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

WRIT PETITION NO.5611 OF 2024

M/s. Vaishnavi Engineers and Developers Private Limited (Through its Authorized Representative Navin Singh) ...Petitioner

vs.

Navnath Ramkrishna Mhatre and Others ...Respondents

Mr. A.A. Karva, for the Petitioner.
Mr. Hemant Gadigaonkar a/w. Mr. Devidas Bhoir and Ms. Ashwini Mhatre, for the Respondents.

CORAM : N. J. JAMADAR, J.
RESERVED ON : JANUARY 30, 2025
PRONOUNCED ON : FEBRUARY 21, 2025

JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the learned counsel for the parties, heard finally at the stage of admission.

2. The challenge in this petition is to an order dated 22nd February, 2024 passed by the learned Civil Judge, Kalyan whereby an application preferred by the respondent/ original defendant to condone the delay of 9 years 4 months and 18 days in preferring an application to recall the order dated 20th April, 2013 permitting the petitioner/ plaintiff to withdraw the suit being R.C.S. No. 782 of 2012, came to be allowed.

3. The background facts leading to this petition can be

summarized as under:-

(a) The petitioner is a company incorporated under the Companies Act, 1956. It was engaged in the business of real estate development. On 31st May, 2008 a Development Agreement was executed by the respondents and Janak Pandurang Mhatre and Motiram Kachru Mhatre is favour of the petitioners, thereby granting development rights in respect of the suit properties. The plaintiff claimed to have parted with consideration of Rs. 47 lakhs under the said agreement, and been put in possession of the suit properties.

(b) Asserting that the defendants were causing obstruction to the possession and enjoyment of the plaintiff over the suit properties and also committed encroachment thereon, the petitioner instituted a suit for declaration that the said agreement was subsisting and binding on the defendants and the defendants had no right to disturb the possession of the plaintiffs over the suit properties, the notice dated 18th May, 2012 addressed by the defendants professing to cancel the said agreement was unlawful and the consequential reliefs of injunction.

(c) In the said suit, initially an order of status-quo was passed on 31st October, 2012. By an order dated 17th April, 2013 the said order of status-quo was modified to include utilization of FSI potential

over the land belonging to the defendants.

(d) On 20th April, 2013 the plaintiff filed a pursis to withdraw the suit unconditinoally. By an order dated 20th April, 2013 the learned Civil Judge granted permission and the suit was disposed as unconditionally withdrawn.

(e) The respondents/ defendants filed an application on 4th October, 2023 seeking condonation of delay in filing application to recall the aforesaid order dated 20th April, 2013 passed in RCS No. 782 of 2012, on the premise that the said suit was withdrawn by the plaintiff fraudulently. Referring to the order dated 17th April, 2013 whereby the earlier order of status quo was modified to include utilization of FSI potential over the land belonging to the defendants, the defendants contended that the plaintiff surreptitiously withdrew the suit as status-quo was running against the plaintiff. A fraud was played on the Court by seeking withdrawal of the suit on the ground that the matter was amicably resolved between the parties though there was no such settlement. Neither the advocate for the defendants nor the defendants were informed about the motion to withdraw the said suit. It was, therefore, necessary to set aside the said order and restore the suit so that the order of status-quo, as modified by the order dated 17th April 2013, continuous to operate.

(f) As regards the delay, the defendants contended that after the unconditional withdrawal of the said suit the plaintiff did not submit building proposal for over 10 years and took any action to erect construction. However, on 19th January, 2023, the plaintiff submitted a proposal for building construction. Thus, the defendants were constrained to approach the Court for recall of the order permitting withdrawal of the suit. Hence, the delay, according to the defendants, was not intentional.

(g) By the impugned order, the learned Civil Judge was persuaded to allow the application for condonation of delay observing that the cause ascribed for the delay was sufficient as the plaintiff did not submit the building proposal and attempt to carry out the construction over the suit property.

4. Being aggrieved, the plaintiff has invoked the writ jurisdiction.

5. Mr. A.A. Karva, learned counsel for the petitioner, submitted that the impugned order is singularly unsustainable. No cause, much less sufficient one, was ascribed for the delay over 9 years in preferring an application for recall of earlier order of withdrawal of the suit. The contention that the defendants were required to approach the Court as, on 19th January, 2023, the plaintiff submitted an application for building permission was a subterfuge.

What really impairs the defendants case and hinges upon the tenability of the application is gross suppression of the facts that the defendants had sought an interim relief in a suit instituted by the defendants, being RCS No. 249 of 2013, with reference to the said status-quo order and said application was rejected by the Court on 21st May, 2013. However, without adverting to the said fact, the defendants approached the Court seeking recall of the order permitting withdrawal of the suit. Mr. Karva, the learned counsel, further submitted that such an application to recall an order permitting withdrawal of the suit by the plaintiff, was even otherwise wholly misconceived. The impugned order, therefore, deserves to be interfered with.

6. Mr. Gadigaonkar, learned counsel for the respondents made an earnest endeavour to support the impugned order. It was submitted that the trial Court has only exercised the discretion to condone the delay. Whether the order permitting the withdrawal of the suit is required to be recalled or not is yet to be decided. Thus, no prejudice as such would be caused to the plaintiff. Mr. Gadigaonkar, would urge that the withdrawal of the suit cannot be a matter of right. If a right is vested in the defendants, the plaintiffs cannot be permitted to withdraw the suit to the prejudice of defendants. The Court was, therefore, enjoined to examine whether

by permitting the withdrawal of the suit, behind the back of the defendants, the rights vested in the defendants were likely to be defeated.

7. To bolster up the aforesaid submission, Mr. Gadigaonkar placed a strong reliance on the decision of the Supreme Court in the case of **K.S. Bhoopathy and Ors. vs. Kokila and Ors.**[1] and another judgment of Rajasthan High Court in the case of **Mathuralal and Ors. vs. Chiranji Lal and Ors.**[2].

8. Mr. Gadigaonkar also joined the issue by canvassing a submission that the ambit of section 151 of the Code is elastic enough to cover in its fold an application seeking recall of an order permitting the withdrawal of the suit. To this end, reliance was placed on a judgment of the Supreme Court in the case of **Jet Ply Wood Pvt. Ltd. vs. Madhukar Nowlakha and Ors.**[3].

9. The learned counsel would, therefore, urge that, in exercise of writ jurisdiction, this Court may not interfere with an order which permits the determination of the matter on merits, rather than shutting out the defendants on the technical grounds of limitation.

10. Before adverting to consider as to whether the learned Civil Judge was justified in condoning the delay of over 9 years in seeking recall of the order of withdrawal of the suit, it may be

1 AIR 2000 Supreme Court 2132.
2 AIR 1962 Rajasthan 109.
3 AIR 2006 Supreme Court 1260.

necessary to note the cantours of the provisions contained in rule 1 of Order XXIII of the Code. It reads as under:-

> **Withdrawal and Adjustment of Suits :-**
> **1. Withdrawal of suit or abandonment of part of claim -**
> (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:
> Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.
>
> (2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.
>
> (3) Where the Court is satisfied,-
> (a) that a suit must fail by reason of some formal defect, or
> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.
>
> (4) Where the plaintiff--
> (a) abandons any suit or part of claim under sub-rule(1), or
> (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule(3),
> he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.
>
> (5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

11. A plain reading of the aforesaid provisions, especially comparing and contrasting the text of sub-rule (1) and (3) of rule 1 of Order XXIII, it becomes abundantly clear that the plaintiff may

withdraw or abandon the suit under sub-rule (1) of rule 1 of Order XXIII, at any stage. The right of the plaintiff to withdraw the suit under sub-rule (1) of rule 1 of Order XXIII is not circumscribed by any restrictions, save and except where the plaintiff happens to be a minor or a person to whom the provisions contained in rule 1 to 14 of Order XXXII extend. In the later case, covered by the proviso to sub-rule (1) of rule 1 of Order XXIII, the leave of the Court is necessary. It, therefore, implies that if the case is not covered by the proviso to sub-rule (1) of rule 1 of Order XXIII, the Code does not envisage any fetters on the choice of the plaintiff not to prosecute or abandon the suit.

12. Sub rule (3) of rule 1 of Order XXIII, on the contrary, operates in different sphere. It addresses a situation where the plaintiff seeks leave to withdraw the suit with liberty to file a fresh suit. A discretion is vested in the Court to grant the plaintiff permission to withdraw the suit with liberty to institute a fresh suit in respect of the subject matter of the suit, where the Court is satisfied that the suit must fail by reason of some formal defect or there are sufficient ground for allowing the plaintiff to institute a fresh suit.

13. The provisions contained in sub-rule (4) of rule 1 of Order XXIII also throw light on the legislative policy of permitting the

plaintiff to withdraw the suit unconditionally, if he so chooses. Sub-rule (4) precludes the plaintiff from instituting any fresh suit in respect of the subject matter of the suit where the plaintiff abandons any suit or part of claim under sub-rule (1), or withdraws from a suit or part of a claim without the permission referred to in sub-rule (3). However, if the plaintiff withdraws the suit with liberty to institute a fresh suit under sub-rule (3), the bar to the institution of a fresh suit, envisaged by sub-rule (4) does not operate. Thus, it becomes abundantly clear that for the simplicitor or unconditional withdrawal of the suit, the permission of the Court is not peremptory.

14. Reliance by Mr. Gadigaonkar on the decision in the case of **K.S. Bhoopathy** (supra) does not seem to advance the cause of submission on behalf of the defendants. The said decision, in fact, brings to the fore the distinction between the unconditional withdrawal of the suit under sub-rule (1) of rule 1 and the withdrawal of the suit with liberty to institute a fresh suit under sub-rule (3) of rule 1 of Order XXIII. The observations in the paragraphs 10 to 12 of the said case are instructive and, hence, extracted below:-

> 10] The present Rule which was introduced in place of the old Rule 1 by the Amendment Act of 1976 makes a distinction between absolute withdrawal which is termed as 'adandonment' and withdrawal with the permission of the Court. This clear distinction is maintained

throughout in the substituted Rule by making appropriate changes in the wording of various sub-rules of Rule 1.

11] The law as to withdrawal of suits as enacted in the present Rule may be generally stated in two parts; (a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the Court, in that case he will be precluded from suing again on the same cause of action. Neither the plaintiff can abandon a suit or a part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and (b) a plaintiff may, in the circumstances mentioned in sub-rule (3), be permitted by the Court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty being granted by the Court enables me plaintiff to avoid the bar in Order II Rule 2 and Section 11 CPC.

12] The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non-suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existences of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; (1) where the Court is satisfied that a suit must fail by reason of some formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or courts below. Grant of permission for withdrawal of a suit with leave to file afresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the

> discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of the large accumulation of cases in lower courts and inordinate delay in disposal of the cases.

15. The endeavour of Mr. Gadigaonkar to press into service the observations in paragraph 12 that the discretion to grant leave envisaged in sub-rule (3) of rule 1 is to be exercised by the Court with caution and circumspection, does not merit countenance as, in the instant case, such contingency did not arise. The withdrawal was plainly under sub rule (1) of rule 1 of Order XXIII. There is no warrant to import the considerations which govern the exercise of discretion under sub-rule (3) to the withdrawal simplicitor under sub rule (1) of rule 1 of Order XXIII.

16. Mr. Gadigaonkar would then urge that the said withdrawal of the suit was actuated by a design to wriggle out of the order dated 17th April, 2013 whereby the scope of the status-quo order was expanded. Under a couple of days of the said order 17th March, 2013, i.e. on 20th April, 2013, the plaintiff had surreptitiously withdrawn the suit, entailing the consequence of vacation of modified status-quo order to the prejudice of the defendants. That was the fraud played on the Court. Therefore, the learned Civil Judge was justified in exercising the discretion to condone the delay.

17. Ordinarily the Court leans in favour of condonation of delay, so as to advance the cause of substantive justice. The overarching principles that the Courts are meant to decide matters on merit and the procedure, which is a handmaid of justice, should not be allowed to score a march over the substantive justice, weigh with the Court in construing the cause ascribed for the delay, liberally. The term sufficient cause thus receives liberal construction.

18. It is equally well settled that when the Court of first instance had condoned the delay by exercising positive discretion, such discretion is not lightly interfered with in exercise of appellate or supervisory jurisdiction, unless the exercise of the discretion by the Court of first instance borders on perversity and manifest arbitrariness, and the delay has been condoned sans any cause. On the contrary, where the Court of first instance declines to condone the delay, the appellate or revisional Court may itself independently examine the justifiability of cause ascribed and draw its own conclusion. This distinction in approach was illuminating postulated by the Supreme Court in the case of **N. Balakrishnan vs. M. Krishnamurthy**[4] wherein it is held that:

> 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

4 (1998) 7 Supreme Court Cases 123.

> 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 revisional 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 to such superior court to come to its own finding even untrammeled by the conclusion of the lower court.
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> (emphasis supplied)

19. On the aforesaid touchstone, reverting to the facts of the case, first and foremost, it is necessary to note that the only cause ascribed in the application for condonation of delay was that the petitioner had not submitted the building proposal and initiated steps to carry out the construction, and the submission of building proposal dated 19th January, 2023, necessitated filing of the application.

20. The aforesaid cause, even if taken at par, by its intrinsic worth, does not qualify as a sufficient cause for condonation of huge delay of 9 years 4 months and 18 days. Undoubtedly, the length of delay is not the sole barometer. However, such huge delay, by itself, demands some account for not approaching the Court. No cause can be said to have been ascribed for the delay. The submission of building plan, at best, gave rise to a right to seek redressal. That action may sustain the claim of accrual of right to seek redressal but not a cause for not approaching the Court. The leanred Civil Judge lost sight of the distinction between cause for delay and the

necessity to seek redressal.

21. Had the matter been of delay simplicitor without intervention of concomitant circumstances, probably different considerations might have come into play. It is not the case that the defendants were unaware of the withdrawal of the suit. Nor is it the case of the defendants that they did not initiate measures to address the situation which arose on account of the withdrawal of the suit.

22. In RCS No. 249 of 2013, which was instituted by the defendants against the plaintiff, an application (Exh.24) was preferred on 18th May, 2013, (under one month of the withdrawal of the RCS No. 782 of 2012 by the plaintiff), seeking a specific prayer to grant status-quo qua utilization of FSI of the defendant's land. In the said application, it was, in terms, contended that on account of unilateral and unconditional withdrawal of the suit, status-quo order modified, by the order dated 17th April, 2012, was required to be continued. The said application was rejected by the Court on 21st May, 2013. Surprisingly, the said fact is conspicuous by its absence in the application for condonation of delay.

23. The situation which thus emerges is that the defendants immediately became aware of the withdrawal of the suit and even took measures to seek injunctive relief in the suit which they had instituted. Having failed in the said endeavour, the defendants could

not have turned back and filed an application to seek condonation of in seeking recall of the order permitting the withdrawal of the suit, passed almost 9 and half years ago. Thus, by no stretch of imagination, the cause ascribed by the defendants could have been termed as bonafide and sufficient.

24. A useful reference in this context can be made to a decision of the Supreme Court in the case of **Esha Bhattacharjee v. Raghunathpur Nafar Academy and ors.**[5]. The following principles culled out in the said case, bear upon the controversy at hand:

> "21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
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> .....
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> 21.5 (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.
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> .....
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> 21.7 (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.
>
> .....
>
> 21.9 (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.
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> 21.10 (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation."

25. The conspectus of aforesaid consideration is that, the

5 (2013) 12 SCC 649.

application for condonation of delay lacked both in bonafide and sufficiency of the cause. The learned Civil Judge was, therefore, not justified in exercising the discretion to condone the delay. The petition, therefore, deserves to be allowed.

Hence, the following order.

ORDER

1] The petition stands allowed.

2] The impugned order dated 22nd February, 2024 condoning the delay in seeking recall of the order dated 20th April, 2013 passed in R.C.S. No. 782 of 2012 stands quashed and set aside.

3] Civil Misc. Application No. 308 of 2023 stands rejected.

4] Rule made absolute in the aforesaid terms.

(N. J. JAMADAR, J.)