

JPP

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION***

***COMMERCIAL APPEAL NO. 46 OF 2020
IN
INTERIM APPLICATION NO. 1 OF 2019
IN
COMMERCIAL SUIT (L) NO. 1374 OF 2018
A/W.
INTERIM APPLICATION NO. 2015 OF 2021***

Oberoi IBC (India) Pvt. Ltd.

... Appellant
(Orig. Plaintiff)

V/s.

S.G. Exports & Ors.

... Respondents
(Orig. Defendants)

Ms. Gunjan Shah i/b. Jignesh Shah for the Appellant

***CORAM : NITIN JAMDAR &
G.A. SANAP, JJ.***

DATE : 17 SEPTEMBER 2021

P.C. :-

The Appellant has challenged the order passed by the learned Single Judge dated 28 November 2019 in Interim Application No.1 of 2019 in Commercial Suit (Lodg.) No.1374 of

2018. By the impugned order the learned Single Judge rejected the application for restoration of the suit which application was filed with delay of 88 days.

2. Heard the learned Counsel for the Appellant.

3. Notice for final disposal was issued in this Appeal on 27 January 2021. The Registry has endorsed that Respondent Nos.1 to 4 are served. The Respondent Nos.6 and 7 are represented through advocates. When the Appeal came up on board on 16 October 2021, we had noted this position and that the Respondent No.5 is a Firm of which the Respondent Nos. 6 and 7 are stated to be the partners. Since the Advocate for Respondent Nos. 6 and 7 were not present, we had deferred the hearing to today. Today also none appears for the Respondents.

4. The learned Single Judge found that the ground given for the delay and as to why the office objections could not be removed, was very casual and therefore rejected the application. The learned Counsel for the Appellant accepts that the office objections were not removed in time because of the mistake of the advocate who represented the Appellant. The learned Counsel submitted that it is also correct that the application for restoration and the condonation of delay did not give any particulars. The learned Counsel for the Appellant submits that the Appellant will file an

affidavit of unconditional apology and will not claim interest on the decretal amount from the date the Suit was dismissed for non prosecution till today in case the Appellant succeeds in the Suit. The learned Counsel submits that the Respondents were present when the impugned order was passed and no contentions were advanced to oppose the application and they had not filed any reply.

5. We have considered the arguments advanced by the Appellant. This is a case where there is a clear fault on the part of the Advocate. The impugned order does not record any opposition by the Respondents. No reply was filed to the interim application. Even today none appears for the Respondents. Apology and undertaking is given by the Appellant. Though it cannot be said that the Appellant is without any blame, considering that the equities can be balanced when the Appellant will give an undertaking of not claiming any interest, for the stipulated period effectively the situation is being restored to the date when the Suit was dismissed, we are of the opinion that an opportunity needs to be granted to the Appellant to prosecute the Suit on merits.

6. Accordingly the following order :-

(i) The impugned order dated 28 November 2019 is set aside. Interim Application No.1 of 2019 in Commercial Suit (Lodg.) No. 1374 of 2018 is allowed subject to the following -

(a) The Appellant will file an affidavit of unconditional apology in this Appeal as well as on the record of the Suit. A copy of the affidavit of apology be also furnished to the Office of the Prothonotary and Senior Master, Original Side, Bombay.

(b) The affidavit to state that the Appellant will not claim any interest in case the Suit is decreed in favour of the Appellant for the period between 12 June 2019 till 17 September 2021.

(c) This affidavit to be filed within a period of two weeks from today.

(d) Office objections should be removed within a period of four weeks.

(e) In case, the affidavit is not filed and the objections are not removed as above, the impugned order will stand automatically revived without reference to the Court.

7. Appeal disposed of in above terms.

G.A. SANAP, J.

NITIN JAMDAR, J.

**JYOTI
PRAKASH
PAWAR**

Digitally signed
by JYOTI
PRAKASH PAWAR
Date: 2021.09.20
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