

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

**COMMERCIAL APPEAL FROM ORDER NO.14 OF 2023
IN
NOTICE OF MOTION NO.3625 OF 2023
IN
COMMERCIAL SUIT NO.736 OF 2021**

M/s. Abhishek Enterprises, Through its
proprietor Mr. Radheshyam Mevalal Gupta ... Appellant
V/s.

S. P. Enterprises, Through its
proprietor Mr. Kamlakar Devnandan Yadav ... Respondent

**WITH
INTERIM APPLICATION NO.4235 of 2023
IN
COMMERCIAL APPEAL FROM ORDER NO.14 OF 2023**

Mr. Dheeraj Dwivedi i/by Mr. Pankaj Dwivedi for the Appellant.

**CORAM : DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.**

DATE : 01st SEPTEMBER 2023

P.C. :

The present Appeal impugns an order dated 20th
February 2023, by which the Appellant's Notice of Motion

seeking condonation of delay for taking out the Notice of Motion for filing the Written Statement in Commercial Summary Suit No.736 of 2021 was dismissed.

2. Mr. Dwivedi, the learned Counsel appearing on behalf of the Appellant submitted that the Writ of Summons in the captioned Suit was served upon the sole proprietor of the Appellant on 12th November 2021. He submitted that the sole proprietor of the Appellant had from 13th November 2021 been suffering from Corona Virus and was at home in self-quarantine till 31st January 2022 (i.e. for a period of over one and a half months). He submitted that thereafter the sole proprietor of the Appellant from 1st February 2022 to 29th May 2022 was advised complete bed rest and it was in the backdrop of these events that the captioned Commercial Summary Suit was proceeded with *ex-parte* on 1st March 2022.

3. Mr. Dwivedi then submitted that it was only on 7th June 2022 that the sole proprietor of the Appellant became aware of the fact that the matter had been proceeded with *ex-*

parte on 1st March 2022. He submitted that the sole proprietor of the Appellant once again suffered from jaundice, pneumonia and typhoid from 10th June 2022 till 17th September 2022 and was advised complete bed rest for three months. He said that it was thus that there was delay on the part of the Appellant in taking out the said Notice of Motion. Hence, the delay was neither willful or intentional, but purely on account of the fact that the sole proprietor of the Appellant had been afflicted by some ailment or the other since the service of the Writ of Summons.

4. However, we noticed from the impugned order that the sole proprietor of the Appellant had appeared before the Metropolitan Magistrate on several dates during the period in which he claimed to have been unwell/advised bed rest. The impugned order expressly recorded that on 18th December 2021, 3rd February 2022, 7th April 2022, 21st June 2022 and 4th August 2022 the sole proprietor of the Appellant had appeared before the Metropolitan Magistrate. The impugned order also recorded that even on 7th June 2022 the sole proprietor of the

Appellant appeared in the Commercial Summary Suit and did not seek time to file his Written Statement. When all of this was pointed out to Mr. Dwivedi, he did not dispute the correctness of what had been recorded in the impugned order. Mr. Dwivedi did not have any counter and/or explanation as to (a) how his client, i.e., the sole proprietor of the Appellant had on the one hand stated on oath that he was unable to file a Written Statement in time on account of illness/bed rest and, (b) how on the other hand he had infact appeared on various dates before the Metropolitan Magistrate.

5. We have heard the learned Counsel for the parties, considered the rival contentions and perused the pleadings. We find that the conduct of the sole proprietor of the Appellant is plainly dishonest. The Appellant has on the one hand pleaded in his Affidavit in support of the Notice of Motion his inability to appear on the ground of ill health and thus sought condonation of delay, while on the other hand we find that the Appellant had been regularly appearing before the Metropolitan Magistrate, to which there was no denial. We find that such conduct of the sole

proprietor of the Appellant would by itself disentitle him from the benefit of any equitable relief.

6. Even on merits if we were to consider the case of the Appellant, we find that the sole document relied upon by the Appellant in support of his contention that he was unwell and/or was advised bed rest is a "Certificate", which has been issued by one Dr. Rajesh R. Ram, B.A.M.S. (BOM), which even if taken to be correct, simply certifies that the sole proprietor of the Appellant was suffering from jaundice from 10th June 2022 to 17th September 2022 and was advised bed rest for that period only. There is no material whatsoever placed on record to support the contention of the sole proprietor of the Appellant was indisposed from 12th November 2021, i.e., the date on which the Writ of Summons was served upon him upto 10th June 2022 which prevented him from filing his Written Statement. Thus we find that there is absolutely no merit in this Appeal and the same is accordingly dismissed.

7. In view of disposal of the Appeal, Interim Application does not survive and the same is also disposed of accordingly.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)