

Santosh

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

WRIT PETITION NO. 3781 OF 2025

Kalpesh Mahendra Patel ...Petitioner
Versus
PICO Capital Pvt. Ltd. ...Respondent

Ms. Leena Sapra, for the petitioner.
Mr. Zubin Sheth, i/b YNA Legal, for the Respondent.

**CORAM: N. J. JAMADAR, J.
DATED: 26th MARCH, 2025**

SANTOSH
SUBHASH
KULKARNI

Digitally signed by
SANTOSH
SUBHASH
KULKARNI
Date: 2025.03.27
17:59:07 +0530

ORDER:-

1. Heard the learned Counsel for the parties.
2. The challenge in this petition is to an order dated 7th January, 2025 passed by the learned Judge, City Civil Court, Bombay, whereby a Notice of Motion taken out by the petitioner – defendant to condone the delay of 66 days in filing an affidavit seeking leave to defend the summary suit came to be rejected.
3. The respondent has instituted a summary suit for recovery of a sum of Rs.74,17,261/- alongwith interest at the rate of 18% p.a. on the basis of the negotiable instruments drawn by the petitioner in favour of the respondent.

4. The summons for judgment was served on the petitioner on 28th November, 2015. The defendant did not file the affidavit seeking leave to defend within the stipulated period. The Notice of Motion to condone the delay in filing the affidavit seeking leave to defend came to be filed on 12th February, 2016.

5. It seems that the Notice of Motion remained pending. On 11th December, 2024, the plaintiff filed an application seeking adjournment on the ground that copy of the affidavit seeking leave to defend was not served on the plaintiff. Thereupon, it transpired that the affidavit seeking leave to defend was not filed alongwith Notice of Motion seeking condonation of delay.

6. Eventually, the Notice of Motion was heard, and by the impugned order, the learned Judge was persuaded to reject the Notice of Motion opining that the defendant failed to substantiate the sole ground taken in the Notice of Motion that, the defendant was out of India and, therefore, the affidavit seeking leave to defend the suit could not be filed within the stipulated period.

7. The learned Counsel for the petitioner submitted that the affidavit which was filed in support of the Notice of

Motion itself was affirmed before the Notary Public at London on 5th February, 2016. Moreover, in the affidavit-in-reply filed on behalf of the respondent it was asserted that the petitioner had absconded from India and a Red Corner Notice was issued against the petitioner. In the face of the aforesaid material, the learned Judge could not have rejected the Notice of Motion.

8. In opposition to this, the learned Counsel for the respondent, submitted that the contention on behalf of the petitioner that the delay is of 66 days only, is not correct. In fact, the affidavit seeking leave to defend was not at all tendered alongwith the Notice of Motion and an attempt was made to tender the said affidavit before the Court at the time of hearing of the Motion. Thus, there is a delay of more than nine years in filing affidavit seeking leave to defend the suit. Therefore, the learned Judge committed no error in rejecting the Notice of Motion.

9. I have perused the material on record.

10. Evidently, the affidavit in support of the Notice of Motion was affirmed on 5th February, 2016 before the Notary Public at London. There is also material to show that Red Corner Notice was issued against the petitioner. The

circumstances in which the said Red Corner Notice was issued and the legality and propriety thereof are not required to be delved into in this petition. The fact remains that at the relevant time, the petitioner appeared to be out of India. The delay cannot be said to be inordinate. Nor can it be said that it remained unexplained. The learned Judge, City Civil Court, thus, could have taken a liberal view of the matter.

11. The Court was anxious to consider the submission on behalf of the respondent that, in fact the delay was of nine years. The learned Counsel for the petitioner would urge that though an effort was made to tender the affidavit seeking leave to defend alongwith Notice of Motion for condonation of delay, the same was not taken on record.

12. A factor which can legitimately resolve the controversy is whether the affidavit seeking leave to defend was ready and affirmed on the date the Notice of Motion seeking condonation of delay was filed. The copy of the affidavit-in-reply on behalf of the defendant to the summons for judgment (pages 223 to 236) indicates that the said affidavit was also affirmed before the Notary Public on 5th February, 2016. In this view of the matter, it cannot be said that there was deliberate inaction on the part of the defendant.

13. For the foregoing reasons and to advance the cause of substantiate justice, the delay in filing affidavit seeking leave to defend deserves to be condoned. Having regard to the time that has been lapsed, the defendant deserves to be saddled with costs.

14. Hence, the following order:

: O R D E R :

- (i) The petition stands allowed.
 - (ii) The impugned order dated 7th January, 2025 stands quashed and set aside.
 - (iii) The delay in filing affidavit seeking leave to defend stands condoned. The affidavit-in-reply filed by the defendant to the summons for judgment be taken on record.
 - (iv) The defendant shall pay costs of Rs.50,000/- to the plaintiff, within a period of two weeks, from the date of uploading of this order.
 - (v) Payment of costs shall be a condition precedent for taking the affidavit-in-reply on record.
 - (vi) Hearing of summary suit stands expedited.
- Petition stands disposed.

[N. J. JAMADAR, J.]