

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

WRIT PETITION NO. 17559 OF 2024

Sunil Bhikaji Kanade

...Petitioner

Versus

1. ASB International Private Limited
2. Kanade Anand Udyog Private Limited
(KAUPL)
3. Dinanath Bhijai Kanade
4. Milind Janardhan Lendhe
5. Indian Overseas Bank

...Respondents

Mr. Atul Damle, Senior Advocate, a/w Namdev Gore, for the
Petitioner.

Mr. Shlok Parekh, a/w Drishti Bhatia, i/b Vaish Associates,
for Respondent No.1.

**CORAM: N. J. JAMADAR, J.
DATED: 7th OCTOBER, 2025**

JUDGMENT:-

1. Rule. Rule made returnable forthwith and, with the
consent of the learned Counsel for the parties, heard finally.

2. This petition under Article 227 of the Constitution of
India calls in question the legality, propriety and correctness
of an order dated 3rd September, 2024 passed by the learned
Civil Judge, Kalyan, on an application (Exhibit-81) for
condoning the delay in filing an application to set aside the ex

parte order, whereby the said application taken out by the petitioner – defendant No.3, came to be rejected.

3. The respondent No.1 – plaintiff has instituted a suit for specific performance of the contract contained in the Memorandum of Understanding dated 27th March, 2014 executed by the petitioner (D3) and respondent Nos.2 and 3 (D1 and D2), and allied reliefs.

4. The summons of the said suit was shown to have been served on the defendant No.3 on 5th February, 2021. As the defendant No.3 did not appear, by an order dated 4th March, 2021, the learned Civil Judge directed that the suit would proceed *ex parte* against the defendant No.3.

5. It seems the trial in the suit progressed. On 4th July, 2023, the petitioner (D3) filed an application for condonation of delay in filing the instant application for setting aside the *ex parte* order dated 4th March, 2021. It was, *inter alia*, contended that the petitioner, for the first time, came to know about the pendency of the suit in the month of June, 2023. The petitioner contacted his Advocate and gathered the relevant information and documents. It transpired that an *ex parte* order was passed against the petitioner on 4th March, 2021. Hence, the petitioner filed an application seeking

condonation of delay of 581 days in filing the application to set aside the *ex parte* order.

6. The application was resisted by respondent No.1 – plaintiff.

7. After considering the averments in the application and opposition thereto, by the impugned order the learned Civil Judge was persuaded to reject the application observing, *inter alia*, that the summons was duly served upon defendant No.3 by affixing a copy thereof as the daughter of the defendant No.3 had refused to accept the service of summons. The petitioner had filed application to condone the delay in filing the application to set aside the *ex parte* order belatedly when the suit was posted for final argument with a view to further protract the trial in the suit.

8. Being aggrieved, the petitioner has invoked the writ jurisdiction.

9. Mr. Damle, the learned Senior Advocate for the petitioner, submitted that the learned Civil Judge did not properly appreciate the cause ascribed by the defendant No.3 for delay in filing the application to set aside the *ex parte* order. Inviting the attention of the Court to the Bailiff's

report, Mr. Damle would urge the summons cannot be said to have been duly served on defendant No.3. It even does not appear that the copy of the summons was affixed on the conspicuous place of the house of the defendant No.3. The learned Civil Judge committed material irregularity in observing that the summons was duly served under the provisions of Order V Rule 20 of the Code of Civil Procedure, 1908 ("the Code") when it was not the case of the plaintiff that he had ever obtained an order for substituted service.

10. In opposition to this, Mr. Parekh, the learned Counsel for respondent No.1 – plaintiff, endeavoured to support the impugned order. It was submitted that the delay is both inordinate and unexplained. It was only when the suit came to be posted for final arguments, the defendant No.3 filed the instant application with intent to delay the trial in the suit. Mr. Parekh refuted the submission on behalf of the petitioner that the summons was not duly served.

11. I have perused the material on record. *Prima facie*, the question as to whether the summons was duly served on the petitioner (D3) appears to be debatable. A bare perusal of the report of the process server would indicate that when the process server visited the house of the defendant No.3 on 5th

February, 2021, the defendant No.3 was not found thereat. A lady, who claimed to be the sister-in-law of defendant No.3, was present. She contacted the daughter of defendant No.3. The latter declined to accept the service of summons. Thereupon, the summons alongwith copy of the plaint was served. By what mode the service was effected, appears to be contentious. The plaintiff – respondent No.1 claims, it was by affixing; as provided under Order V order 17 of the Code. The petitioner, on the other hand, contends that, the report indicates that the service was by intimation.

12. At this stage and in this proceeding, it may not be appropriate to delve into the aspect of due service of the summons on the petitioner (D3) as the learned Civil Judge has yet not delved into the merits of the application for setting aside the *ex parte* order. Reference to the aspect of the service of summons is made only to the judge the sufficiency of the cause ascribed by the petitioner (D3) for the condonation of delay.

13. *Prima facie* it appears that, the learned Civil Judge was not justified in observing that the summons was duly served on the defendant No.3 under the provisions of Order V Rule 20 of the Code. It does not appear that, substituted service

was ever prayed for by the plaintiff and allowed by the learned Civil Judge. Even otherwise, the Court is enjoined to apply its mind to requirement of Order V Rule 20 of the Code and the order of substituted service must indicate due consideration as regards the satisfaction of the requirement.

(Neerja Realtors Private Limited vs. Janglu (Dead) through Legal Representative¹ and Auto Cars vs. Trimurti Cargo Movers Private Limited and others²)

14. In the case at hand, evidently, the petitioner (D3) was not present. It is to be determined by the trial Court, whether the service of summons on the sister-in-law of the petitioner (D3) i.e. the sister of the petitioner's wife, would constitute a valid service. It is necessary to note that under the provisions of Order V Rule 19 of the Code, where the question of due service of the summons arises for consideration, the Court is empowered to examine the serving officer on oath to satisfy itself and, thereafter, declare whether the summons has been duly served or not. It does not appear that the trial Court had examined the process server.

1 (2018) 2 Supreme Court Cases 649.

2 (2018) 15 Supreme Court Cases 166.

15. In the aforesaid view of the matter, the learned Civil Judge ought to have considered the application for condonation of delay liberally. It is trite that the Courts generally lean in favour of condonation of delay so as to advance the cause of substantive justice. In a situation of this nature, where it *prima facie* appears debatable, whether the summons was duly served or not, the refusal to condone the delay in seeking setting aside of the *ex parte* order would cause grave prejudice.

16. A useful reference, in this context, can be made to the decision of the Supreme Court in the case of ***N. Balakrishnan V/s. M. Krishnamurthy***³ wherein the approach to be adopted by the Court in the matter of condonation of delay was expounded as under:

“9. It is axiomatic that condonation of delay is a matter of discretion of the court Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in reversional jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter when the first cut refuses to condone the delay. In such cases, the superior cut would be free to consider the cause shown for the delay afresh and it is open

3 AIR 1998 Supreme Court 3222,

to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. the object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim *Interest reipublicae up sit finis litium* (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain V/s. Kuntal Kumari* (AIR 1969 SC 575) and *State of W.B. V/s. Administrator, Howrah Municipality* ((1972) 1 SC 366).

13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of *mala fides* or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. It would be a salutary guideline that

when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss.”

(emphasis supplied)

17. The reasons assigned in the application for condonation of delay, if viewed in the backdrop of the positive case that the summons was not duly served on the defendant No.3, cannot be said to be unreasonable or unsustainable.

18. It is true, there is a delay of more than 500 days in seeking setting aside of the *ex parte* order. Yet if the defendant No.3 succeeded in demonstrating *bona fide* and a justifiable cause, the delay could have been condoned by imposing appropriate costs.

19. For the foregoing reasons, I am inclined to allow the petition and condone the delay in filing the application for setting aside the *ex parte* order.

20. Hence, the following order:

: O R D E R :

- (i) The petition stands allowed.
- (ii) The application (Exhibit-81) stands allowed.
- (iii) The impugned order stands quashed and set aside.

- (iv) The delay in taking out the application to set aside the *ex parte* order dated 4th March, 2021 stands condoned subject to payment of costs of Rs.50,000/- by the petitioner (D3) to the plaintiff within a period of four weeks from today.
- (v) In the event, the costs are paid within the said period, the learned Civil Judge shall decide the application for setting aside the *ex parte* order on its own merits and in accordance with law, as expeditiously as possible.
- (vi) The petition stands disposed.

[N. J. JAMADAR, J.]