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

CIVIL REVISION APPLICATION NO.82 OF 2019

Sonia Sandesh Tarkar	... Applicant
V/s.	
Sola Chandrasekhar & Ors	... Respondents

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Ms. Rajgor Ranjan, for applicant a/w Mr. S. K. Halwasia for applicant.

Mr. R. D. Suryawanshi i/by Mr. Suraj Naik, for respondent Nos.1 & 2.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 5, 2023

P.C.:

1. The applicant has challenged the order passed by the Trial Court rejecting application for condonation of delay in setting aside ex parte decree.
2. The respondents/original plaintiffs filed suit for specific performance of agreement to sell dated 28 August 2002. The applicant was duly served with suit summons. She engaged an Advocate; however, failed to file written statement. Therefore, by order dated 22 February 2011, the suit proceeded without written statement of defendant. The Trial Court by judgment and order dated 1 March 2012 passed ex parte decree for specific performance.
3. Yesterday learned Advocate for the applicant made

submissions on merits. Present petition was adjourned only to enable parties to place on record copy of reply to application for condonation of delay.

4. Today she submitted that Advocate Halwasia will be appearing on her behalf, she requested to permit the Advocate to make submissions on behalf of the applicant. It is consistent practice followed by this Court that whenever matter is part heard, or substantially heard the Advocate who argued the matter earlier needs to continue with his submission. Yesterday, the applicant was granted full opportunity to make her submissions. She made all her submission yesterday. Today , it was fixed only for the purpose of producing reply to the application for condonation of delay. As a matter of law, such reply needed to be filed along with petition; however, due to lapse of Advocate for petitioner to annex such reply, petitioner should not suffer, hence opportunity to file reply was granted till today.

5. Taking into consideration consistent practice followed by this Court that in a part heard matter no new Advocate is entitled to make his submission. I, refuse to allow Advocate Halwasia to make submissions; hence, the request of Advocate to permit another Advocate Halwasia to appear on behalf of applicant, is rejected.

6. Learned Advocate for the respondents relying on his reply submitted that petitioner contested the proceeding filed by one Dinesh Nathharam Poshirkar under Section 138 of Negotiable Instruments Act, during relevant period. Learned Magistrate delivered judgment on 3 July 2015.

7. The applicant has filed rejoinder to the affidavit-in-reply to state that proceeding filed by Dinesh Nathharam Poshirkar under Section 138 of the Negotiable Instruments Act, where she appeared and contested, has no relevance in the present proceeding. The applicant be put strict all the proof of facts occurred during January 2013 to March 2015. She appeared in the said proceeding. She further stated in affidavit-in-reply that the said proceeding was wound up within two to three dates in June 2015 or July 2015 she appeared only for recording statement under Section 313 of the Code of Criminal Procedure, 1973.

8. Since the present application arises out of decision making process of rejection of application for condonation of delay, this Court is entitled to take into consideration pleading in the application for condonation in delay and material in support of the said application. Therefore, in my opinion, no other material than material which was not before the Trial Court while rejecting the application of condonation of delay, can be considered in proceeding under Section 115 of the Code of Civil Procedure, 1908.

9. On 27 March 2015, the defendant filed an application for setting aside ex parte decree along with application for condonation of delay. In support of application for condonation of delay, the applicant furnished reasons as under:

(i) her husband was suffering from high blood pressure, kidney disease and diabetes; on 20 January 2013 he died during hospitalization;

(ii) the applicant was not aware about the proceeding pending before the Court as she was busy in taking care of her husband in hospital;

(iii) after 28 January 2013, she was under medical treatment for depression and was under the shock of her husband's death.

10. The respondents contested the application by raising following objections:

(i) Applicant engaged an Advocate to appear in the suit. Despite sufficient opportunity she did not file written statement.

(ii) After passing of decree, the applicant appeared in execution petition and filed an affidavit on 20 November 2012 contesting the execution petition. Even thereafter the applicant appeared in execution petition.

11. The Trial Court rejected the application for condonation of delay of 36 months. The Trial Court assigned following reasons for rejection of application for condonation of delay:

(i) The applicant furnished two versions of explanation; (a) absence of knowledge judgment and decree on 25 February 2015, (b) she got knowledge of passing of decree only on 28 September 2012 when she received show cause notice of execution.

(ii) Despite illness of her husband, she was attending the Court. She appeared in the execution petition and filed

affidavit on 28 November 2012.

(iii) The applicant has not examined the doctor who issued certificate for advising her to rest for three years.

(iv) Her husband died on 20 January 2013, she appeared in execution proceeding on 28 November 2012; therefore she had sufficient time to file application for setting aside the delay.

12. Learned Advocate for the applicant in addition to the reasons mentioned in the application submitted that, her family member expired immediately after the death of her husband which furnished additional cause to unable her to file application for condonation of delay.

13. The said reason is not stated in the application for condonation of delay and therefore, it cannot be considered as sufficient cause for setting aside the decree. Assuming such averments to be correct till the applicant has sufficient time to file application immediately thereafter which the applicant has failed to file.

14. According to the applicant, she was under severe mental depression for period of three years and therefore, she could not file application for condonation of delay immediately. It needs to be noted that, it is a matter of record that the applicant appeared in execution petition and filed affidavit on 28 November 2012. She thereafter appeared in execution petition on four occasions. Therefore, the cause shown in the application that due to her severe mental depression, she was unable to file application for

condonation of delay in setting aside ex-parte decree cannot be accepted as she had filed affidavit in execution petition.

15. Moreover, even after her explanation about seriousness of disease suffered by her husband and unfortunate death of her husband is accepted, still the fact remains as to why she did not file application for condonation of delay in setting aside ex parte decree for period of two years after the death of her husband. The cause shown in paragraph 4 of the civil revision application cannot be accepted as sufficient cause as the nature of disease pleaded would not disable her from filing application for condonation of delay in setting aside ex parte decree immediately after death of her husband. Therefore, in my opinion, exercise of discretion by the Trial Court rejecting the application for condonation of delay of 36 months in setting aside ex parte decree can not be accepted as sufficient cause for condonation of delay. Hence, the civil revision application is, therefore, rejected.

16. At this stage, learned Advocate for the applicant requested for grant of ad-interim relief to enable her to approach Apex Court. The present petition is filed on 13 December 2018. From the said date no ad-interim relief is granted by this Court; therefore, after dismissal of petition, this Court cannot grant ad-interim relief for the first time. Hence, the request for grant of ad-interim relief is refused.

(AMIT BORKAR, J.)