

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

**FIRST APPEAL STAMP NO.26887 OF 2023
WITH
INTERIM APPLICATION NO.16565 OF 2023
WITH
INTERIM APPLICATION STAMP NO.26890 OF 2023
WITH
INTERIM APPLICATION STAMP NO.26889 OF 2023**

Abeda w/d of Nishar Khan alias
Abeda Nabibkhan Naru Sarkhel ..Appellant
Versus
Mr. Sabir Fazlur Rehman Khan & Ors. ..Respondents

**AND
FIRST APPEAL STAMP NO.26892 OF 2023
WITH
INTERIM APPLICATION NO.16558 OF 2023
WITH
INTERIM APPLICATION STAMP NO.26894 OF 2023
WITH
INTERIM APPLICATION STAMP NO.26895 OF 2023**

Abeda w/d of Nishar Khan alias
Abeda Nabibkhan Naru Sarkhel ..Appellant
Versus
Mr. Fazlur Rehman Habib Khan & Ors. ..Respondents

Ms. Minal Chandnani a/w Bhavesh Sawant i/by Jaiwant S.
Chandnani Associates, for the Appellant.
Mr. Satish Kamat, for the Respondent No.4.
Mr. V. Dhoke, for the Respondent No.3 in I.A. No. 16565 of 2023 &
Respondent No.5 in I.A. 16558 of 2023. (Through V.C.)
Mr. Santosh Parad, for the MCGM.

CORAM : KISHORE C. SANT, J.
RESERVED ON : 8th JANUARY, 2024
PRONOUNCED ON: 23rd JANUARY, 2024

PC.

1. Application Nos.26889 of 2023 and 26894 of 2023 are with the prayer to condone delay that is caused in filing Interim Application No.26893 of 2023 and Interim Application No.26888 of 2023 which are filed seeking leave to file appeal against order passed by learned City Civil Court, Dindoshi passing decree in the Suit on Consent Terms. Since the leave is sought in both the Applications against the similar order passed by the Trial Court and as the nature of dispute and the parties before the Court are same, all the Applications are taken up together.

2. The relations between the parties are not disputed. The Applicant is sister of Respondent No.1 in Interim Application No.16558 of 2023. He is also Respondent No.1 in Interim Application No.16565 of 2023. Respondent No.2 in the said application is son of Respondent No.1. The Application No. 16565 of 2023 is filed challenging Order dated 14th July, 2021 in LC Suit No. 988 of 2021

and Application No. 16558 of 2023 is filed against order passed on 14th July, 2021 in LC Suit No. 987 of 2021 by City Civil Court, Dindoshi. Both Orders are passed on the Consent Terms.

3. In short, it is the case of the Applicant that Respondent Nos. 1 & 2 in Application No. 16558 of 2023 filed Suit, bearing Suit No. 987 of 2021 in the City Civil Court at Dindoshi against the Respondent Nos.3, 4 & 5 in respect of Shop No. 153/1, Rajasthan Lime Depot situated at Vermawadi, Khandwala Lane, Daftary Road, Malad (E), Mumbai and Shop No.153/A-1 Malad Jambo Xerox. The Suit No. 988 of 2021 was filed by Respondent No.1 in respect of the property situated at the same place. Both these Suits i.e. Suit No.987 of 2021 and Suit No.988 of 2021 are filed challenging notices under Section 354 issued by the Municipal Corporation. In both the Suits notices issued by the Municipal Corporation dated 18th October, 2017 and Letter/Notice dated 2nd February, 2021 were challenged. The notices were issued for demolition of the construction on the said property. In these Suits later on the only Plaintiffs and the developer M/s Brijwasi Builders entered into compromise and Consent Terms were filed. It is recorded in the Consent Terms that builder proposes

to redevelop the said Plot and entered into Agreement for Permanent Alternate Accommodation dated 17th January, 2018. Para 1 Clause (c) of the Consent Terms in L. C. Suit No.987 of 2021 reads as under:-

“(c) Since, the Defendant No.3 proposed to redevelop the said Plot and pursuant thereto entered into Agreement for Permanent Alternate Accommodation dated 17th January, 2018 with the Plaintiff No.1 in respect of the Shop No. 153/1 (inadvertently mentioned as 1A) registered under no. BRL-5-754-2018 wherein the said shop is describe as Shop No. 1A. It is agreed and confirm that Shop No. 1A and 153/1 is the same shop.”

Para 2 of the Consent Terms reads as below:-

“2. The Defendant No.3 is the owner of all that piece or parcel of land bearing CTS No. 513, 513/1 to 6 total area admeasuring 1500.50 sq.mtr. Being part of TPS No.1 of Malad East and bearing Final Plot No. 55A area admeasuring 1345.32 sq. mtrs. Or thereabouts situate lying and being at junction of Daftary Road and Khandwala Lane, Malad (East), Taluka Boriviali, Mumbai Suburban District (hereinafter referred to the as “the said Plot”) The part of the said Plot comprises of Ground plus 1 floor structure known as Venubai Tambe Chawl with Shop Nos. 153/1 & 153/A-1 under the staircase of Venubai Tambe Chawl and four premises adjacent to Venubai Tambe Chawl which is collectively know as “Verma Wadi/Verma Apartment”. The Plaintiffs are in use and

occupation of the Shop No. 153/1 & 153/A-1 as tenants of the Defendant No.3.”

Para 5 Clause (a) & (b) of the Consent Terms read as below:-

“5.

(a) The Plaintiffs agree and confirm that the Shop No. 153/1 & and 153/A-1 (hereinafter collectively referred to as “said Shops”) are included and part of Verma Wadi. Accordingly, the said 354 notices issued by the Defendant No.1 are applicable to the said Shops and the same are legal, lawful and binding upon the Plaintiff.

(b) The Plaintiffs and Defendant No.3 agree and confirm that the terms and conditions stipulated in said Agreements are valid and binding upon them and no terms and condition of the said Agreements are altered/modified by this Consent Terms.”

Even the other terms of the compromise show that it's a compromise between the Plaintiff and M/s Brijwasi Builders only.

4. The learned Trial Court in view of these consent terms disposed of the Suits. Similarly consent terms are filed in L.C. Suit No. 988 of 2021.

5. The present Applicant who claims to have interest in the

said properties is aggrieved by these orders passed on this Consent Terms by the Trial Court. It is her case that though she has interest in the said properties she is not joined as party to these Suits and compromise is recorded without her knowledge.

6. It is stated that there are disputes pending between the present Applicant and the Plaintiffs in earlier Suits wherein the Corporation is also a party. There are various proceedings going on in the City Civil Court at Mumbai. The parties have the knowledge of the said proceedings as they are also parties therein. Thus despite of having knowledge she is deliberately kept away in these Suits and decree is obtained by playing fraud on the Court. In these Suits, there is no mention of the earlier Suits.

7. It is the case that the M/s Brijwasi Builders is the landlord and owner of the Plot of land bearing FP No.55A of TPS Malad No.I, CTS No. 513, part 1 to 6, situate at Khandwala Lane, Daftary Road, Malad (E), Mumbai together with structure standing on the said property known as Venubhai Tambe Chawl. The mother of the Applicant and Respondent No.1 was running business in the

name and style as “Rajasthan Lime Depot”, from Shop No. 153/1. She was occupying the premises by paying rent since prior to August 1972. In August 1972, she also took on rent an open space ad-measuring 45ft. x 13ft. on northern side of compound and started paying composite rent towards the properties. The mother constructed A.C. Shed with the permission of the landlord. She had also taken one electricity connection. She had obtained a license from Municipal Corporation under Bombay shops and Establishment Act, 1948. However after some time the landlord stopped accepting rent. The mother, therefore, filed a declaratory suit being Suit No. 2369 of 1980 against the landlords i.e. Brijwasi Builders and the same is pending. Applicant’s father Habibkhan Naru was initially managing and conducting the business on behalf of her mother. After Applicant’s father passed away in the year 1989, Applicant’s mother started carrying on the business. The Applicant was living with her mother.

8. In 1996, Respondent No.1 started threatening mother and attempted to dispossess her from the suit shop and tried to take over the management of the business, since he could not succeed in

an attempt to dispossess mother, he filed a Suit, bearing SC Suit No. 2841 of 1997, wherein the present Applicant is shown as Respondent No.1 with a prayer not to disturb his peaceful possession. In the said Suit a Notice of Motion was moved for interim relief bearing No. 2646 of 1997 and same came to be rejected on 19th May, 1997. Thereafter he filed one more Suit bearing No. 4144 of 1997 in the City Civil Court, wherein the mother of the Applicant was also party along the present Applicant by suppressing the fact of filing of Suit No. 2841 of 1997. However, the same also was dismissed for want of prosecution.

9. When all these Suits referred above are pending and orders were passed even dismissing one of the Suits bearing Suit No.2841 of 1997, the Respondent No.1 again filed a Suit in the High Court bearing Suit No.3376 of 2003 seeking partition of the properties of mother. In the said Suit, Chamber Summons was filed bearing No. 143 of 2007 for adding immovable properties i.e. House No. 153/1. One of the properties sought amendment by adding property admeasuring 18x8 sq. ft. and having two open spaces. He thereafter filed another Chamber Summons No. 1004 of 2006 to

implead the present Applicant and other legal heirs of deceased mother as party. Another brother of the Applicant also filed Notice of Motion No. 733 of 2008 in the said Suit seeking appointment of the Court Receiver. This Court passed an Order in the said Chamber Summons. This Court in Order dated 13th January, 2009 in Notice of Motion No. 733 of 2008, recorded a statement of Respondent No.1 that he would not alienate, encumber, part with possession thereof and create third party rights therein in any manner till the Suit is heard and disposed off. The said Suit is also pending.

10. It is case of the contesting Respondent that the Impugned Orders are passed in the Suits those were filed only against the Corporation challenging the notices issued under Section 354A of the Bombay Municipal Corporation Act, 1888. There is Application filed by Applicant and the Respondent No.3. Care of interest of the Applicant would be taken. The Applications before the Dindoshi Court were withdrawn without seeking liberty to file appeal. It was necessary to seek liberty on the Trial Court before file Appeal against the impugned Judgment and Order.

11. Thus all these matters were pending. In spite of these litigations and various proceedings now the Respondent No.1 has thereafter partitioned the suit shop and sub-divided the suit shop into number of shops and have also constructed an unauthorized AC Shed Structures in the open space without intimating other heirs. By suppressing all these facts now Suits are filed in the Court at Dindoshi, wherein Consent Terms are now filed and Suits are disposed of. Subsequently on legal advice the said Applicant and decided to file first Appeals in this Court. There is delay caused in filing these Applications. It is mainly argued that the plaintiffs in the Suits before Dindoshi i.e. Fazlur and Sabir under the garb of filing Suit challenging the notice obtained a Consent Decree. The material facts of earlier proceedings are suppressed from the Court. The said Suits were filed without making this Applicant as a party.

12. So far as delay is concerned it is a case that since under wrong impression an Applications were filed for recall of the orders the same were being prosecuted bonafide. After consulting with advocate for some time she received a proper advice to file Appeals. It is thereafter she approached this Court. There is delay of 176 days

caused in filing these Applications. The Applicant has a right to challenge the Consent Decree as she is a person aggrieved by the Impugned Order.

13. During the course of argument learned Advocate for the Applicant invited attention to letter dated 26th April, 2019 issued by the Advocate for Applicant to three persons including Brijwasi Builders, where it is specifically stated in para 7 that Brijwasi Builders has filed a Marzi Application before the Small Causes Court, Bandra seeking reliefs in the year 2017. Wherein the present Applicant is also a party to show knowledge to the builder.

14. Learned Advocate for the Respondent No.3 in Interim Application No. 16565 of 2023 and Respondent No.5 in Interim Application No.16558 of 2023 opposes the Applications by submitting that the present Applications are not maintainable at the behest of the Applicant. There is alternative remedy which is already availd by filing Applications to recall the Orders. It is only after the Court expressed that it is not inclined to entertain the Applications those are withdrawn. No leave was sought to file appeal before this

Court while withdrawing said applications. In view of above, now Applicant cannot file Appeal having withdrawn the applications. Now she cannot again agitate the same issue before this Court and prays for dismissal of both the applications as well applications for condonation of delay.

15. This Court now needs to consider as to whether the Applicant can be said to a person aggrieved and whether it is necessary to grant leave by condoning the delay.

16. So for as question as to whether the Applicant can be said to be a person aggrieved this Court has to consider whether the Applicant has any right in the Suit properties. From the facts recorded above, it is clearly seen that, mother of Applicant and Respondent No.1 was tenant on the suit premises and there are various litigations pending in respect of the said properties. In spite of this, there is no mention of these Suits either in Suit No. 987 of 2021 or Suit No. 988 of 2021. Though it is tried to be canvased that these Suits are only in respect of the notices under issued by the corporation, however, the contends of Consent Terms which are

recorded above, clearly shows that an arrangement is made only between the Brijwasi Builders and the Plaintiff. Looking at these terms, it is clearly seen that in fact those are the terms settled between the Brijwasi Builder and the Plaintiffs. The notice issued by the Municipal Corporation is referred only to show some cause of action while filing suit. This Court therefore records that the Applicant is certainly aggrieved by the Orders and thus has rightly approached this Court.

17. So far as the objection that no liberty is sought from the Dindoshi Court while withdrawing the Applications is concerned this Court has to consider, as to whether it was necessary to obtain such liberty. From record it is clearly seen that the Application for recall was simply withdrawn. The right to appeal is vested in a party aggrieved by the Order and for that no leave was necessary from Dindoshi Court. Though the Application was filed under wrong legal advice but later on party can certainly file an Appeal. The remedy of filing the Appeal is not a parallel remedy or alternative remedy but a substantive right of the party.

18. The Hon'ble Supreme Court in the Judgment reported in 2022 SCC OnLine Page 1063, in the case of *My Palace Mutually Aided Co-operative Society Versus B. Mahesh and Others*, has considered the provisions of Sections 96 and 100 of the Code of Civil Procedure. It has also considered as to what is proper course available to a party aggrieved by a decree or order obtained by fraud. In Para 30, the Court has observed that by now it is well settled that, the party aggrieved can maintain Appeal though is not party in the Suit. It is considered that Section 151 of the CPC is applicable when there is no alternative remedy available. It can not override statutory provisions or create remedy not contemplated under the code. The Court has further considered that a person who is not a party to the Suit can always file Application for recall of the Order. However, it is open for the Trial Court in such cases to direct such person to file another Suit. There are restrictions for exercise of power under Section 151. This Court finds that the present Applicant has rightly filed these Applications seeking leave to file Appeal and no leave was necessary from Dindoshi Court while withdrawing application for recall of orders impugned.

19. So far as delay part is concerned there is delay 776 days. This Court finds that the following dates are material for consideration of Application for condonation of delay. The suits were decreed on Consent Terms on 14th July, 2021. Decree was drawn on 23rd August, 2021 and thereafter the Applicant filed Applications for recalling of the said decree & orders on 8th November, 2023. On realizing that the proper remedy would be to file First Appeals she withdrew those Applications on 10th January, 2023. The present Applications are filed in this Court on 21st September, 2023. It appears from the dates that though the Applications for recall were withdrawn on 10th January, 2023, the present Application is filed in this Court on 21st September, 2023. There does not appear to be any specific explanation of this period. Looking to the facts and that the applicant is involved and is prosecuting litigations and that she has good prima facie case. This Court find that delay deserves to be condoned. Hence the following order.

:ORDER:

- (a) The Application for Condonation of Delay Nos.26894 of 2023 & 26889 of 2023 stand allowed.

- (b) Delay stands condoned.
- (c) The Applications seeking leave to file Appeal challenging orders dated 15th July, 2021 passed by the City Civil Court, Dindoshi in Small Cause Suits No.987 of 2021 & 988 of 2021 on the basis of Consent Terms are allowed.
- (d) First Appeal Stamp No.26887 of 2023 & First Appeal Stamp No.26892 of 2023 be registered.

[KISHORE C. SANT, J.]