

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL NO.93 OF 2023
IN
INTERIM APPLICATION NO.2047 OF 2019
IN
SUIT NO.3350 OF 2009**

Ashik Shah & Ors. ... Appellants
(Original Defendants No.2 to 4)

V/s.

M/s. Metal Rolling Works Limited ... Respondent
(Original Plaintiff)

And

Haresh Kapadia ... Respondent
(Original Defendant No.1)

Mr. A. S. Khandeparkar, Senior Advocate a/w Mr. Nihir Dedhia
i/by Madekar & Company for the Appellants.

Mr. Amod Ekhaspur for Respondent No.1.

Mr. Prerak A. Sharma for Respondent No.2.

Mr. A. P. Sathe, former Advocate for Respondent No.1 through
Video Conferencing is present.

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

DATE : 18th DECEMBER 2023

P.C. :

The present Appeal impugns an order dated 28th February 2023 allowing the Interim Application filed by the Respondent Company and condoning the delay of 1503 days.

2. Mr. Khandeparkar, Learned Senior Counsel appearing on behalf of the Appellants, at the outset, submitted that in normal course, he would not have opposed such an Application for condonation of delay, provided the same was *bona fide*. In the present case, however, he submitted that condonation of delay was sought for on *ex-facie* false and untenable grounds. He pointed out that the two reasons given by Mr. Paresh Shah, the Director of the Respondent Company for seeking condonation of delay were both false and on the face of it untenable. The first reason, he submitted, was on account of the alleged ill-health/illness of the erstwhile Advocate of the Respondent Company, which was the reason given for non-appearance. He submitted that the stroke allegedly suffered by the erstwhile Advocate was in the year 2006, whereas the Suit

came to be dismissed for non-prosecution on account of non-appearance of the erstwhile Advocate on 1st October 2015, which is almost nine years after the erstwhile Advocate is said to have suffered a stroke. Mr. Khandeparkar then pointed out that at the same time when the Suit came to be dismissed, the very same Advocate was regularly attending the criminal proceedings that were ongoing against the Respondent Company and its Director Mr. Paresh Shah in the Additional Chief Metropolitan Magistrate's Court. He thus submitted that to allege the non-appearance of the erstwhile Advocate on the date on which the Suit was dismissed was on account of ill-health of an extent that the same precluded the erstwhile Advocate from appearing in Court, was a patently false statement on oath.

3. Mr. Khandeparkar then submitted that the second reason given for seeking condonation of delay was that the Respondent Company came to be amalgamated with one M/s. Lallubhai Amichand Limited. He submitted that since the Director of the Respondent Company, viz., Mr. Paresh Shah was busy with such amalgamation, he lost sight of the said Suit. Mr.

Khandeparkar pointed out that this ground was also patently untenable and far from amounting to sufficient cause since the amalgamation took place in the year 2012 and, as already noted, the Suit came to be dismissed on 1st October 2015. He, therefore, submitted that the same could have never been a factor which could amount to coming in the way of the Respondent Company and its Director from loosing sight of the matter. Mr. Khandeparkar submitted that there were several litigations between the parties and the same was closely followed by Mr. Paresh Shah and, therefore, question of him loosing sight of the matter did not arise.

4. Mr. Khandeparkar then, apart from the aforesaid factors, invited our attention to the Impugned Order and pointed out that the delay had been condoned and the Suit restored subject to Respondent Company making payment of costs of Rs.10,000/- to each of the Defendants within a period of three weeks from the date of the said Impugned Order which he submitted had also not been complied with by the Respondent Company. In support of his contention, he tendered

a compilation of documents and invited our attention to two blank cheques, both dated 21st March 2023, drawn in the sum of Rs.10,000/- each issued by the erstwhile Advocate of the Respondent Company. Basis this, he submitted that there was infact no compliance of the Impugned Order by the Respondent Company and hence the present Appeal must necessarily be allowed.

5. To highlight the conduct of the Respondent Company and its Director, Mr. Paresh Shah, Mr. Khandeparkar first invited our attention to the Affidavit of Mr. Aniruddha P. Sathe, the erstwhile Advocate for the Respondent Company, which was filed pursuant to what was observed by us in our order dated 14th December 2023, and pointed out that in the said Affidavit, Mr. Sathe had specifically in Paragraph No.2 stated on oath that he was instructed by his client Mr. Paresh Shah to bear the costs imposed by this Hon'ble Court and comply with the Impugned Order. It was thus that Mr. Sathe stated that he had issued the said cheques and informed Mr. Paresh Shah of the same.

6. Mr. Khandeparkar then invited our attention to the Affidavit of Mr. Paresh Shah, which was also filed pursuant to what was observed by us in our order dated 14th December 2023, and pointed out therefrom that Mr. Paresh Shah had firstly in Paragraph 2 thereof admitted non-compliance of the order dated 28th February 2023 (Impugned Order). The Affidavit then confirms that Mr. Shah had instructed Mr. Sathe to bear the costs imposed by the Impugned Order, since the Suit was dismissed on account of non-appearance of Mr. Sathe, to which Mr. Sathe was agreeable. He then pointed out that Mr. Paresh Shah had stated that it was only on 4th September 2023 that his current Advocate informed him about non-compliance of the payment of costs, as directed by the Impugned Order, however, he submitted that even on that date Mr. Paresh Shah chose not to comply with the order in view of the pending Mediation, by stating in the Affidavit that *"I believed that the dispute could be resolved, and the amount of costs could be paid to the Defendants at the time of filing consent terms. However, despite best efforts, no settlement could be arrived at and the mediation failed"*.

Basis the above, he submitted that there was willful and deliberate refusal by the Respondent-Company/its Director to comply with the order of this Court and thus the Appeal ought to be allowed.

7. Mr. Eklaapur, Learned Counsel appearing on behalf of Respondent-Company essentially submitted that the failure to pay costs was not deliberate and that the Respondent Company should not be faulted with on account of the fact that blank cheques were sent by the erstwhile Advocate. He, in any event, pointed out that the Respondent Company had issued four pay orders, each of which was dated 14th December 2023, in compliance with the Impugned Order. He pointed out that Mr. Paresh Shah, in his Affidavit, had unconditionally apologized to this Court and had also explained the fact that the costs remained unpaid on account of disconnect between the erstwhile Advocate and himself. Basis this, he submitted that the Appeal be dismissed.

8. Having heard Learned Counsel for the parties, we find that the conduct of the Respondent Company has disentitled itself from seeking any discretionary relief from this Hon'ble Court. We find that Mr. Paresh Shah, the Director of the Respondent Company in his Affidavit has accepted the knowledge of the Impugned Order, despite which the Respondent Company had chosen not to comply with the same, but directed Mr. Sathe to do so.

9. Another factor, which to our mind, is glaring and reflects the clear intention of the Respondent Company and its Director, to comply with the Impugned Order as is clear from the Affidavit filed by Mr. Paresh Shah, is though he admits he was aware on 4th September 2023 that the Impugned Order was not complied with, even at that stage, he chose not to comply with the Impugned Order. The explanation given is absolutely untenable, i.e., he believed that the dispute could be resolved, and the amount of costs could be paid to the Defendants at the time of filing consent terms, as stated in Paragraph 6 of the Affidavit.

10. In our view, such conduct completely disentitles such a litigant from availing discretionary relief. Even on merit, we find that the reasons stated for seeking condonation of delay, i.e., the ground of ill-health of Mr. Sathe and amalgamation of the Respondent Company, are false reasons stated on oath. Such a litigant, therefore, must necessarily face the consequence of making such loose and false statements on oath. Even the Affidavit filed by Mr. Sathe, at the time of seeking condonation of delay, does not explain how he was able to, on the one hand, attend the criminal proceedings before the Additional Chief Metropolitan Magistrate's Court, but on account of ill-health was unable to appear before this Court. We must note here that had the Respondent Company or its Advocate simply pleaded that the erstwhile Advocate was not available and had failed to appear on account of oversight or otherwise, the Court would have possibly, in view of the law laid down in the case of ***Secretary, Department of Horticulture, Chandigarh and Anr. Vs. Raghu Raj***¹, condoned the delay,

¹ (2008) 13 SCC 395

since the same was account of inadvertence of an Advocate. However, the Respondent Company and its Advocate have chosen not to state the truth, but have chosen to plead a false case and seek condonation of delay. Such conduct cannot be countenanced by this Court. If a party like the Respondent Company is permitted to take benefit of such conduct, the same would undermine to very dignity and majesty of this Court, as the same would embolden similarly dishonest litigants from believing that they could first attempt hoodwinking this Court by pleading a false case for condonation/invoking the discretionary jurisdiction and then if caught out, tender an apology and accept and/or offer to pay costs. Such a conduct simply cannot be permitted.

11. In view of above reasons, the Appeal is allowed and disposed of accordingly.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)