation of delay in filing the application for setting aside was patently false in as much as in the said case the copy of the exparte decree in respect of which the said application for setting aside was filed was produced in the Criminal Case filed by the Respondent No.1 against Ayodhyanath Kapoor and the same also found a mention in the judgment of the Sessions Case No.1397 of 1996. Hence the Apex Court found that the case of the Defendant No.1 in the said Suit No.1249 of 1995, that he had no knowledge of the decree could not be accepted. We are therefore unable to accept the contention of the Learned Counsel for the Appellant who claims through the Defendant No.1 in the said Suit, that since the judgment is in a matter between the same parties,

on a parity the Defendants in the instant Suit who were the Appellants in the SLP should be visited with the same treatment as was extended to the Defendant No.1 in the said earlier Suit No.1249 of 1995 by not condoning the delay. It is well settled that the exercise of discretion has to be judicious and must have due regard to the facts and circumstances of the case. In the instant case, we find that the exercise of discretion by the Learned Single Judge in the facts and circumstances of the present case cannot be faulted with. Hence no case for interference with the impugned order dated 7-8-2017 in our Appellate Jurisdiction is made out. The Appeal is accordingly dismissed.

9 It is required to be noted that pursuant to the filing of the Written Statement, costs as directed have been deposited by the Defendants as also the issues have been framed considering the pleadings which are now on record between the parties, the Suit it seems is set down for trial.

10 At this stage, the Learned Counsel for the Appellant seeks stay of the trial for a period of two months. In the facts and circumstances of the case, the said prayer is rejected.

11 In view of the dismissal of the above Appeal, the Notice of Motion (L) No.1751 of 2017, does not survive and to accordingly stand disposed of as such.

[SARANG V KOTWAL, J]

[R.M.SAVANT, J]