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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 193 OF 2021

IN

FIRST APPEAL ST NO. 22780 OF 2017

Harshad B. Sonawale

.....Applicant

V/s.

M/s. Nilay Consultancy and Investment
Company and another

.....Respondents

Mr. Tejas Dande a/w Mr. Chinmay Dande and Mr. Bharat Gadhani i/b Tejas Dande Associates Advocate for the Applicant.

Mr. S. C. Naidu a/w Mr. Manoj Gujar, Mr. T. R. Yadav, Mr. Sudesh Naidu, Ms. Divya Yujurvedi, Mr. Pradeep Kumar i/b C. R. Naidu & Co. Advocate for Respondents.

CORAM : GAURI GODSE, J.

DATE : 30th AUGUST, 2022.

P.C.

1. This is an application filed by original Defendant praying for condonation of delay of 1 year and 279 days in filing the First Appeal. The First Appeal challenges the Judgment and Decree dated 17th August 2015

passed by the learned Judge, City Civil Court, Greater Mumbai in Summary Suit No. 8110 of 1999. By this Judgment and Decree, Suit filed by the Respondents is decreed and the Applicant is directed to pay an amount of Rs. 11 Lakhs with interest at the rate of 12% per annum from the date of filing of suit till realisation of the amount.

2. It is submitted on behalf of the Applicant that suit was initially filed in this Court and later on the same was transferred to the City Civil Court. Stage of the suit in this Court was that of completion of recording of evidence and the Suit was pending for final arguments. It is submitted by the learned Advocate for the Applicant that after the Suit was transferred to the City Civil Court, no notice was any time issued to the Applicant or his Advocate. He further relies on the averments in the Application where he has stated that for the first time in April 2017, he came to know about passing of the impugned Judgment and Decree, when he was served with warrant of attachment. He further states that thereafter, he contacted his Advocate who was appearing in High Court and from his Advocate he learnt that Suit was transferred to the City Civil Court. The Applicant has also stated that his Advocate informed him that at that particular time, his Advocate had visited office of City Civil

Court to make enquiry. Applicant states that his Advocate also informed him that he was under a bonafide impression that notice will be served upon him as well as the Applicant after assignment of the matter. However, after transfer of the case, no fresh notice of the assignment of the matter or fixing of date of hearing was any time given. It is the case of the Applicant that thereafter his Advocate also informed him that at the relevant point of time, his Advocate had undergone some surgery and was under complete bed rest and thus, his Advocate had not visited the office of City Civil Court to make enquiry.

3. Applicant has also stated that he himself had suffered massive stroke ESR (lung related disease) sometime in September 2015 and due to said ailment he was undergoing treatment. Applicant has also relied upon medical papers with respect to the said ailment, which are annexed to the Application. Applicant has further stated that due to his ailment, he was unable to approach another Advocate after knowledge of the impugned Judgment and Decree, however, sometime in July 2017, he approached a new Advocate with respect to taking legal opinion and he was advised to file present First Appeal. Applicant has stated in his application that in June 2017, he had applied for certified copies and other papers for the purpose of filing First Appeal and

same were made available to him on 3rd August 2017. With these averments in the Application, Applicant filed the Appeal with application for condonation of delay on 4th August 2017.

4. It is thus submitted on behalf of the Applicant that considering the peculiar facts of the case, with respect to transfer of Suit from this Court to the City Civil Court, grounds raised by him may be taken into consideration for condonation of delay. He further submits that after having knowledge of the impugned Judgment and Decree, he took sometime to collect papers and engage new Advocate and that as stated in the Application, due to his illness, he was unable to take steps immediately. Thus, it is submitted that grounds taken by him in the Application be accepted and he may be given a fair opportunity to contest the Appeal on merits by condoning the delay. Learned Advocate for the Applicant also submits on instructions from the Applicant that the Applicant is ready to compensate the Respondents for the delay caused in approaching this Court, by making substantial payment towards cost to the Respondents.

5. Learned Advocate for the Respondents have vehemently opposed this Application for condonation of delay, by submitting that the case made out by

the Applicant is totally false and the entire approach is full of dishonesty. In support of the contention that the Application for condonation of delay is utterly dishonest, learned Advocate for the Respondents read paragraph No. 5 of the Application for condonation of delay. It is submitted that the grounds taken in the Application for condonation of delay itself are contrary to each other and four different stories have been set up by the Applicant. Learned Advocate for the Respondents relies upon a specific claim made out in the affidavit in reply with respect to the relevant dates. Learned Advocate for the Respondents points out page No. 111 of the affidavit-in-reply filed on behalf of Respondents. On page No. 111 there is an endorsement that warrant of attachment was served upon the Applicant on 22nd March 2017. The address where the warrant of attachment was served is same address where the Applicant is residing. Thus, it is submitted that it is clear that the ground taken by the Applicant that he came to know about the impugned Judgment and Decree only in April 2017 is thoroughly false and that in any event on 22nd March 2017, Applicant was obviously aware about the impugned Judgment and Decree. In short, it is the contention of Respondents that all the averments made in the Application are false and grounds taken are in casual

manner. Learned Advocate for Respondents further relies upon the entries in the Rozanama which is at page 103 of the reply. It is stated that the very first entry at page 103 shows that learned Advocate who was appearing for the Applicant in this Court had appeared before the City Civil Court on 22nd March 2013. Thus, it is clear that Applicant's Advocate was having knowledge that the suit was transferred to the City Civil Court. It is further submitted that these factual aspects with respect to entries in the Rozanama, shows that Applicant has made out different cases which are contrary to each other and that contentions in the Application are in a manner that the entire blame is sought to be put on his Advocate.

6. It is vehemently submitted that the conduct of the Applicant even after knowledge of impugned Judgment and Decree as well as after filing of this Appeal is also careless and negligent. Specific reliance is placed with respect to paragraph no. 2 of order dated 16th July 2021 passed by this Court. By order dated 16th July 2021, statement on behalf of the Applicant was accepted that bank guarantee of 50% of the decretal amount will be furnished by the Applicant within a period of 4 weeks from the date of order. By accepting the said statement, this Court protected the Applicant by passing an order that no

coercive steps will be taken against the Applicant. It is submitted on behalf of the Respondents that the dishonest conduct of the Applicant is more clearly seen by his subsequent conduct. By relying upon the said Order, it is submitted that by making a voluntary statement that bank guarantee for 50% amount shall be submitted, Applicant succeeded in getting protective orders by this Court, however, conveniently avoided to comply with the statement made before this Court. Thus, this attitude of the Applicant shows that he is only interested in delaying the execution of impugned Judgment and Decree and that he has no regards to orders passed by this Court. On page 108 and 109 of the reply, specific dates are mentioned with respect to dismissal of this Appeal for want of prosecution and subsequent restoration of the Appeal. It is thus submitted that all this conduct of the Applicant shows that there is sheer negligence on the part of the Applicant, apart from making dishonest claim. It is therefore strongly submitted that the conduct of the Applicant does not warrant any kind of interference in favour of the Applicant.

7. I have carefully gone through the record as well as the averments made in the Application and affidavit-in-reply. It is correct to say that page 111 of the affidavit-in-reply specifically shows that warrant of attachment was served

upon the Applicant on 22nd March 2017. In response to this objection, learned Advocate for the Applicant fairly submitted that Application for condonation of delay does not specifically mention the dates with respect to knowledge of the impugned Judgment and Decree. However, he submits that considering the age of the Applicant and the illness which he suffered, minor difference with respect to dates i.e. warrant of attachment executed on 22nd March 2017 and the case of the Applicant that he came to know about the impugned Judgment and Decree sometime in April 2017 may not be held against the applicant. I find that the conduct of the Applicant is absolutely negligent and careless. However, the fact that the suit was initially pending in this Court and after recording of evidence, the same was transferred to the City Civil Court cannot be completely ignored. I do not find any record which shows that after the suit was transferred to the City Civil Court any notice of intimation was served upon and/or issued to the parties. It is equally correct to say that a litigant is not expected to completely rely upon any such notice to be given for the purpose of attending the Court proceedings, which the party is very well aware of. Applicant was aware that the suit was at the stage of final arguments. Therefore, it was expected that Applicant should have made enquiries with

respect to further progress in the suit. Though the conduct of the Applicant shows that he was negligent, I find that the fact of transfer of the suit from this Court to the City Civil Court needs to be taken into consideration for the purpose of condonation of delay.

8. For the purpose of compensating the Respondent for the delay that is caused, Applicant has shown willingness to pay cost of Rs. 2 Lakhs which will be directly paid to Respondents. I find that apart from paying cost, it will be also required by the Applicant to deposit the entire decretal amount in this Court. Statement made by the Applicant before this Court and which is recorded in Order dated 16th July 2021 that he will furnish bank guarantee of 50% of decretal amount and the fact that Applicant has not complied with the statement made before this Court will warrant an additional condition on the Applicant that he shall deposit the entire decretal amount in this Court as a condition for condonation of delay. Hence, following order is passed.

(i) As stated by the learned Advocate for the Applicant on instructions, Applicant shall pay an amount Rs. 2 Lakhs towards cost directly to the Respondents on/or before 30th September 2022 and shall file compliance affidavit in this Court, within one week thereafter.

(ii) Entire decretal amount shall be deposited by the Applicant in this Court on or before 1st January 2023 and compliance affidavit shall be filed in this Court, within one week thereafter.

(iii) Subject to compliance of clauses (i) and (ii) above, Civil Application No. 193 of 2021 for condonation of delay is allowed in terms of prayer clause (a).

(iv) It will be necessary to record that time granted for compliance of clauses (i) and (ii) above is as per the statement made by the learned Advocate for the Applicant on instructions. Hence, there will be no further extension of time and in the event of non-compliance of the directions as per clauses (i) and (ii) above, Application for condonation of delay will stand dismissed without further reference to the Court.

(v) Application stands allowed in above terms.

[GAURI GODSE, J.]