

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 74 OF 2022
WITH
INTERIM APPLICATION NO. 335 OF 2022**

Mr. Muhammed Jameel Tayalmaturam
And Ors. ..Appellants

v/s.

Municipal Corporation of Gr. Mumbai. ..Respondents

Mr. Prashant Surve for the Appellant
Mr. Santosh Parad for the Respondent.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 1st MARCH, 2022.**

P.C.

1. With consent, heard finally at the stage of admission.
2. The Appellants herein have challenged the Order dated 29.11.2021, whereby the learned Judge has allowed the Notice of Motion and thus condoned the delay and permitted the Respondent Corporation to file their written statement and reply.
3. Shri Surve, learned Counsel for the Appellant states that there was inordinate delay in filing the Notice of Motion and that the delay was not satisfactorily explained. He has relied upon the

decision of the Apex Court in *Maniben Devraj Shah vs. Municipal Corporation of Gr. Mumbai 2012 5SCC 157* to contend that in a similar case where delay was not satisfactorily explained, the Apex Court had declined to condone the delay in filing the Application for setting aside the ex-parte decree.

4. I have perused the records and considered the submissions advanced by learned Counsel for the respective parties. The records reveal that the Appellants herein had filed a suit for permanent injunction along with the Notice of Motion for interim relief. Ad-interim relief was granted in favour of the Appellants, and the matter was listed for filing reply on 10.12.2018. The Respondent did not file reply and as such the learned Judge by order dated 13.02.2019 ordered the matter to proceed without reply. At the same time the learned Judge dismissed the Notice of Motion for non-prosecution.

5. The Notice of Motion for interim relief was restored on a subsequent date. The matter was adjourned time and again from 3.6.2019 to 15.01.2020, 21.2.2020 and further from 1.4.2020 because of the lockdown declared due to the outbreak of COVID 19 pandemic. The Respondent filed Notice of Motion on

24.9.2021 and sought liberty to file reply. The Officer of the Respondent filed affidavit stating that the papers were not traceable and that the Notice of Motion could not be filed as some of the Officers were transferred and thus prayed to condone the delay.

6. The trial Court observed that the delay though inordinate has been sufficiently explained. The trial Court also held that the decision in Maniben Shah is not applicable to the facts of the case. The trial Court therefore allowed the Notice of Motion, condoned the delay and allowed the Respondent-Defendant to file the written statement and reply.

7. It may be mentioned that in Maniben Shah, the Suit was already decreed and the application for setting aside ex-parte decree was filed after lapse of over 7 years without making out any sufficient cause for condoning the delay. It was in these circumstances that the Apex Court had refused the prayer to condone the delay of 7 years. In the instant case, the records reveal that Notice of Motion for interim relief was still pending and hence no prejudice has been caused to the Appellant-Plaintiffs by allowing the Respondent to file the reply and in deciding the

Notice of Motion for interim relief on merits of the matter. The matter was also delayed because of outbreak of COVID-19 and hence the delay cannot be solely attributed to the Defendant. The Officer of the Respondent Corporation had also filed an affidavit stating that the papers were not traceable, some of the Officers were transferred and hence prompt steps could not be taken for filing the Notice of Motion. It is also stated that the Officer was over burdened and it was under these circumstances the Respondent had sought to condone the delay in filing reply to the Notice of Motion. The trial Court has accepted the reasons and exercised the discretion to condone the delay and permitted the Respondent to file written statement and reply. It is well settled that when a Court has exercised its discretionary powers to condone the delay, the Appellate Court should not ordinarily interfere with such decision unless the discretion exercised is arbitrary, overlooking the rights accrued in favour of the other party. In the instant case, as noted above, the exercise of discretion is not arbitrary and the order does not cause prejudice to the Appellants.

8. Considering the above facts and circumstances, the appeal has not merits and is accordingly dismissed. Interim Application stands disposed of in view of dismissal of appeal.

PRASANNA P
SALGAONKAR

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(ANUJA PRABHUDESSAI, J.)