

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

INTERIM APPLICATION NO.3633 OF 2022
WITH
INTERIM APPLICATION NO.3634 OF 2022
IN
COMMERCIAL SUIT NO.71 OF 2017

Sambhaji Ramchandra Varne	...Applicant
<i>In the matter of</i>	
M/s. Art In Art	...Plaintiff
vs.	
Sambhaji Ramchandra Varne	...Defendant

Mr. Girish Thanvi, for the Applicant.
Mr. S.C. Naidu a/w. Mr. Pradeep Kumar and Mr. Sandeshkumar
Naidu i/b. Mr. Parshva Shah, for the Plaintiff.

CORAM : N. J. JAMADAR, J.
DATE : MARCH 02, 2023

P.C.:

1. This application is preferred seeking condonation of delay in taking out the application to set aside the ex-parte decree dated 22nd January, 2018 passed by this Court in Commercial Suit No. 71 of 2017.

2. The application proceeds on the premise that the writ of summons was not duly served on the applicant/defendant. The writ of summons was purportedly sent on the address of M/s. Piyush Pharma where the applicant/defendant was rendering services as a consultant. The applicant claims that he became aware of the

passing of the decree on 27th October, 2019 when the notice of the Execution Petition preferred by the plaintiff/respondent, being Special Darkhast No. 61 of 2019, was served on him. The applicant claims that, thereafter, on account of his illness and the situation which arose due to Covid 19 pandemic, he could not take steps to file an application to set aside the decree. Hence, there was delay of about 608 days in filing the application. In the event the delay is not condoned and the decree is executed, the applicant would suffer an irreparable loss. Hence, this application.

3. An affidavit in reply is filed on behalf of the plaintiff/respondent. The claim of the defendant/applicant that he came to know about the decree on 21st December, 2019 is stated to be against the weight of the material on record. In fact, the applicant/defendant had pleaded different dates of the knowledge of the decree. None of the reasons assigned by the applicant constitute a sufficient cause for condonation of delay. The defendant had filed application for obtaining the certified copies of the decree only on 15th March, 2021 and there is no explanation for the delay in the intervening period. In the circumstances of the case, the defendant/applicant would not be entitled to the benefit of the order of the Supreme Court whereby the period of limitation was suspended

during the currency of Covid 19 pandemic.

4. I have heard Mr. Girish Thanvi, learned counsel for the applicant/defendant and Mr. Naidu, learned counsel for the respondent/plaintiff. I have perused the order passed by this Court on 22nd January, 2018 and the affidavit of service of writ of summons.

5. Mr. Naidu, learned counsel for the respondent/plaintiff urged that even if we proceed on the premise that the writ of summons was not duly served on the applicant/defendant, there is no explanation much less justifiable for the delay in preferring the application from the date of the knowledge. Attention of the Court was invited to the order passed by the learned Civil Judge on Exhibit 7 in Special Darkhast No. 61 of 2019 dated 8th January, 2020 wherein it is recorded that notice was served on the defendant/ judgment debtor on 16th October, 2019. It was submitted that there is no cause much less sufficient one, assigned in the application.

6. On the contrary, the learned counsel for the applicant/defendant would urge that the applicant/defendant had

been suffering from multiple ailments. Attention of the Court was invited to the copies of the medical report to bolster up the submission that the applicant was suffering from ailments and his son was infected with Covid 19 pandemic.

7. From the perusal of the averments in the application and the material on record, it becomes evident that the applicant/defendant become aware of the passing of the decree when the notice of the Special Darkhast was served on him on 16th October, 2019.

8. Though multiple reasons are ascribed to account for the delay which occurred in taking steps to file the application for setting aside the decree, yet it is evident that there was some inadvertence or indolence on the part of defendant. Some element of default or inaction is discernible in almost every application for condonation of delay.

9. It is trite that an application for condonation of delay receives liberal consideration so as to advance the cause of substantive justice. The Courts often than not lean in favour of the condonation of delay so as to decide a lis on merits rather than on technicalities or default. The principle that the procedure which is a handmaid of

justice should not be permitted to score a march over substantive justice informs the exercise of discretion to condone the delay.

10. In the case at hand, the aspect of delay is required to be considered in two parts. One, the delay which occurred before the onset of Covid 19 pandemic. Two, the delay during the currency of the pandemic. By the order of the Supreme Court the limitation period stood suspended during the pandemic. In fact, there is a delay of about four months in applying for certified copies after the defendant/applicant was served with the notice of Execution Petition on 16th October, 2019.

11. In my view, in the circumstances of the case, the delay does not appear to be intentional. The cause ascribed for the delay in the light of the situation in life of the applicant/ defendant, can not be said to be unsustainable. If viewed through the enormity of the circumstances, which arose on account of Covid 19 pandemic, even before the lockdown was formally imposed, the reasons ascribed for not taking steps to prefer application cannot be brushed aside as flimsy or unreasonable.

12. In the facts of the instant case, in my view, it would be

expedient in the interest of justice to condone the delay in taking out the application subject to payment of costs.

Hence, the following order.

ORDER

- 1] The application stands allowed subject to payment of costs of Rs. 25,000/- by the applicant to the respondent/plaintiff within a period of one week.
- 2] Payment of costs shall be condition precedent. If the costs are not paid the application shall stand dismissed without reference to the Court.
- 3] List Interim Application No. 3634 of 2022 on 9th March, 2023.

(N. J. JAMADAR, J.)