

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO.1616 OF 2025
IN
COMMERCIAL SUMMARY SUIT NO.15 OF 2024

ASHESH MEHTA)...APPLICANT
IN THE MATTER BETWEEN
NAGENDRA GANPATI KINI)...PLAINTIFF
V/s.
ASHESH MEHTA)...DEFENDANT

Mr.Vivek Sharma i/by Mr.H.R.Sharma, Advocate for the Plaintiff.

Mr.Hemant Ingle a/w. Mr.Prashant Goyal i/by Jasmeet Kaur Viridi,
Advocate for the Applicant in the IA and for the Defendant in the
COMSS.

CORAM : ABHAY AHUJA, J.

DATE : 7th MAY 2025

PC. :

1. This Interim Application seeks condonation of delay of 134 days in entering appearance as per Order XXXVII of the Code of Civil Procedure, 1908 ("CPC").

2. Mr.Hemant Ingle, learned Counsel, appearing for the Applicant submits that there is sufficient cause for condoning the delay.

3. It is submitted that the Applicant and his wife were sought to be implicated and framed in a false case including drug peddling case registered in Madhya Pradesh. That, later, since no evidence was found against the Applicant and his wife, the Narcotic Drugs and Psychotropic Substances (NDPS) charges were dropped from the final charge-sheet. Mr.Ingle submits that the drug case was part of a larger conspiracy orchestrated by an entity that has filed fake arbitration proceedings against the Applicant to falsely implicate the Applicant.

4. Mr.Ingle would submit that, thereafter, around December 2023 a group of investors filed FIR against the Applicant and his wife, since the investors could not withdraw their money from the portal of Bliss Consultants which is a sole proprietary concern of the Applicant, who is a stock market trader by profession.

5. That, on or about 29th December 2023, the Applicant and his wife were arrested by Mumbai Police officials. That, thereafter, although the Applicant's wife was permitted to be released on bail around June 2024 but the Applicant continues to be in judicial custody in the Arthur Road jail. That, the Applicant was served upon with the writ of summons on

22nd April 2024 in jail. It is submitted that since the Applicant was in jail and had to face multiple litigations, instructions could not be given to the Advocate / Attorneys within time to appear in this matter. Mr.Ingle would further submit that, the Applicant was also not aware of the procedure and the limitation with regard to Order XXXVII of the CPC. That, the Advocate received instructions along with papers only around August 2024 and that after taking appropriate instructions, this Interim Application under Order XXXVII Rule 3(7) of the CPC has been filed on 10th September 2024 seeking condonation of delay of 134 days.

6. Mr.Ingle submits that, accordingly, considering the multiple adverse circumstances faced by the Applicant, who is still in jail, the sufficient cause has been made out for condoning the delay and that this Court allow the application.

7. Mr.Ingle has relied upon a decision of this Court in the case of *Swastik Enterprises vs. Marianella Properties Private Limited*¹ in support of his contentions submitting that his client although in a state of penury, will be willing to pay reasonable costs for the delay.

1 2024 (1) All.M.R. 327

8. On the other hand, Mr.Vivek Sharma, learned Counsel for the Plaintiff, has opposed the application submitting that the delay has not been explained. Mr.Sharma would submit that the only ground taken in paragraph 5 of the application is that the Applicant was in jail due to which he was unable to give instructions. Mr.Sharma submits that the said statement is belied by the fact that during the very same time, instructions were given to Advocates who were appearing in matters filed against the Applicant in various States in the country including Punjab, Gujarat and Rajasthan. Mr.Sharma has taken this Court through some of the orders passed by the various criminal courts in different States of the country in support of his contention. Mr.Sharma submits that although the Applicant was able to give instructions to his Advocates in the other matters, however, he has avoided appearance in this Suit. That, there has been no sufficient cause in the matter and that this Court may reject the application and place the matter for *ex-parte* decree.

9. I have heard the learned Counsel and considered the rival contentions.

10. It is not in dispute that the writ of summons along with the plaint has been served upon the Defendant on 22nd April 2024 through the Superintendent of Arthur Road jail. It is also not in dispute that the Applicant and his wife have been facing various types of proceedings (criminal and civil) and that the Defendant / Applicant continues to be in judicial custody. The learned Counsel for the Applicant has stated that as the Applicant was in jail, he was unable to give instructions to his Attorney to enter appearance in the Suit and that he was also not aware of the summary procedure under Order XXXVII of the CPC. Mr.Sharma for the Plaintiff is aggrieved that if the Applicant could give instructions to the Advocates in other matters around the Country why could he not enter appearance in this matter and that, therefore, there is no sufficient cause.

11. I am afraid, I am unable to agree with this submission made on behalf of the Plaintiff. Admittedly, this is a case where the Applicant and his wife have been faced with multiple civil and criminal proceedings. The procedure under Order XXXVII is a special summary procedure. This is the only provision which requires entering of appearance by a Defendant within a period of ten days after service. Although the Applicant may have been instructing lawyers in several

States in various matters, it is quite possible that he may be unaware of the procedure under Order XXXVII of the CPC and the limitation for entering appearance within a period of ten days. It is quite possible that the plethora of criminal proceedings faced by the Applicant and his wife could have diverted their entire attention to first securing personal liberty instead of entering appearance in a Summary Suit particularly when the Applicant is still in judicial custody. This Court is also aware of the time restrictions to inmates to meet their lawyers or to give instructions to their lawyers while in prison. In my view, a plausible explanation has been furnished for the delay caused.

12. In the case of *Swastik Enterprises vs. Marianella Properties Private Limited (supra)* this Court has while considering the provisions of Order XXXVII Rule 3(7) of the CPC observed in paragraphs 27 to 33 as under :

“27. As can be seen from the provisions of Order XXXVII Rule 3(7) of the CPC quoted above, the Court can excuse the delay if sufficient cause is shown by the Defendant for the delay in entering an appearance or in applying for leave to defend the suit.

28. I am therefore conscious that this Application has been made in a summary suit where a summary procedure with strict time lines is prescribed for summary disposal of suits. However, as noted above, Sub-rule (7) of Rule 3 itself

empowers the Court to condone the delay if sufficient cause is shown by the Defendant for delay in entering an appearance or in applying for leave to defend. The length of delay is not the determinative criteria. If a sufficient cause is made out, the length of delay does not matter. The Courts lean in favour of condonation of delay so as to advance the cause of substantive justice, on the premise that the procedure, which is a handmaiden of justice, should not be allowed to score a march over substantive justice. I am also mindful of the fact that refusal to exercise the discretion in favour of the Applicant, in the instant case, would entail the consequence of depriving the Defendant of leave to defend, if the Court so finds the Defendant entitled to upon the hearing of the Summons for Judgment.

29. The Defendant is suffering from multi vessel coronary artery disease since 2005 and has been taking treatment and was also admitted in Asian Heart Institute. The Defendant is also suffering from diabetic mellitus and on a number of occasions suffered chest pain and therefore the doctors advised him to take rest. Also during the period from July 2018 to October 2018, the Defendant suffered severe pain and heart problem and was advised to take rest by the doctors. The Defendant has annexed the medical reports issued by Asian Heart Institute in support of his contention. The Defendant being unaware of these proceedings having been filed by the Plaintiff against the Defendant could not engage any Advocate to represent the Defendant in time. Though his wife is one of the Directors of the Defendant but as she was looking after the Defendant(Applicant), the proceedings for grant of leave to file Vakalatnama and to appear and defend the suit could not be initiated in time. Also, the son of the Defendant, Mr.Lynton, suffered a brain hemmorrhage and had to undergo brain surgery somewhere in the month of October 2019. Therefore, as the Defendant and his wife were not attending the office as the

Defendant/Applicant was suffering from heart disease and his staff did not inform him about the said proceedings being served, it is not disputed that the said proceedings have been served on 18th September 2018. Therefore, due to the aforesaid exigencies, the Vakalatnama could not be filed in the matter and the matter could not be attended to by the Defendant.

30. *No doubt as claimed by the learned Counsel for the Plaintiff that the whole purpose of expeditious and summary disposal of an Order 37 of the Civil Procedure Code, 1908, suit which avowedly prescribes summary procedure is totally defeated if the Defendant who under Order 37 Rule (3) of the Civil Procedure Code, 1908 has been served with the statutory summons is given further opportunity to file the application for condonation of delay in filing memo of appearance and is obviously not interested in any expeditious disposal and can easily delay proceedings by making himself scarce. Once the service is complete and 10 days have elapsed then Summons for Judgment under Sub-section (4) is only required to be served on such Counsel, who files memo of appearance on behalf of the defendant within the stipulated time of 10 days of receipt of the writ of summons. All such hearings could have been averted and valuable judicial time and effort saved in case the Defendant's Counsel had taken care in filing the memo of appearance on behalf of the Defendant within the stipulated time of 10 days of the receipt of the writ of summons.*

31. *The two decisions cited by the learned Counsel reemphasize the aforesaid submissions. However, as noted, the Court may for sufficient cause shown by the Defendant excuse the delay of the Defendant in entering appearance or in applying for leave to defend. In the above two cases, the Courts found the delays to be inexcusable on the basis of the respective facts of those cases. In the case of **Emmsons International Ltd Vs. Harshvardhan Chemicals & Minerals Ltd***

(supra), that was a case where the court has decreed the suit as the Defendant had neither filed any application for condonation of delay nor memo of appearance and 4 months after having appeared in the matter; thereafter, when the matter was listed again, further time was sought to file application for condonation of delay but no application was filed and time was sought to take instructions to settle the matter. As on the date of the decision, neither any application for condonation of delay nor any memo of appearance had been filed. Those are not facts here. This is a case where the Director of the Defendant who was running the show was unable to attend the office due to ill health having been advised bedrest and when he resumed office, his staff did not inform him about the same. Thereafter there was some repair and painting work and shifting when the packet containing the writ of summons and plaint was discovered. Although not many details have been provided, but there are two medical reports annexed to the Rejoinder indicating the health condition of the Director of the Defendant as suffering from multi vessel coronary artery disease. No contrary facts have brought on record by the Plaintiff to disprove the same.

32. Even the decision of Delhi High Court in the case of **Anand Shekhar Singh Vs. M/s. Apco Construction Pvt. Ltd and Anr** (*supra*), relied upon by the Plaintiff is distinguishable on the facts in as much as what weighed with the Hon'ble Court was that it was a case of bouncing of a cheque which was given as security for repayment of a loan and the Defendant failed to assign reasons for the long delay and no sufficient cause was shown. As noted above, in the present case, the facts are distinguishable and this Court has already observed that sufficient cause has been shown by the Defendant. Not only was he suffering from an adverse and serious health conditions such as the multi vessel coronary artery disease in addition to diabetes and hypertension and not only that his wife was taking care of him but even his son

was not well and had suffered brain hemorrhage, which has not been controverted by the Plaintiffs with any material or cogent evidence.

33. Therefore, in my view, sufficient cause has been made out by the Defendant for not filing the appearance in time and that there is no deliberate or intentional delay on the part of the Defendant for not approaching this Court for filing the Application and for making an Application for grant of leave to file an appearance in this Court but at the same time the delay of 282 days cannot be ignored, and therefore, although there is sufficient cause for the delay, costs need to be imposed, as it cannot be denied that if the delay was not condoned, the Plaintiff would be entitled to a decree, and therefore, I propose to balance the situation by imposing costs. In this view of the matter, I am inclined to allow the Chamber Summons, subject to payment of costs.”

13. In the facts of this case, the learned Counsel for the Plaintiff himself has pointed out the number of criminal cases faced by the Applicant. Therefore, in my view, sufficient cause has been made out by the Defendant for not filing the appearance in time and that there is no deliberate or intentional delay on the part of the Defendant for not approaching this Court for filing the Application for condonation of delay in entering appearance in this Court and I am inclined to allow this application. But at the same time the delay of 134 days cannot be ignored in a Commercial Summary Suit. Therefore, although there is sufficient cause for the delay, costs need to be imposed, as it cannot be

denied that if the delay is not condoned, the Plaintiff would be entitled to a decree, and therefore, I propose to balance the situation by imposing costs, albeit reasonable, considering the facts and circumstances of the Applicant recorded above. The learned Counsel for the Applicant has also submitted to reasonable costs.

14. Accordingly, subject to payment of costs of Rs.25,000/- to the Plaintiff within a period of two weeks, the delay of 134 days in entering appearance is hereby condoned.

15. Subject to the above, let Vakalatnama be taken on file.

16. The Interim Application accordingly stands allowed and disposed as above.

(ABHAY AHUJA, J.)

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