

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 2595 OF 2021

IN

FIRST APPEAL (St) NO. 7740 OF 2021

WITH

INTERIM APPLICATION (St) NO. 7742 OF 2021

Pavan Kumar Nath

...Applicant/
Appellant/
Ori.Defendant

Versus

Yashita Mukhi

...Respondent/
Ori.Plaintiff

Mr. M. M. Vashi, Senior Advocate, a/w Mr. Siddiquie, i/b A.A.
Siddiquie & Asso., for the Applicant/Appellant.

Mr. Mayur Khandeparkar, i/b Mr. Mehul A. Shah, for the
Respondent.

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CORAM: N. J. JAMADAR, J.

RESERVED ON: 12th OCTOBER, 2022

PRONOUNCED ON: 17th JANUARY, 2022

ORDER:-

1. This application is preferred by the applicant – original defendant to condone the delay of 1916 days in preferring the appeal against the judgment and decree dated 21st December, 2015, in Summary Suit No.3189 of 2012 (High Court Suit No.1012/2012), passed by the learned Judge, City Civil Court, Bombay, whereby the suit instituted by the respondent – original plaintiff came to be decreed and the applicant was ordered to pay the sum of Rs.83,60,925/- along with further interest on the principal amount of Rs.40,00,000/- at the rate of

9% p.a. from the date of the institution of the suit till realization.

2. Though the core controversy was in the nature of a money claim based on the negotiable instrument and written contract to pay the debt, the litigation has a chequered history.

3. The facts, necessary for the determination of this application, can be stated in brief as under:

(a) The plaintiff claims that her mother and defendant were family friends. The plaintiff had advanced a loan of Rs.40,00,000/- on 19th November, 2008, at Mumbai, to the defendant. The latter had agreed to pay interest on the said loan amount at the rate of 2.1% per month, compounded monthly. The defendant never paid interest as agreed nor repaid the loan amount. Eventually, on 6th May, 2011, the defendant passed a receipt acknowledging the loan.

(b) On 5th July, 2011, the defendant issued two cheques, one for Rs.40,00,000/-, towards the principal amount, and another for Rs.36,88,925/-, towards interest component, payable on 19th October, 2011 and 19th March, 2012, respectively, on Nainital Branch of Vijaya Bank. Upon presentment the first cheque drawn for Rs.40,00,000/- was returned unencashed vide memo dated 21st October, 2011, on account of insufficiency of funds. The plaintiff addressed a statutory demand notice on

14th November, 2011 and upon failure of the defendant to comply with the demand, lodged a complaint under the provisions of Section 138 of the Negotiable Instruments Act, 1881 (“the N.I. Act”), in the Court of Metropolitan Magistrate, Andheri, Mumbai. The cheque drawn towards the amount of interest, however, was not presented for encashment. Hence, the summary suit came to be instituted in the High Court for recovery of the said amount of Rs.83,60,925/- along with further interest at the rate of 2.1% compounded monthly on the principal amount of Rs.40,00,000/- from 5th July, 2011 till the institution of the suit and from the date of the suit till realization.

(c) The plaintiff claimed that the writ of summons was served on the defendant on 2nd May, 2012 and 17th May, 2012. Affidavits of service were tendered. With the enhancement in the jurisdiction of City Civil Court, Bombay, the suit came to be transferred to the City Civil Court and renumbered as Summary Suit No.3189 of 2012.

(d) A spate of proceedings followed. As the plaintiff had sought leave under Clause XII of the Letters Patent, High Court, Bombay, the defendant took out a Notice of Motion being Notice of Motion No.673 of 2013, for revocation of the leave. By an order dated 30th July, 2013, the learned Judge, City Civil Court

dismissed the said Notice of Motion No.673 of 2013 opining, *inter alia*, that the defendant failed to enter appearance within the period stipulated by Order XXXVII Rule 3.

(e) The defendant took out another Notice of Motion, being NM No.3723 of 2013, for setting aside the aforesaid order dated 30th July, 2013 in Notice of Motion No.673 of 2013. This Notice of Motion No.3723 of 2013 was also dismissed by the learned Judge, City Civil Court, Bombay, by an order dated 24th December, 2013.

(f) Another Notice of Motion, being NM No.459 of 2014 was taken out by the defendant to set aside the affidavits of service filed by the Bailiff and the plaintiff's clerk, in proof of service of writ of summons on the defendant and also for initiation action for perjury against those deponents. This Notice of Motion No.459 of 2014 was also dismissed by a learned Judge, City Civil Court, Bombay, on 11th August, 2015.

(g) The defendant preferred Civil Writ Petition No.4224 of 2016 assailing the order dated 11th August, 2015 passed in Notice of Motion No.459 of 2014. The said writ petition was subsequently withdrawn. For the completion of record it may be relevant to note that Civil Writ Petition No.3481 of 2016 preferred by the defendant challenging the order dated 24th December, 2014 in Notice of Motion No.3723 of 2013 was

dismissed for want of prosecution by this Court by order dated 18th April, 2019.

(h) In the meanwhile, Summary Suit No.3189 of 2012 was taken up for hearing, and observing that the defendant had failed to enter appearance within 10 days from the date of service of writ of summons and thus the allegations in the plaint were deemed to have been admitted, in accordance with the provisions contained in Order XXXVII Rule 2(3) of the Code, the learned Judge, City Civil Court, Bombay, was persuaded to decree the suit by the judgment and order dated 21st December, 2015, the delay in preferring appeal thereagainst is now sought to be condoned.

(i) The defendant took out a Notice of Motion No.917 of 2016 to set aside the aforesaid decree. By an order dated 3rd April, 2018, the said Notice of Motion No.917 of 2016 was dismissed by the learned Judge opining, *inter alia*, that it could not be inferred that the defendant was not aware about the proceedings or was not served by the plaintiff or the defendant was prevented by a sufficient cause from appearing before the Court.

(j) The aforesaid order was assailed by the defendant by filing Civil Writ Petition No.5161 of 2018. By an order dated 16th

December, 2019, the said writ petition was dismissed by this Court.

(k) A Special Leave Petition, being SLP (L) No.2998 of 2020, thereagainst was dismissed by the Supreme Court by an order dated 6th March, 2020.

(l) The defendant sought to review the order passed by this Court in Writ Petition No.5161 of 2018 by filing Review Petition (St) No.4817 of 2014. Eventually, the defendant withdrew the review petition and, upon being advised, claims to have instituted this application for condonaton of delay in preferring appeal against the judgment and order dated 21st December, 2015.

(m) In the application, it is averred that against the *ex parte* judgment and decree sought to be impugned, the applicant had two remedies. One, an appeal against the decree. Two, an application for setting aside the *ex parte* judgment and decree. As it was the stand of the applicant that writ of summons was not duly served on him, as contemplated by the provisions contained in Order XXXVII of the Code, the applicant had adopted the latter course. Since the said grievance of the applicant has not been properly considered, the applicant has now exercised the statutory right to prefer an appeal against the said *ex parte* judgment and decree. Delay is neither intentional

nor deliberate. The applicant *bona fide* prosecuted the proceedings, as permissible in law. Hence, the delay deserves to be condoned. Lest the applicant would suffer irreparable loss.

(n) The respondent – plaintiff has filed an affidavit-in-reply in opposition of the application for condonation of delay. The substance of the resistance put-forth by the plaintiff is that the instant application is a link in the chain of the dilatory tactics adopted by the defendant to defeat the legitimate claim of the plaintiff. The application, like the multiple proceedings initiated by the defendant in the past, suffers from the vice *suggestio falsi and suppressio veri*. The application is not *bona fide*. On the contrary, the averments in the application work out the retribution of the claim of the defendant that the delay was neither intentional nor deliberate. Reference is made to the observations in the various orders, which according to the plaintiff, reflect upon the claim of *bona fide*.

4. In the backdrop of the aforesaid facts and pleadings, I have heard Mr. Vashi, the learned Senior Counsel for the applicant and Mr. Khandeparkar, the learned Counsel for the respondent. The learned Counsels have taken me through the pleadings, impugned judgment and order and few of the orders referred to above.

5. Mr. Vashi, the learned Senior Counsel for the applicant, would urge that notwithstanding the multiple proceedings which were initiated by the applicant/defendant, the core grievance of the defendant that writ of summons was not duly served on the defendant, had not been adjudicated satisfactorily in any of the proceedings. Laying emphasis on the fact that the issue of territorial jurisdiction of the Civil Court or for that matter the High Court (before which the suit was initially instituted), plainly arises for consideration. Thus, the endeavour on the part of the defendant to question the legality and propriety of grant of leave under Clause XII of the Letters Patent can only be said to be legitimate and *bona fide*.

6. Mr. Vashi further submitted that in view of the settled legal position that the defendant against whom an *ex parte* decree is passed has two remedies: one of seeking to setting aside the *ex parte* decree and other of preferring appeal against the decree itself, the fact that the defendant chose to exercise initially the option of seeking setting aside the *ex parte* decree does not impinge upon the statutory right of appeal under Section 96 of the Code. The pursuit of those remedies *bona fide* thus deserves to be construed as a sufficient cause for condonation of delay. The defendant cannot be rendered remediless, for the only reason that the endeavour to seek

setting aside of *ex parte* decree did not yield success. To lend support to the aforesaid submissions, Mr. Vashi placed a very strong reliance on a three Judge Bench Judgment of the Supreme Court in the case of *N. Mohan vs. Madhu*.¹

7. Mr. Khandeparkar, the learned Counsel for the defendant, stoutly submitted that the aforesaid submissions on behalf of the defendant do not merit countenance. Amplifying the submission, Mr. Khandeparkar strenuously urged that the submissions based on the availability of two remedies against an *ex parte* decree, under Order IX Rule 13 and Section 96(2) of the Code of Civil Procedure, 1908 (“the Code”) loses sight of the significant distinction between the provisions contained in Order IX Rule 13 and Order XXXVII Rule 4 of the Code, which confers power on the Court to set aside the decree only under special circumstances. Since the decree sought to be impugned, in the case at hand, was passed in a summary suit, the defendant cannot bank upon the existence of alternate remedies.

8. Mr. Khandeparkar further submitted that even where the defendant’s statutory right to prefer an appeal under Section 96(2) of the Code despite the dismissal of an application under Order IX Rule 13 of the Code, is upheld, the element of *bona fide* exercise of the statutory right of appeal is required to be

1 AIR 2020 Supreme Court 41.

determined. If the defendant is guilty of adopting dilatory tactics, and lacks *bona fide*, the Court would be justified in declining to exercise the discretion to condone the delay. The facts of the case, according to Mr. Khandeparkar, are so glaring that under no circumstances an inference can be drawn that the defendant prosecuted the proceedings *bona fide*. Mr. Khandeparkar took me through the orders passed by the City Civil Court, Bombay and this Court to bolster up the submission that the defendant has left no stone unturned to delay and defeat the legitimate and undefendable claim of the plaintiff.

9. The interplay between the right of appeal under Section 96(2) of the Code and an application under Order IX Rule 13 to seek setting aside of an *ex parte* decree came up for consideration before the Supreme Court in the case of ***Bhanu Kumar Jain vs. Archana Kumar and another.***² The Supreme Court considered the question whether the first appeal was maintainable despite the rejection of an application under Order IX Rule 13 of the Code to set aside the decree, which was sought to be appealed. The Supreme Court held that the right of appeal being a statutory right, a litigant shall not be deprived of

2 (2005) 1 Supreme Court Cases 787.

the right of appeal. The observations in paragraphs 36 and 38 exposit the law:

“36. However, it appears that in none of the aforementioned cases, the question as regard the right of the defendant to assail the judgment and decree on merit of the suit did not fall for consideration. A right to question the correctness of the decree in a First Appeal is a statutory right. Such a right shall not be curtailed nor any embargo thereupon shall be fixed unless the statute expressly or by necessary implication say so. [See Deepal Girishbhai Soni Vs. United India Insurance Co. Ltd. (2004) 5 SCC 385 and Chandravathi P.K. and Others Vs. C.K. Saji and Others, (2004) 3 SCC 734].

38. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex-parte hearing by the Trial Court and/ or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the First Appeal filed by him against Section 96(2) of the Code on the merit of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr. Choudhari that the 'Explanation' appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this court in Rani Choudhury (supra), P. Kiran Kumar (supra) and Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others [2004 (9) SCALE 270].”

10. In the case of **N. Mohan** (supra) in somewhat identical fact situation, the Supreme Court, *inter alia*, considered the following questions:

- “(i) After dismissal of the application filed under Order IX Rule 13 CPC for condonation of delay in filing the appeal, whether the appeal filed under Section 96(2) CPC against the *ex-parte* decree dated 09.10.2015 is maintainable?
- (ii) Whether the time spent in the proceedings to set aside the *ex-parte* decree be taken as “sufficient cause” within the meaning of Section 5 of the Limitation Act,

1908 so as to condone the delay in preferring the first appeal?”

11. After adverting to the pronouncement in the cases of *Bhanu Kumar Jain* (supra) and *Neerja Raltors (P) Ltd. vs. Janglu (Dead) through Legal Representative*,³ the legal position was expounded in the following words:

“12. The right of appeal under Section 96(2) CPC is a statutory right and the defendant cannot be deprived of the statutory right of appeal merely on the ground that the application filed by him under Order IX Rule 13 CPC has been dismissed. In *Bhanu Kumar Jain v. Archana Kumar and Another* (2005) 1 SCC 787, the Supreme Court considered the question whether the first appeal was maintainable despite the fact that an application under Order IX Rule 13 CPC was filed and dismissed. Observing that the right of appeal is a statutory right and that the litigant cannot be deprived of such right, in paras (36) and (38), it was held as under:-

36. ... A right to question the correctness of the decree in a first appeal is a statutory right. Such a right shall not be curtailed nor shall any embargo be fixed thereupon unless the statute expressly or by necessary implication says so. (See *Deepal Girishbhai Soni v. United India Insurance Co. Ltd.* (2004) 5 SCC 385 and *Chandravathi P.K. v. C.K. Saji* (2004) 3 SCC 734.)
.....”

14. The defendant against whom an ex-parte decree is passed, has two options. First option is to file an application under Order IX Rule 13 CPC and second option is to file an appeal under Section 96(2) CPC. The question to be considered is whether the two options are to be exercised simultaneously or can also be exercised consecutively. An unscrupulous litigant may, of course, firstly file an application under Order IX Rule 13 CPC and carry the matter up to the highest forum; thereafter may opt to file appeal under Section 96(2) CPC challenging the ex-parte decree. In that event, considerable time would be lost for the plaintiff. The question falling for consideration is that whether the remedies provided as simultaneous can be converted into consecutive remedies.

15. An appeal under Section 96(2) CPC is a statutory right, the defendant cannot be deprived of the statutory

3 (2018) 2 SCC 649.

right merely on the ground that earlier, the application filed under Order IX Rule 13 CPC was dismissed. Whether the defendant has adopted dilatory tactics or where there is a lack of bona fide in pursuing the remedy of appeal under Section 96(2) of the Code, has to be considered depending upon the facts and circumstances of each case. In case the court is satisfied that the defendant has adopted dilatory tactics or where there is lack of bona fide, the court may decline to condone the delay in filing the first appeal under Section 96(2) CPC. But where the defendant has been pursuing the remedy bona fide under Order IX Rule 13 CPC, if the court refuses to condone the delay in the time spent in pursuing the remedy under Order IX Rule 13 CPC, the defendant would be deprived of the statutory right of appeal. Whether the defendant has adopted dilatory tactics or where there is lack of bona fide in pursuing the remedy of appeal under Section 96(2) of the code after the dismissal of the application under Order IX Rule 13 CPC, is a question of fact and the same has to be considered depending upon the facts and circumstances of each case.”

(emphasis supplied)

12. In the context of the controversy at the hand, the aforesaid observations, in paragraph 15, assume significance. The Supreme Court has laid emphasis on the existence or lack of *bona fide* in the pursuit of the proceedings under Order IX Rule 13. It was in terms observed that whether the defendant adopted dilatory tactics or lacked *bona fide* in pursuing the remedy of appeal Under Section 96(2) of the Code after dismissal of the application under Order IX Rule 13 is a question of fact and the same has to be considered depending upon the facts and circumstances of each case.
13. At this stage, the essential distinction between the provisions contained in Order IX Rule 13 and Order XXXVII Rule 4 is required to be appreciated. From the text of Order IX

Rule 13, it becomes clear that a defendant can seek setting aside *ex parte* decree if he satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. In contrast, Rule 4 of Order XXXVII empowers the Court, which passes the decree in a summary suit to set aside the decree, under special circumstances. The Court, under Rule 4, is further empowered to stay or set aside the execution and grant leave to the defendant to appear to the summons and defend the suit. Though the provisions contained in Order IX rule 13 and Order XXXVII Rule 4 empower the Court to set aside the decree, yet the parameters for exercise of the said power are not identical. The fact that the writ of summons was not duly served on the defendant may furnish a ground for setting aside the decree under Order XXXVII Rule 4 as well. However, that does not equate the special provisions under Order XXXVII Rule 4 with the general provisions under Order IX Rule 13. The former warrants existence of special circumstances.

14. An useful reference, in this context, can be made to the judgment of the Supreme Court in the case of ***Rajni Kumar vs. Suresh Kumar Malhotra and another***,⁴ wherein the distinction

4 AIR 2003 Supreme Court 1322.

between the provisions contained in Order IX Rule 13 and Order XXXVII Rule 4 was illuminatingly postulated:

“8. The expression 'special circumstances' is not defined in the C.P.C. nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extra-ordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37, Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extra ordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to pre decree matters viz., to give leave to the defendant to appear to the summons and to defend the suit.

9. In considering an application to set aside ex parte decree, it is necessary to bear in mind the distinction between suits instituted in the ordinary manner and suits filed under Order 37 C.P.C. Rule 7 of Order 37 says that except as provided thereunder the procedure in suits under Order 37 shall be the same as the procedure in suits instituted in the ordinary manner. Rule 4 of Order 37 specifically provides for setting aside decree, therefore, provisions of Rule 13 of Order 9 will not apply to a suit filed under Order 37. In a suit filed in the ordinary manner a defendant has the right to contest the suit as a matter of course. Nonetheless, he may be declared ex parte if he does not appear in response to summons, or after entering appearance before framing issues; or during or after trial. Though addressing arguments is part of trial, one can loosely say that a defendant who remains absent at the stage of argument, is declared ex parte after the trial. In an application under Order 9 Rule 11, if a defendant is set ex parte and that order is set aside, he would be entitled to participate in the proceedings from the stage he was set ex parte. But an application under Order 9 Rule 13 could be filed on any of the grounds mentioned thereunder only after a decree is passed ex parte against defendant. If the court is satisfied that (1) summons was not duly served, or (2) he was prevented by sufficient cause from appearing when the suit was called for hearing, it has to make an order setting aside the decree against him on such terms as to cost or payment into court or otherwise as it thinks fit and thereafter on the day fixed for hearing by court, the suit would proceed as if no ex parte decree had been passed. But

in a suit under Order 37 the procedure for appearance of defendant is governed by provisions of Rule 3 thereof. A defendant is not entitled to defend the suit unless he enters appearance within ten days of service of summons either in person or by a pleader and files in court an address for service of notices on him. In default of his entering an appearance, the plaintiff becomes entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, upto the date of the decree together with costs. The plaintiff will also be entitled to judgment in terms of sub-rule (6) of Rule 3. If the defendant enters an appearance, the plaintiff is required to serve on the defendant a summons for judgment in the prescribed form. Within ten days from the service of such summons for judgment, the defendant may seek leave of the court to defend the suit, which will be granted on disclosing such facts as may be deemed sufficient to entitle him to defend and such leave may be granted to him either unconditionally or on such terms as the court may deem fit. Normally the court will not refuse leave unless the court is satisfied that facts disclosed by the defendant do not indicate substantial defence or that defence intended to be put up is frivolous or vexatious. Where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, no leave to defend the suit can be granted unless the admitted amount is deposited by him in Court. Inasmuch as Order 37 does not speak of the procedure when leave to defend the suit is granted, the procedure applicable to suits instituted in the ordinary manner, will apply.

10. It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the court to grant leave to the defendant to appear to summons and defend the suit if the Court considers it reasonable so to do, on such terms as court thinks fit in addition to setting aside the decree. Where on an application, more than one among the specified reliefs may be granted by the Court all such reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the court is empowered to grant leave to defendant to appear to the summons and to defend the suit in the same application. It

is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9."

(emphasis supplied)

15. Pointing out the distinction between Order IX Rule 13 and Order XXXVII Rule 4, in the context of the grounds under which the application under each of the provisions can be made, the Supreme Court has emphasized that under Order XXXVII Rule 4 it is not enough for the defendant to show special circumstances, which prevented him from appearing and applying from leave to defend; the defendant is further enjoined to demonstrate by affidavit or otherwise such facts, which would entitle him to leave to defend the suit. This differentiates Rule 4 of Order XXXVII from Rule 13 of Order IX.

16. The position which thus emerges is that, where an *ex parte* decree is passed in a summary suit, two remedies are open to the defendant, like a decree in an ordinary suit. One, assail the decree on merits under Section 96 of the Code. Two, seek the setting aside of the decree under Rule 4 of Order XXXVII. In the latter case, the defendant is enjoined to show not only the special circumstances, which may subsume non-service of writ of summons or a sufficient cause for non-

appearance, but also the justness of the claim for leave to defend.

17. On parity of reasoning, it can be urged that even when an application for setting aside the decree under Order XXXVII Rule 4 is dismissed, there is no embargo on the statutory right to prefer an appeal under Section 96 of the Code. However, the other provisions of Order XXXVII, which curtail the right to defend the suit, as a matter of right, also come into play.

18. Sub-rule (3) of Rule 2 circumscribe the right to defend the suit, by providing that the defendant shall not defend the suit referred to in Sub-rule (1) unless he enters appearance within ten days of service of summons. It further provides that in default of the defendant entering an appearance, the allegations in the plaint shall be deemed to be admitted and, thus, the plaintiff becomes entitled to a decree in any sum not exceeding the sum mentioned in the summons, along with interest and costs. Rule 3 of Order XXXVII regulates the procedure for the appearance of the defendant. Sub-rule (7) of Rule 3 empowers the Court or Judge to excuse the delay on the part of the defendant in entering an appearance or in applying for leave to defend the suit, provided a sufficient cause is shown by the defendant. Even if a decree is passed, Rule 4 as we have seen

above, empowers the Court to set aside the decree, under special circumstances.

19. The *bona fide* of a defendant in pursuing a remedy under Rule 4 of Order XXXVII, and exercising the statutory right of appeal against the decree passed in summary suit, under Order XXXVII Rule 2(3) of the Code, after the dismissal of the application to set aside the decree (under Rule 4) are thus required to be decided in the backdrop of the aforesaid provisions and the action or omission on the part of the defendant at the relevant stages of the proceedings. The term *bona fide* implies, in good faith. Good faith, in turn, indicates a state of mind, which is attended by honesty in belief or action and not associated with disingenuity. Good faith takes colour from the context in which it is used.

20. Re-adverting to the facts of the case, in the light of the above legal conspectus, it is imperative to note that the thrust of the defendant's case has all along been that of non-service of the writ of summons. The City Civil Court in the first order in Notice of Motion No.673 of 2013, taken out by the defendant to condone the delay of 365 days caused in filing the said Notice of Motion and to set aside the leave granted under Clause XII of the Letters Patent, by order dated 9th April, 2012, categorically recorded that the writ of summons was served on the defendant

on 6th July, 2012. Yet the defendant failed to appear within ten days. Thus, by order dated 20th June, 2013, the suit proceeded *ex parte* against the defendant. The learned Judge further recorded that without entering an appearance as provided under Order XXXVII Rule 3(1), the defendant had no *locus standi* to take out the Notice of Motion.

21. In Notice of Motion No.2723 of 2013 taken out to set aside the aforesaid order dated 30th July, 2013 in Notice of Motion No.673 of 2013, the learned Judge again recorded that without applying for leave to enter appearance under Order XXXVII Rule 3 (7) the defendant was not entitled to take out the said Notice of Motion.

22. In the order dated 11th August, 2015, passed in Notice of Motion No.459 of 2014, taken out by the defendant to set aside the affidavits of service dated 6th July, 2012 and issue notice for perjury against the deponents thereof, the learned Judge *inter alia* recorded that the postal acknowledgment bore the seal of the defendant. The defendant denied genuineness of the said seal. It was the stand of the defendant that nobody from his office had received the article under the said acknowledgment. This implied that the defendant professed to dispute signature on the acknowledgment receipt. These factual observations, in

a sense, take the wind out of the defence of non-service of the writ of summons.

23. Mr. Khandeparkar, was justified in advancing a submission that the defendant chose to take out all sorts of applications, except seeking condonation of delay in entering appearance, as was required under sub-rule (7) of Rule 3 of Order XXXVII, till the passing of the decree, now sought to be impugned. All those challenges were repelled. What exacerbates the situation is the fact that those orders were further assailed by the defendant by instituting proceedings in the High Court. It seems that the defendant resorted to litigative stratagem to delay the disposal of the suit.

24. Evidently, when the defendant took out Notice of Motion No.3723 of 2013 seeking setting aside of the order dated 30th July, 2013 passed in Notice of Motion No.673 of 2013, the defendant was fully aware that the learned Judge, who was seized with the suit, had not only recorded a finding that the writ of summons was duly served on the defendant and by an order dated 20th June, 2013, the suit was directed to be proceeded *ex parte* against the defendant, but also that the defendant had no *locus standi* to take out the applications without entering an appearance as envisaged by the provisions contained in Order XXXVII Rule 3 of the Code. It can hardly be

disputed that the defendant appeared in the suit not for the purpose of seeking condonation of delay in entering appearance and seeking leave to defend the suit, but to deflate course of the suit by raising collateral objections.

25. The order passed by the learned Judge, City Civil Court, Bombay, on 11th August, 2015, in Notice of Motion No.459 of 2014, seals the issue. In the said order, the learned Judge ascribed elaborate reasons as to why there was no substance in the contention of the defendant that writ of summons was not duly served. The said order undoubtedly preceded the passing of the decree sought to be impugned. Even, at that stage, the defendant did not seek condonation of delay in entering appearance and leave to defend the suit. Instead, the order passed in Notice of Motion No.459 of 2014 dated 11th August, 2015 was sought to be challenged before this Court in Writ Petition No.4224 of 2016.

26. In the light of the aforesaid chronology of events, it becomes abundantly clear that the defendant had knowledge of the pendency of the suit, nay the defendant participated in the proceeding and took out multiple applications and yet chose not to file an application for condonation of delay in entering the appearance. This consciously adopted litigative strategy was to the peril of the defendant.

27. The events which transpired after the passing of the decree on 21st December, 2015, also reflect upon the good faith in which the proceedings were prosecuted. By Notice of Motion No.917 of 2016, the defendant sought the setting aside of the decree under Order XXXVII Rule 4. It was the stand of the defendant that no writ of summons was served on the defendant and thus he had no knowledge about the passing of the decree on 21st December, 2015. The endeavour of the defendant to oversimplify the matter is belied by the fact that the defendant had in fact submitted to the jurisdiction of the Court by taking out multiple applications, even before the passing of the decree.

28. In this context, Mr. Khandeparkar, invited the attention of the Court to the observations of this Court in its order dated 3rd April, 2018, in Writ Petition No.5161 of 2018, which was preferred by the defendant, being aggrieved by the dismissal of Notice of Motion No.917 of 2016 (under Order XXXVII Rule 4). The learned Judge of this Court observed in no uncertain terms that the conduct of the defendant was actuated by malafide and betrayed an intent to delay and prolong the matter and thereby defeat the object of expeditious disposal of the summary suit.

29. The observations in paragraph 8 deserve extraction in verbatim. They read as under:

“8. It is pertinent to note that during the pendency of this petition, this Court dismissed the petitioner’s Civil Writ Petition No.3481 of 2016 challenging the order dated 24th December, 2013, dismissing Notice of Motion No.3723/2013. A perusal of the facts in the present case clearly reveal that the petitioner had appeared before the learned City Civil Court, Greater Mumbai, and had filed several notice of motion before the learned Judge. This clearly shows that the petitioner was aware of the summary suit filed against him right from the inception i.e. from 2013 till 2015, when the summary suit was decreed. In the order dated 30th July, 2013 passed by the learned Judge, City Civil Court, Greater Mumbai, the learned Judge had clearly observed that the petitioner had not entered his appearance within ten days from the date of receipt of writ of summons as provided under Order XXXVII Rule 3 of CPC nor had filed any vakalatnama or appearance memo in the notice of motion. The conduct of the petitioner is well recorded in the said order. At no point of time from 2013 till 2015, the petitioner had made any grievance that the writ of summons was not served upon him. In fact, the petitioner had appeared and participated in the summary suit, by filing several notices of motion, as set out in the aforesaid paragraphs. The conduct of the petitioner throughout appears to be malafide, with an intent to delay and prolong the matter and as such defeat the object of expeditious disposal of the summary suit. It is not a case where the petitioner was not aware of the proceedings and an ex-parte decree is passed against him.”
(emphasis supplied)

30. In the totality of the circumstances and the facts which are so gross, it would be superfluous to dilate more on the conduct of the defendant as emerged from the actions and omissions adverted to above. By applying the very test which is enunciated in the case of **N. Mohan** (supra), on which a strong reliance was placed by Mr. Vashi, namely, whether the defendant had adopted dilatory tactics or there was lack of *bona fide* in pursuing the remedies, to the facts of the case at hand, no other inference than that of the defendant having not prosecuted the proceedings *bona fide* and deliberately not

pursued the remedies under Order XXXVII of the Code can be drawn. To hold otherwise, would amount to putting premium on disingenuity.

31. I am conscious of the fact that ordinarily an application for condonation of delay receives liberal consideration. The length of delay is not the determinative criteria. If a sufficient cause is made out, the length of delay does not matter. The Courts lean in favour of condonation of delay so as to advance the cause of substantive justice, on the premise that the procedure, which is a handmade of justice, should not be allowed to score a march over substantive justice. I am also mindful of the fact that refusal to exercise the discretion in favour of the applicant, in the instant case, would entail the consequence of depriving the defendant of the statutory right of appeal. However, in the light of the conduct of the defendant, which emerges from the record, the defendant can only blame himself for the predicament which he finds himself in.

32. It would be contextually relevant to note that when interim relief in the nature of no coercive action to be taken against the defendant till the decision of the application for condonation of delay, was granted on 23rd July, 2021, the defendant had offered to deposit Rs.45,00,000/- in this Court by 18th August, 2021 and a further sum of Rs.30,00,000/- by 15th September, 2021.

The defendant deposited Rs.45,00,000/-. However, on 30th September, 2021, the defendant expressed his inability to deposit the further amount of Rs.30,00,000/-. Yet, this Court thought it appropriate to stay the execution proceedings, since the defendant had deposited an amount of Rs.45,00,000/-. Without holding anything against the defendant for his inability to abide by the statement to deposit Rs.30,00,000/-, the fact remains that the defendant has not complied with the statement on the strength of which interim protection was granted.

33. For the foregoing reasons, the application deserves to be dismissed.

34. Hence, the following order.

: O r d e r :

- (i) The application stands dismissed.
- (ii) Ad-interim order stands vacated.
- (iii) In view of the dismissal of the application, the First Appeal (St) No.7740 of 2021 and Interim Application (St) No.7742 of 2021 also stand disposed of.
- (iv) The amount of Rs.45,00,000/- deposited by the applicant – defendant/J.D, and the interest accrued thereon, be paid to the respondent – plaintiff upon proper identification and as per rules.

[N. J. JAMADAR, J.]

At this stage, the learned Counsel for the applicant seeks stay to the execution and operation of this order and also continuation of stay to the proceedings before the Executing Court as the applicant desires to assail this order before the Supreme Court.

Since the applicant has deposited an amount of Rs.45,00,000/- and this Court has permitted the respondent – plaintiff to withdraw the said amount along with interest accrued thereon, it may be expedient in the interest of justice to stay the execution and operation of this order as well as the execution proceedings before the Executing Court for the period of six weeks.

Ordered accordingly.

All concerned shall act on an authenticated copy of this order.

[N. J. JAMADAR, J.]