

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 1384 OF 2024.

IN

FIRST APPEAL (St.) NO. 17004 OF 2023.

Rishi Raj Tejuja

...Applicant/Appellant.

Versus

Namrata Manoharlal Hinduja and Others

...Respondents.

Mr. Ashok Kumar Dubey, Ms. Shweta Yadav i/b Savj Law Solutions for the Appellant.

Mr. Vijay M. Vaghela for Respondent.

Coram : Sharmila U. Deshmukh, J.

Date : 30th January, 2025.

P. C. :

1. Interim Application has been preferred seeking condonation of delay of 8 years, 294 days caused in preferring the present Appeal.
2. The facts of the case are that the Respondents who are the original Plaintiffs had filed suit initially before this Court bearing H. C. Suit No. 2984 of 2009 for recovery of amount of Rs.26,51,873/- being the value of shares alleged to be illegally misappropriated by the Defendants along with accrued dividend. Subsequently, the suit came to be transferred to the City Civil Court and was renumbered as Civil Suit No. 4587 of 2009. Before this Court, the Applicant was duly served with writ of summons and the suit was categorized as 'Undefended

Suit' in March, 2010 for want of Written Statement. Subsequently, the suit came to be decreed by the City Civil Court on 8th August, 2014. The First Appeal has been filed challenging the judgment of 8th August, 2014.

3. The present Application has been filed seeking condonation of delay on the ground that the Applicant was unaware of passing of the judgment and decree dated 8th August, 2014 and became aware of the same only when the warrant of attachment was issued on 29th February, 2016. It is further pleaded that immediately Notice of Motion No. 1658 of 2016 was filed before the Civil Court to set aside the *ex parte* decree which came to be rejected by order dated 4th January, 2019. The order of 4th January, 2019 was challenged before this Court in Appeal from Order No. 761 of 2019 and came to be dismissed by order dated 29th April, 2022. Subsequently, the First Appeal along with Application for condonation of delay came to be filed on 5th June, 2023. It is further pleaded that the Applicant's father had expired on 18th January, 2023 and the Applicant tried to settle the issue with the Plaintiffs which could not be done and therefore, the present Appeal came to be filed.

4. The Application came to be resisted by the plaintiff-original decree-holder alleging mala fides on the part of Defendant in respect of filing the Appeal against the impugned judgment and decree. It was

contended that the Applicant filed an Application under Order IX, Rule 13 of Code of Civil Procedure, 1908 [for short, "**CPC**"] when the decree was passed under Order VIII, Rule 10 of CPC. It was further pleaded that the Applicant was duly served when the original suit was before this Court and the suit was transferred to the 'Undefended Suit' as 'No Written Statement Order' was passed. It is pleaded that no steps were taken after the suit was transferred to the City Civil Court in October, 2012 for recalling the order of No Written Statement. Even in the new suit, the Applicant did not remain present and therefore, from time to time, the suit was adjourned and ultimately the impugned judgment came to be passed on 8th August, 2014. It was denied that there were any settlement talks going on between the parties and in fact, in criminal proceedings, the Applicant was appearing. It is further contended that the arrest warrant was issued against the Applicant in the execution proceedings and no attempt has been made to pay the amount under decree.

5. Learned counsel appearing for Applicant has taken this Court through the order passed by this Court in the Appeal from Order filed against the order of rejection of Application under Order IX, Rule 13 of CPC. He would submit that though the delay is shown to be of 8 years and 294 days, in fact, after acquiring knowledge of passing of impugned judgment, the Applicant had taken steps by filing

Application under Order IX, Rule 13 of CPC and thereafter, carried the challenge to this Court. He submits that subsequently the Appeal came to be filed and delay between passing of order in Appeal from Order and filing of the Application and First Appeal is caused for the reason that the Applicant was trying to settle the issue with the Respondent. He draws support from the decision of the Apex Court in the case of ***Bhivchandra Shankar More vs. Balu Gangaram More***¹.

6. *Per contra* learned counsel appearing for Respondent submits that filing of an Application under Order IX, Rule 13 of CPC was a wrong remedy in law in as much as the decree was passed under Order VIII, Rule 10 of CPC and the said finding has been arrived at by this Court in the Appeal from Order. He submits that in those proceedings, it was observed by this Court that there was no sufficient cause for non-appearance and the Applicant did not justify the default in appearance when the suit was called on and that the Applicant moved the Application in execution proceedings. He submits that the proceedings were not prosecuted *bona fide* by the Applicant as though the proceedings were transferred to the City Civil Court, no steps were taken for recall of order of the High Court or to participate in the proceedings by filing Written Statement. He submits that all these show the conduct of Applicant which cannot be condoned. He submits

1 (2019) 6 SCC 387.

that the decision in the case of ***State of Madhya Pradesh vs. Ramkumar Choudhary***² shows a shift in the judicial trend of adopting a liberal approach in condonation of delay. He submits that the Apex Court has held that sufficient cause must be shown for explaining the delay for non-filing of the Appeal before the expiry of limitation period and no event or circumstance arising after the limitation period can constitute such sufficient cause. He submits that in the present case, the delay is of about 8 years and 294 days and the only explanation given is a technical delay, which cannot be accepted.

7. I have considered the submissions and perused the record.

8. The Application has been filed in the year 2023 challenging the judgment and decree dated 8th August, 2014. The suit initially was filed before this Court being High Court Suit No. 2984 of 2009 where the Applicant though served with writ of summons did not appear and the suit was transferred to the list of 'Undefended Suits'. Subsequently, the suit came to be transferred to the City Civil Court in about 2012 and it is not demonstrated that any notice was issued to the Applicant as regards the transfer of suit. No doubt, it was expected of the Applicant to be diligent about the proceedings and to take timely steps to ensure that he is properly represented in the matter, however, the fact remains that it is not shown that he was aware of transfer of

2 Special Leave Petition (C) Diary No. 48636 of 2024.

proceedings to the City Civil Court. It is well-known that suits filed before the High Court take longer time to be listed on board and the possibility of the Applicant being complacent in view of that fact cannot be ruled out.

9. The pleading in the Application is that Applicant was unaware of passing of the judgment and decree dated 8th August, 2014 and became aware only when the warrant of attachment was issued on 29th February, 2016. Before this Court, there is no material to demonstrate that the Applicant was aware of judgment of 8th August, 2014 and therefore, there is sufficient explanation for non-filing of Appeal before expiry of period of Limitation. After being aware of passing of judgment and decree, the Applicant has taken steps by filing Notice of Motion under Order IX, Rule 13 of CPC. It cannot be said that filing of Notice of Motion for setting aside the *ex parte* decree was not a remedy available to him under the law. It needs to be noted that litigant depends on the legal advise and he may not be aware as to whether the decree has been passed under Order VIII, Rule 10 of CPC. Viewed from that aspect, timely steps were taken by Applicant by immediately seeking to set aside the *ex parte* decree by filing an Application under Order IX, Rule 13 of CPC. The Notice of Motion came to be dismissed by the City Civil Court which was challenged by the Applicant before this Court in an Appeal from Order which also came

to be dismissed on 29th April, 2022. The steps taken by the Applicant would demonstrate that the Applicant was not acting *mala fide* only with the purpose of delaying the proceedings, but was adopting legal remedies as advised. It is only after the dismissal of the Appeal from Order that the present Appeal has been filed.

10. In the case of ***Bhivchandra Shankar More*** (supra), the Apex Court has taken into consideration as to whether the time spent in the proceedings to set aside the *ex parte* decree constitute the sufficient cause within Section 5 of Limitation Act, 1963 so as to condone the delay in preferring the Appeal against the *ex parte* decree on merits. Addressing the said issue, the Apex Court has held in Paragraph Nos. 12, 13, 15 and 20 as under:-

“12. The right of appeal under Section 96(2) CPC is a statutory right and the defendant cannot be deprived of the statutory right of appeal merely on the ground that the application filed by him under Order 9 Rule 13 CPC has been dismissed. In *Bhanu Kumar Jain v. Archana Kumar* [(2005) 1 SCC 787], the Supreme Court considered the question whether the first appeal was maintainable despite the fact that an application under Order 9 Rule 13 CPC was filed and dismissed. Observing that the right of appeal is a statutory right and that the litigant cannot be deprived of such right, in paras 36 and 38, it was held as under:-

“36. A right to question the correctness of the decree in a first appeal is a statutory right. Such a right shall not be curtailed nor shall any embargo be fixed thereupon unless the statute expressly or by necessary implication says so. (See *Deepal Girishbhai Soni v. United India Insurance Co. Ltd.* [(2004)5 SCC 385] and *Chandravathi P.K. v. C. K. Saji* [(2004) 3 SCC 734]

38. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be

permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for *ex parte* hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr. Chaudhari that the "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this Court in *Rani Choudhury v. Suraj Jit Choudhary* [(1982) 2 SCC 596], *P. Kiran Kumar v. A.S. Khadar* [(2002) 5 SCC 161] and *Shyam Sundar Sarma v. Pannalal Jaiswal* [(2005) 1 SCC 436]."

13. After referring to its own judgment in *Jotiba Limbaji* [1937 SCC OnLine Bom 136], the High Court held that after the appeal from the order of the lower court refusing to set aside the *ex parte* decree, the defendant may think of applying to the High Court in revision and in that process, considerable time might be lost. After referring to other judgments, in the impugned judgment, the High Court held as under: (Balu Gangaram More case [2014 SCC OnLine Bom 1199])

"15..... An unscrupulous defendant may file the application under Order 9 Rule 13 CPC and carry the order to the highest forum irrespective of the merit in it and thereafter still file appeal against the decree. Considerable time would be lost for the plaintiff in that case. Every provision under the law of procedure is aimed at justness, fairness and full opportunity of hearing to the parties to the court proceedings. It caters to every conceivable situation. But at the same time, the law expects a litigant to be straight, honest and fair. The two remedies provided against *ex parte* decree are in respect of two different situations and are expected to be resorted to only if the facts of the situation are available to a litigant. The remedies provided as simultaneous and cannot be converted into consecutive remedies."

15. It is a fairly well settled law that "sufficient cause" should be given liberal construction so as to advance sustainable justice when there is no inaction, no negligence nor want of bona fides could be imputable to the appellant. After referring to various judgments, in *B. Madhuri* [(2012) 12 SCC 693], this Court held as under:-

"6. The expression "sufficient cause" used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that substantive rights of the parties are not defeated only on the ground of delay."

20. In the facts and circumstances of the present case, the time spent in pursuing the application under Order 9 Rule 13 CPC is to be taken as "sufficient cause" for condoning the delay in filing the first appeal. The impugned judgment of the High Court cannot be sustained and is liable to be set aside."

11. The Apex Court has held that sufficient cause be given liberal construction so as to advance cause of justice when there is no inaction nor want of *bona fides* imputable to the Appellant. In the present case, it cannot be denied that the Applicant was unaware of passing of the judgment and decree as admittedly it is not shown that any notice was issued to him. Further immediately upon acquiring the knowledge of warrant of attachment being issued, the Applicant had taken steps by filing an Application under Order IX, Rule 13 of CPC and had thereafter, challenged the same before this Court. Adopting the legal remedies shows the intention of Applicant to bonafidely prosecute the proceedings and not to delay the same. The observation of the Apex Court in the case of ***Bhivchandra Shankar More*** (supra) squarely applies to the present case.

12. Before this Court, when the matter was being heard, a query was

posed by this Court as to whether the Applicant is ready to settle the matter to which he has responded that he is ready and willing to pay the sum of Rs.15,00,000/-, to which, learned counsel for Respondent, on instructions of Respondents that Respondents are not willing to settle the matter.

13. In light of the above discussion, there is sufficient cause which is shown for condoning the delay though termed as 8 years and 294 days by calculating the same from date of passing of judgment of the year 2014, it needs to be considered that the Applicant acquired knowledge on 29.2.2016 and proceedings were immediately initiated under Order IX, Rule 13 of CPC which went on till 29th April, 2022 and thereafter, the present Appeal is filed on 5th June, 2023. The explanation tendered about talks of settlement is substantiated by the submissions made in this Court showing the readiness and willingness to settle the matter.

14. In light of the above, Interim Application is allowed. The delay of 8 years and 294 days stand condoned.

[Sharmila U. Deshmukh, J.]