

IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
CIVIL APPELLATE JURISDICTION.

Civil Application (F) No.3487 of 2018

In

First Appeal (ST.) No.17594 of 2018

In

S.C. Suit No.3877 of 2008 (High Court Suit No.1467 of 2008)

Amjad Ali Shafi Khan,
Aged about 62 years of Bombay, adult,
Indian Inhabitant, residing At Flat No.A/6-403,
Al-Madina Millat Nagar, Andheri (West),
Mumbai 400 053. Applicant/Org. Appellant.

- Versus -

Abdul Hameed Abdul Gai Shaikh
Of Mumbai adult, Indian Inhabitant,
Residing at B/15-303, Al-Qudsiya Hamara Ghar CHS Ltd.,
Millat Nagar, Andheri (West),
Mumbai 400 053. Respondent/Org. Plaintiff.

Shri Sanjay Jain, Advocate, instructed by Shri Ashok M. Saraogi, Advocate
for applicant.
Shri Mayur Khandeparkar, Advocate, instructed by Shri Mehul A. Shah,
Advocate for non-applicant.

Coram : A.S. Chandurkar, J.

Dated : 22nd December, 2018.

J U D G M E N T

This application for condonation of delay has been filed by the original defendant who seeks to challenge the decree passed by the trial Court on 08-03-2013, by filing an appeal under Section 96 of the Code of Civil Procedure, 1908 (for short, 'the Code'), which has been filed beyond

the period of limitation.

2. The facts giving rise to the present proceedings are that, the non-applicant is the original plaintiff who had filed suit for specific performance of the Memorandum of Understanding dated 26-10-2007, along with other ancillary reliefs. The applicant filed his written statement opposing the said suit. Thereafter, he as well as his Counsel remained absent and hence the suit proceeded ex-parte against the applicant. The trial Court decreed the suit on 08-03-2013. According to the non-applicant, he got knowledge about the aforesaid ex-parte decree on 18-12-2014. The applicant, therefore, filed an application under the provisions of Order IX Rule 13 of the Code, for setting aside that ex-parte decree. That application was dismissed by the trial Court on 20-03-2015. This order was challenged by the applicant by filing Appeal From Order No.537 of 2015. That appeal was allowed by this Court by its judgment dated 20-03-2017 and the proceedings were remanded to the trial Court for deciding the same afresh. The trial Court, thereafter, allowed the Notice of Motion filed by the applicant on 27-10-2017 and after condoning the delay set aside the ex-parte decree. Being aggrieved by that order, the non-applicant herein filed Civil Revision Application No.12 of 2018. By judgment dated 27-02-2018, the said Civil Revision Application came to be allowed and the order passed by the trial Court dated 27-10-2017, came to be set aside. The order passed by this Court has been further challenged by the applicant before the Hon'ble Supreme Court and that challenge is pending. Thereafter, the applicant herein has filed the present appeal under Section 96 of the Code on 21-06-2018, along with the application for condonation of delay. The period of delay as stated is of 5 years and 75 days.

3. Shri Sanjay Jain, learned Counsel for the applicant submitted that in view of the fact that the applicant was pursuing proceedings for setting aside the ex-parte decree by filing an application under the provisions of Order IX Rule 13 of the Code, the time spent in pursuing those proceedings ought to be taken into consideration and the delay in filing the appeal under Section 96 of the Code ought to be condoned. Placing reliance on the decision in **J. Kumaradasan Nair and another vs Iric Sohan and others**, reported at **(2009) 12 SCC 175**, it was submitted that the principles underlying the provisions of Section 14 of the Limitation Act, 1963 (for short, 'the Act of 1963'), would be applicable while considering the prayer for condoning the delay under Section 5 of the Act of 1963. It was urged that the principles for applying provisions of Section 14 of the Act of 1963, were meant for grant of relief where a person has committed some mistake and ought to be applied in a broad based manner. In view of the fact that the earlier proceedings were being bona fide pursued, that period ought to be excluded. The learned Counsel then referred to the order dated 06-05-2011 in Miscellaneous Civil Application No.1013 of 2009 in Stamp Number Main No.3866 of 2009 (**Suresh G. Ramnani s/o Govindram J. Ramnani vs Mrs. Aurelia Ana da Piedade Miranda alias Araiyo Alvares and others**) to urge that in somewhat similar circumstances this Court had condoned the delay in filing Second Appeal by applying the provisions of Section 14 of the Act of 1963. Relying upon the decision in **Suresh G. Ramnani vs Mrs. Aurelia Ana da Piedade Miranda alias Araiyo Alvares and others**, reported at **2012(5) Mh.L.J. 40**, it was submitted that when proceedings under the provisions of Order IX Rule 13 of the Code as well as an appeal under Section 96 of the Code can be pursued simultaneously, there was no reason not to apply the

provisions of Section 14 of the Act of 1963 for condoning the delay caused while pursuing the earlier proceedings. It was submitted that all necessary requisites on the basis of which the provisions of Section 14 of the Act of 1963 could be applied had been satisfied in the present case. He referred to the decision in **Consolidated Engineering Enterprises vs Principal Secretary, Irrigation Derangement and others**, reported at **(2008) 7 SCC 169**, in that regard. It was urged that even though the order passed by the trial Court in the earlier proceedings was set aside by this Court, that factor would not come in the way of the applicant in the present proceedings. Moreover, costs of Rs. 1,50,000/- had been imposed on the applicant and hence no prejudice would be caused to the non-applicant, if the delay was condoned. The learned Counsel laid emphasis on the latter portion of Section 14(1) of the Act of 1963 and especially the expression, "other cause of a like nature" and submitted that the delay in filing the appeal was liable to be condoned.

4. *Per contra*, Shri Mayur Khandeparkar, learned Counsel for the non-applicant opposed the aforesaid submissions. He submitted that in the facts of the present case, the provisions of Section 14 of the Act of 1963, would not at all be applicable. According to him, the earlier proceedings that were preferred under the provisions of Order IX Rule 13 of the Code were adjudicated on merits and the same did not suffer from any defect of jurisdiction or other cause of a like nature. It was pointed out that the Special Leave Petition filed by the applicant for challenging the order passed in C.R.A. No.12 of 2018 was still pending which indicated that the applicant was pursuing the earlier proceedings. It was then submitted that a part of the period of delay in filing the present appeal was

already considered by this Court while deciding the proceedings in C.R.A. No.12 of 2018. In the entire application for condonation of delay, no sufficient cause had been shown by the applicant. By placing reliance on the decision in **Jotiba Limbaji Kanashenavar vs Ramappa Jotiba Kanashenavar**, reported at **AIR 1938 Bombay 459**, it was urged that steps taken for setting aside the ex-parte decree would not amount to “sufficient cause” within the meaning of Section 5 of the Act of 1963. It was submitted that this decision has been consistently followed in various subsequent decisions and in that regard the learned Counsel referred to the decisions in **Maharashtra Rajya Sahakari Adiwasi Vikas Mahamandal Maryadit through its Regional Manager vs M/s Kanti Shantilal and Co.**, reported at **2003 Vol. 105 (2) Bom. L. R. 349**, **Nandkishor Kanhyalal Agrawal vs Dhule Municipal Corporation and others**, reported at **2012(1) Mh.L.J. 918** and by the Andhra Pradesh High Court in **Jokam Reddy and others vs Kokar Malliah**, reported at **AIR 1976 Andhra Pradesh 399**. It was then submitted by referring to the decision in **Balu Gangaram More and others vs Bhivchandra Shankar More and others**, reported at **2015(2) Mh.L.J. 879**, that though the remedies provided against an ex-parte decree could be said to be simultaneous, they could not be converted into consecutive remedies. Having failed in the earlier proceedings on merits, it was not open for the applicant to now turn around and again seek condonation of delay in filing the appeal under Section 96 of the Code. The learned Counsel also sought to distinguish the decisions relied upon by the learned Counsel for the applicant. It was, thus, submitted that the Civil Application was liable to be dismissed.

5. I have heard the learned Counsel for the parties at length and I have gone through the various decisions cited at the bar. The factual aspects in the present proceedings are not in dispute. The suit filed by the non-applicant herein was decreed ex-parte on 08-03-2013. The application filed under provisions of Order IX Rule 13 of the Code came to be allowed by the trial Court on 27-10-2017 and that order was set aside by this Court in C.R.A. No.12 of 2018. It is common ground that SLP (Civil) No. 10471 of 2018, challenging that order is pending before the Hon'ble Supreme Court. The appeal under Section 96 of the Code has been filed on 21-06-2018 and the same is filed after 5 years and 75 days from the expiry of the period of limitation.

6. Much emphasis has been placed on behalf of the applicant on the provisions of Section 14(1) of the Act of 1963, to canvass that the period spent in prosecuting the proceedings under provisions of Order IX Rule 13 of the Code deserves to be excluded while considering the period of delay in filing the appeal under Section 96 of the Code. For the purposes of applying the provisions of Section 14 of the Act of 1963, the conditions that are required to be satisfied as held in **Consolidated Engineering Enterprises** (supra) are, that the prior and subsequent proceedings are civil proceedings prosecuted by the same party, the prior proceeding had been prosecuted with due diligence and in good faith, the failure of the prior proceeding was due to defect of jurisdiction or other cause of a like nature, the earlier proceeding and the later proceeding must relate to the same matter in issue and both the proceedings must be in a Court. It is only after the aforesaid conditions are satisfied that the provisions of Section 14 of the Act of 1963 or principles analogous thereto

can be applied.

However, on examining the facts of the present case, I am of the opinion that the conditions requisite for satisfying the applicability of Section 14 of the Act of 1963 are not satisfied. It is pertinent to note that the proceedings under provisions of Order IX Rule 13 of the Code along with the prayer for condoning the delay in initiating the same have been adjudicated on merits. Those prior proceedings have not failed due to any defect of jurisdiction or other cause of a like nature. The application filed under the provisions of Order IX Rule 13 of the Code was allowed by the trial Court but this Court set aside that order in C.R.A. No.12 of 2018. The challenge to the order passed in C.R.A. No.12 of 2018 is still pending before the Hon'ble Apex Court. In other words, the prior proceedings have not yet attained finality and are still being prosecuted by the applicant.

7. It may be stated that where the earlier proceedings have failed on merits, it would not be open for the losing party to seek to invoke the provisions of Section 14 of the Act of 1963 for having the delay condoned in prosecuting those proceedings. Reference in this regard can be usefully made to the decision in **Zafar Khan and others vs Board of Revenue, U.P. and others**, reported at **AIR 1985 SC 39**, wherein it has been held that where a party has failed in the earlier proceedings on merits and not on a defect of jurisdiction or other cause of a like nature, such party would not be entitled to the benefit of Section 14 of the Act of 1963. Thus, for two reasons namely; that the earlier proceedings initiated by the applicant are still being prosecuted and secondly those proceedings have not failed on account of any defect of jurisdiction or other cause of like nature but have been adjudicated on merits, the applicant is not entitled to seek to rely

upon the provisions of Section 14 of the Act of 1963. It is well settled that the expression “other cause of a like nature” has to be read in the context of the expression used in the former portion of Section 14(1) of the Act of 1963, as regards the defect of jurisdiction. That cause has to be analogous to the expression “defect of jurisdiction”. Said aspect is missing in the present case. It is, thus, clear that the reliance sought to be placed on behalf of the applicant on the provisions of Section 14(1) of the Act of 1963 is misconceived.

8. As regards the legal principles laid down in the decisions relied upon by the learned Counsel for the applicant are concerned, there cannot be any quarrel with the same. However, as it has been found that the necessary requisites for invoking the provisions of Section 14(1) of the Act of 1963 are not present in the case in hand, those legal principles cannot be made applicable to the present case. It is also to be noted that in **Suresh G. Ramnani** (supra), the time spent in prosecuting the proceedings under Order IX Rule 13 of the Code was not sought to be excluded while seeking condonation of delay in filing an appeal under Section 96 of the Code. In those facts, therefore, said decision is clearly distinguishable. In the present case, the time spent in the earlier proceedings is sought to be excluded while making the prayer for condonation of delay. The learned Counsel for the non-applicant is justified in placing reliance upon the decision in **Balu Gangaram More and others** (supra), wherein it has been held that though two remedies have been provided against an ex-parte decree, such remedies are expected to be resorted to only if the facts of the situation contemplated are available. The remedies provided though simultaneous cannot be

converted into consecutive remedies. In the present case, the remedy of applying under provisions of Order IX Rule 13 of the Code is still being prosecuted and consecutively, the delay in filing an appeal under Section 96 of the Code for challenging the ex-parte decree is also sought to be condoned.

9. Once, it is found that the applicant is not entitled to invoke the principles analogous to the provisions of Section 14 of the Act of 1963, for having the delay condoned, the application in question has to be considered in the light of the provisions of Section 5 of the Act of 1963. However, perusal of the Civil Application indicates that except for pleading as regards the earlier litigation under the provisions of Order IX Rule 13 of the Code, there is no other reason stated for the cause of delay. The Civil Application does not disclose any sufficient cause for condoning the delay. It is, thus, found that in the absence of any sufficient cause for condoning the delay, the prayer as made in the Civil Application cannot be granted.

10. Consequently, Civil Application No.3487 of 2018, stands dismissed. It is held that the delay in filing the appeal under Section 96 of the Code cannot be condoned as no sufficient cause has been shown by the applicant. The Civil Application is dismissed with costs.

JUDGE