

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11204 OF 2017

M/s. Neel Controls and Ors.

.. Petitioners

Versus

M/s. K. Patel Metal Industries Pvt. Ltd. and Anr. .. Respondents

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- Mr. Atul Sabhamrim Singh, Advocate for Petitioners.
- Ms. Sukeshi Bhandari a/w. Mr. Akshay Chaudhari, Advocate for Respondent No.1.
- Ms. Sakshi Agarwal i./by Bipin Joshi, Advocate for Respondent No.2.

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CORAM : MILIND N. JADHAV, J.

DATE : MARCH 18, 2024

P.C.:

1. Heard Mr. Singh, learned Advocate for Petitioners, Ms. Bhandari, learned Advocate for Respondent No.1 and Ms. Agarwal, learned Advocate for Respondent No.2.

2. The present Writ Petition impugns order dated 01.07.2017. This order has been passed in an Application filed by the Applicants who are the Judgment Debtors for seeking condonation of delay of 9 months and 22 days for setting aside of *ex parte* decree passed on 01.05.2015. The submission of Judgment Debtors was that despite the written statement having been filed and counter claim raised in the written statement considering the engagement of parties with multiple litigations, the Defendants – Applicants were not in the knowledge of the *ex parte* decree having been passed against them. However,

immediately thereafter the said decree was sought to be executed. In execution proceedings, the Judgment Debtors deposited the principal amount alongwith interest which was accrued till then.

3. Incidentally, the said principal amount alongwith interest already stands withdrawn by the Decree Holder as far back as on 31.10.2017. Incidentally, a bank guarantee has been submitted at time of seeking such withdrawal by the Decree Holder. I have seen the order dated 31.10.2017. The guarantee was required to be continued and enforced only for 2 years. Much time has lapsed thereafter.

4. Today Defendants i.e. Judgment Debtors desire to revisit the proceedings and their revisitation is on basis of an Application preferred at that time for seeking condonation of delay of 9 months and 22 days which was not allowed by the learned Trial Court by the impugned order. One of the most significant fact which revolts against the Applicants' right to continue with this counter claim is the fact that evidence of the Applicant clearly shows that the Applicant was well aware of the proceedings in the year 2015 itself and that the Applicant waited till the last moment and only after receiving notice for attachment under Order XXI Rule 43 of the Civil Procedure Code, 1908 i.e. execution proceedings initiated by Decree Holder, he attempted to challenge the exparte decree.

5. On the issue of sufficient cause, the learned Trial Court has referred to and relied upon the list of dates which includes the history from the website of the High Court / District Court of Maharashtra which clearly shows that he was aware of all the stages and dates of the proceedings being a well qualified person. This has been clearly admitted by the Judgment Debtors i.e. Defendants in their cross-examination before the learned Executing Court in the year 2015 itself. That apart, evidence of the said Judgment Debtors i.e. Defendants clearly showed that they were in contact with their Advocate and were also aware of the proceedings. The learned Trial Court has meticulously gone into the sufficient cause shown and has enumerated precise reasons in paragraph Nos.9 to 15 of the impugned order and only thereafter in paragraph No.16 concluded that the delay of 9 months and 22 days though on the face of record may appear to be insignificant, but considering the facts and circumstances of the present case, the same cannot be condoned. The findings returned by the learned Trial Court in paragraph Nos.9 to 15 are reproduced below:-

“(9) The Applicant has shown the cause for delay that he was engaged in various litigations by his brother. Though the Advocate was appointed but he lost the contact with the Advocate. The business of the Applicant was severely affected due to the act of his brother. The Advocate on record informed that he was not suffering from allergic Asthma and during the winter it was aggravated therefore he could not appear in the Court after 06.01.2015. He did ask his junior to contact the client but junior was not able to contact. The Applicants were under bonafide belief that the proceeding are in the hands of able advisor which was engaged by Opponent No.2.

(10) The Applicants to prove the contents of the application examined Mr.Ravindra G. Meheta at Exh.29. The Applicant is a qualified person holding B.E. (Electrical) degree. The contents of the affidavit of the Applicants is as per the application. He has been thoroughly cross-examined. It has been brought on record that he signed written statement and got it notarized. Generally there is contact between him and the Advocate which he engaged. He followed up the case from 03.05.2012 to 01.06.2015 on telephonic call to his Advocate. His Advocate did not tell him that the suit is fixed for final hearing. The question was put that "Whether after 01.06.2015 you contacted your advocate or your advocate contacted you to tell the stage of the suit?". To that witness answered that "Yes, I contacted my advocate." The witness has further admitted that he came to know about the decree passed in the suit. He immediately contacted his Advocate at Surat and talked him on telephone. He cannot say precisely the date and month of his contact to his Advocate. He do not remember whether it was between or after 06.01.2015 till April 2015. He contacted his Advocate or his Advocate contacted him. He do not remember whether there was correspondence between him and his Advocate. He admitted the suggestion that he has not filed any documentary evidence to show that he or his Advocate contacted on telephone. He did fell that it was the responsibility of his Advocate to tell him the date of the suit. He did not issue any notice to his Advocate why he did not communicate the dates of the suit. He admitted the suggestion that his Advocate never withdraw his Vakalatnama of the suit.

(11) This evidence of the witness shows that he was in regular contact with the Advocate. He was aware of the dates of the proceeding."

(12) The another reason for not knowing the date and appearing in the Court was the illness of his Advocate who is suffering Asthma. Gravity of the Asthma is increased in winter season therefore it was not possible to remain present in the Court. He collected the aid medical certificate after decree was passed in the suit. He denied the suggestion that only to get the excuse and to show sufficient cause he concocted the story of illness of his Advocate.

(13) The reason in the application para 10 and in evidence affidavit para 10 is that when the Applicant received notice from Hon'ble City Civil Court in execution Application No. 523/2015 as to the attachment of the property under Order 21 Rule 43 of C.P.C. on 16.01.2016 they came to know about the decree passed in the suit. However in the cross- examination the Applicant has admitted that in the year 2015 itself he came to know about the decree passed in suit. This admission on the part of the Applicant itself shows that he was knowing about the decree in the year 2015 itself. However, when the attachment order was received for recovery of the amount the present application came to be filed.

(14) The Applicant has produced on record the stages of the various proceedings against him as under:-

Sr.No.	Details of Case	Exh.No.
1.	Trade Mark Suit no. 55 of	Exh.34

	<i>2012 filed at Bombay High Court.</i>	
2.	<i>Appeal No. APP/391/2014 of Trade Mark Suit at Bombay High Court</i>	<i>Exh.37</i>
3.	<i>Arbitration Petition No. 1384 of 2012 at Bombay High court.</i>	<i>Exh.39</i>
4.	<i>Suit No. S/2574/2012 at Bombay High Court</i>	<i>Exh.41</i>
5.	<i>Summary Suit No. 4073 of 2013 in City Civil Court at Greater Bombay</i>	<i>Exh.43</i>
6.	<i>Summary Suit No. 1867 of 2013 in City Civil Court at Greater Bombay</i>	<i>Exh.44</i>
7.	<i>Summary Suit No. 1600 of 2013 in City Civil Court at Greater Bombay</i>	<i>Exh.45</i>
08	<i>Summary Suit No. 1599 of 2013 in City Civil Court at Greater Bombay</i>	<i>Exh.46</i>
9.	<i>Summary Suit No. 5180 of 2012 in City Civil Court at Greater Bombay</i>	<i>Exh.47</i>
10.	<i>Summary Suit No. 1247 of 2013 in City Civil Court at Greater Bombay</i>	<i>Exh.48</i>
11.	<i>Summary Suit No. 1270 of 2012 In City Civil Court at Greater Bombay</i>	<i>Exh.49</i>
12.	<i>Summary Suit No. 795 of 2013 in City Civil Court at Greater Bombay</i>	<i>Exh.50</i>
13.	<i>Summary Suit No. 2197 of 2013 in City Civil Court at Greater Bombay</i>	<i>Exh.51</i>
14.	<i>Penalty Proceeding U/s. 271(1)(c) of the Income Tax Act 1961</i>	<i>Exh.55</i>

(15) The above document on record about the proceedings against the Applicant and his company clearly shows that he is aware about the Court Proceeding pending in various Courts against him. The Applicant has also filed the list of the dates which includes the history from the website of the District court of Maharashtra which clearly shows that the Applicant is well aware to find out the dates and the stages of the proceedings which are being available in Hon'ble High Court/ District Court Website of Maharashtra. The Applicant is well qualified person. His son is also M.Sc. Graduate. The Applicants are doing the business

therefore it cannot be said that they are not aware of the proceeding and the Judgment passed in SCS No. 23/2011.”

6. I am in complete agreement and in consonance with the findings returned by the learned Trial Court. This is a case where the Judgment Debtors have taken advantage of the protraction in Execution proceedings and only on failing, attempted to now revive their challenge to the exparte decree and invoke their counterclaim. In such facts the delay should not be condoned. The Petitioners i.e. Defendants who are the Judgment Debtors are therefore not entitled to maintain the present Writ Petition in the facts of the present case. The action on the part of the Judgment Debtors is nothing but to protract and delay the proceedings. It is unfortunate that the Writ Petition has been languishing till date since the date of its filing in the year 2017. It was mentioned on 18.01.2024 and today's listing was given by the Court and that is how it has seen the light of the day.

7. In view of the above observations and findings, the order dated 01.07.2017 being a well reasoned and cogent order is sustained and confirmed.

8. With the above directions, Writ Petition is dismissed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

Digitally signed
by HARSHADA
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SAWANT
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