

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMMERCIAL APPEAL NO. 49 OF 2021
IN
NOTICE OF MOTION NO.1272 OF 2019
WITH
INTERIM APPLICATION (L) NO. 7867 OF 2021
IN
COMMERCIAL APPEAL NO.49 OF 2021

CVS Infrastructure Pvt Ltd.

....Appellant

V/s.

Hazel Mercantile Ltd.

...Respondent

Mr. Piyush Deshpande i/b Mr. Yash Jariwala for Appellant.

Mr. Amey Patil i/b Mr. Vivek M Sharma for Respondent.

CORAM : K.R. SHRIRAM &
KAMAL KHATA JJ

DATED : 29th NOVEMBER 2022

PC. :

INTERIM APPLICATION (L) NO. 7867 OF 2021

1 Interim application is for condonation of delay in filing the appeal. Keeping open all rights and contentions of respondents, the delay is condoned.

2 Interim application disposed.

COMMERCIAL APPEAL NO. 49 OF 2021

3 Appeal is impugning an order pronounced on 20th March 2020 rejecting appellant's notice of motion for condonation of delay in taking out the notice of motion and also for recall of the order of dismissal and

restoration of the suit. Appellant is the original plaintiff and respondent is defendant. For convenience appellant is hereinafter referred to as plaintiff.

4 Plaintiff had filed a commercial summary suit. For the purpose of this appeal, we need not go into the facts of the case.

5 The plaint was presented on 22nd August 2013. Writ of summons was served upon defendant on 11th September 2014, after almost 13 months. On 17th September 2014 defendant entered appearance.

6 On 18th June 2015, since no one was present in the morning session, the suit was passed over to the afternoon session. In the afternoon session none appeared for plaintiff and, therefore, the court was pleased to stand over the suit to 22nd June 2015 for dismissal.

7 On 22nd June 2015, notwithstanding the suit being listed under the caption for dismissal, plaintiff chose not to appear and therefore, the suit was dismissed.

8 On 21st July 2015, notice of motion was preferred for restoration of the suit. When the said notice of motion was called out on 7th October 2015, which was in the pre-lunch session, none appeared for plaintiff and the notice of motion was dismissed. Post lunch, plaintiff's advocate appeared and the notice of motion was restored to file.

9 On 23rd December 2015, the notice of motion for restoration came to be allowed, the suit was restored to file and cost of Rs.15,000/- was imposed.

10 On 24th June 2016, once again plaintiff chose to remain absent during

the pre-lunch session and the suit came to be dismissed. In the post lunch session, plaintiff appeared and the suit was restored to file.

11 On 21st March 2018 again when the matter was called out, none appeared for plaintiff and the suit was dismissed for want of prosecution.

The order dated 21st March 2018 reads as under:

“None for the Plaintiff. This Suit was dismissed earlier on 22nd June 2015 and restored to file by an order dated 23rd December 2015. The Suit thereafter appeared before this Court on 24th June 2016, when nobody was present. Even the Summons for Judgment was not taken out within six weeks of lodging of the plaint. Hence the suit was dismissed. It was thereafter restored on the application made on behalf of learned Counsel for the Plaintiff. On the same date at 03.00p.m., the Suit was restored to file. Even today none appears for the Plaintiff. The Suit is dismissed for want of prosecution.”

12 On 15th April 2019, after almost 13 months a notice of motion was taken out by plaintiff for restoration. In the affidavit in support, the reason for non appearance given was, the advocate took ill sometime in October 2018 upto November 2018. But the fact is the suit came to be dismissed on 21st March 2018 and in the affidavit in support, there is no explanation for the delay between 21st March 2018 to 20th October 2018 and for not appearing on 21st March 2018. In fact, paragraph 6 of the affidavit simply says *“the above suit was once again dismissed vide order dated 21st March 2018 passed by this Hon’ble Court is annexed herewith as Exhibit D thereby the commercial suit was dismissed.”*

13 Strangely, in the affidavit in support, it is stated as Advocate Mr. Kamble does not regularly practise before the High Court and still appellant being a corporate entity continued with Mr. Kamble. That Notice of Motion

No.1272 of 2019 came to be dismissed by the impugned order dated 20th March 2020.

14 We have considered the impugned order with the assistance of Counsel Mr. Deshpande and Mr. Patil. It is a very elaborate order and we see no reason why we should interfere. One of the grounds raised in the appeal is that a litigant ought not to be denied of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. In our view, there has been gross negligence on the part of appellant, which has been noted and rightly so in the impugned order. In all such matters, the onus is on appellant to explain and make out a sufficient cause as to what prevented him from appearing on the date the matter was listed and what prevented him from approaching the court expeditiously or atleast with alacrity. In the affidavit in support of the notice of motion for restoration of the suit, as noted earlier, it is stated the advocate took ill between October 2018 to November 2018 but the suit was dismissed on 21st March 2018. There is no explanation, whatsoever, in the affidavit in support. Notice of motion itself was lodged only on 15th April 2019 and for the delay, in paragraph 9 of the affidavit, the only explanation is *“I say that after receiving papers from Advocate Kamble, I met the present advocate on record and entrusted the papers to her and requested her to take appropriate steps and hence there is a delay of one year, i.e., 360 days as on April 2019.”* There is nothing to state when the new advocate was

approached, when Mr. Kamble returned the papers, when instructions were given to the new advocate, etc. Therefore, the Learned Single Judge was right in rejecting the notice of motion and we would also agree with the Learned Single Judge that no sufficient cause or justification has been made out by appellant for remaining absent on 21st March 2018 and for taking out the notice of motion late.

15 In the circumstances, appeal dismissed.

16 Appellant to pay a sum of Rs.25,000/- as cost to respondents within 4 weeks from today. The amount shall be paid by way of cheque drawn in favour of advocate on record.

(KAMAL KHATA, J.)

(K.R. SHRIRAM, J.)