IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.154 OF 2023

Appellants (Ori. Defendant-1) : 1. Richa Leasing and Properties Pvt. Ltd.
Through its Director, Umesh Shyam Kambli,
having its Office at 101, Kshitij, Sena Bhavan Path,
Dadar (West Mumbai)

(Ori. Defendant-2) 2. Umesh s/o Shyam Kambli,
R/o 123/4042, Neharu Nagar, Kurla, East, Mumbai

– Versus –

Respondents (Ori. Plaintiff-1) : 1. Rameshprasad s/o Nandkishor Mishra (Dead)

(Ori. Plaintiff-2) 2. Smt. Pramila w/o Rameshprasad Mishra.

(Ori. Plaintiff-3) 3. Rohit s/o Rameshprasad Mishra,

All R/o Bungalow No.13 & 14,
Rajat Vihar, Mecosabagh, Nagpur, Maharashtra

(Ori. Defendant-3) 4. Revayur Beauty Care India Pvt. Ltd.
Through its Director,
Mrs. Palak Prakashchandra Minocha,
having its Office at 1505/1, Universal Square,
Shanti Nagar, Nagpur.

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Mr. R.P. Joshi, Advocate for the Appellants.
Dr. Ramaswamy Sundaram, Advocate for Respondent Nos.1 to 3.
None for Respondent No.4.

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CORAM : Y.G. KHOBRAGADE, J.
RESERVED ON : 21st APRIL, 2026.
PRONOUNCED ON : 30th APRIL, 2026.

JUDGMENT :

01. By the present appeal under Section 100 of the Code of Civil Procedure (for short "CPC"), the appellants are takes exception to the impugned order dated 20/10/2022 passed in Misc. Civil Application No.610/2018 by the learned Ad hoc District Judge-2, Nagpur, thereby refused to condone the delay of one year and seven months (1 year and 7 months) caused while lodging the appeal against the judgment and decree dated 05/10/2016 passed in Special Civil Suit No.1184/2010 by the learned Civil Judge Senior Division, Nagpur.

02. The present appellant Nos.1 and 2 are the original defendants whereas respondent Nos.1 to 3 are the original plaintiffs. The Respondent No.4 is the original defendant No. 3 in S.C.S. No.1184/2010. For the sake of brevity, the parties are hereinafter referred to in their original capacities as "plaintiffs" and "defendants."

03. In a nutshell, the facts giving rise to the present appeal are as under:

i. The plaintiffs instituted S.C.S.No. 1184/2010 seeking a decree for specific performance of contract in respect of the suit property situated on the first floor, bearing Nos. 43-A, 52, 53, 54 and 54-A, having RCC superstructure with built-up area of 1208 sq. ft. (112.23 sq. mtrs.) or super built-up area of 1495 sq. ft. (138.89 sq. mtrs.) along with 1.093% undivided share in the

land in a building known as “Shewalkar Gardens”, constructed on the land bearing City Survey Nos. 90/2, 90/3, 90/4 and 90/5, Sheet No. 6/16 in Khasra No.38, Mouza Parsodi, Gopal Nagar, in front of VRCE, Ward No.74, Tahsil and District Nagpur.

ii. After service of notice, defendant Nos.1 and 2 (present appellants) appeared through their learned Counsel and filed their written statement at Exh.19. However, the suit against defendant No.3 proceeded *ex parte*. On the basis of the pleadings of the plaintiffs as well as defendant Nos.1 and 2, the learned trial Court framed issues at Exh.28. In support of their case, the plaintiffs examined PW-1 Shri Rohit Rameshprasad Mishra by way of affidavit at Exh.29, PW-2 Kodumal Tirathdas Dhanrajani at Exh.43, PW-3 Ramcharan Dindayal Dubey at Exh.44, PW-4 Uttam Kumar Rameshprasad Shahu at Exh.57, and also proved documentary evidence on record. However, defendant Nos.1 and 2 neither led any evidence nor conducted cross-examination of the plaintiffs’ witnesses because of their counsel did not appear in the matter after filing of Written Statement.

iii. On 05/10/2016, the learned Civil Judge, Senior Division, Nagpur passed the judgment and decree, whereby the suit filed

by the plaintiffs was decreed. The learned trial Court directed the plaintiffs to deposit the balance consideration amount of Rs.28,00,000/- in pursuance of the agreement to sale dated 27/04/2010 for execution of the sale-deed in respect of the suit property.

iv. Thereafter, the plaintiffs initiated execution proceedings bearing S.D. No.21/2017. Subsequently, defendant Nos.1 and 2 preferred an appeal challenging the judgment and decree dated 05/10/2016 passed in S.C.S. No.1184/2010 and order passed in M.C.A. No.610/2018 filed under Section 5 of the Limitation Act, 1963 seeking condonation of delay in filing the said appeal. On 20/10/2022, the learned First Appellate Court passed the impugned order in M.C.A. No.610/2018 and declined to condone the delay.

v. Being aggrived by the said order, the Appellants/defendants have filed present appeal under Section 100 of CPC. In *Shyam Sundar Sarma vs. Pannalal Jaiswal and others – (2005) 1 SCC 436* and in case of *Devidas Ganpati Kale (died) through his Legal Heirs Bhagwan Devidas Kale and others vs. Saw. Munirbi Mahebub Karanje – 2023 SCC OnLine Bom. 1319,* wherein the issue was "Whether an order rejecting an application for condonation of

delay in filing an appeal under Section 96 of the CPC, is a decree within the meaning of Section 2(2) of the CPC, making it appealable under Section 100 of the CPC". In the cited case laws it has been held that, the order passed by the Appellate Court dismissing the application for condonation of delay in filing an appeal amounts to a decree of the Appellant Court, which is challengeable under Section 100 of CPC.

vi. On 18/09/2024, this Court passed the following order, which reads as under:

ORDER

"1. Heard learned counsel for the appellants as well learned counsels for the respondents.

2. After hearing for some time, the following substantial question of law arose in this appeal:

> *"In view of the cause shown in the application for condonation of delay whether the First Appellate Court was justified in refusing to condone the delay in filing the first appeal?"*

3. With the consent of both the parties, list the matter on 26/09/2024 for final disposal of the appeal at the admission stage."

04. The learned Counsel appearing for the appellants submits that, on 22/10/2010, the plaintiffs filed S.C.S. No.1184/2010 and prayed for a

decree of specific performance of contract based on an agreement to sale executed on 27/04/2010. After service of notice, defendant Nos.1 and 2 appeared in the suit through Adv. Ms. Shabana Karim and filed their written statement at Exh.19. The learned trial Court framed issues at Exh.28 on the basis of the pleadings of both sides. The plaintiffs examined their witnesses, i.e., PW-1 Rohit Rameshprasad Mishra by filing affidavit at Exh.29, PW-2 Kodumal Tirathdas Dhanrajani at Exh.43, PW-3 Ramcharan Dindayal Dubey at Exh.44, and PW-4 Uttamkumar Rameshprasad Shahu at Exh.57. However, Advocate Ms. Shabana Karim had left practice during pendency of the suit and did not inform the present appellants/original defendants that she left practice and that the present appellants were required to engage another Counsel. No written communication was issued to the present appellants/ original defendant Nos.1 to 3 for engagement of another Counsel to represent them or to cross-examine the witnesses on their behalf. Therefore, there was no representation on behalf of the appellants/original defendants during the course of the trial.

05. Ultimately, on 05/10/2016, the learned trial Court decreed the suit *ex parte*. Thereafter, the respondents/decree holders instituted execution proceedings bearing S.D. No.21/2017. After service of notice in the execution proceedings, the appellants came to know about passing of the *ex parte* judgment and decree dated 05/10/2016. Thereafter, on 21/03/2018, the

appellants/defendants applied for a certified copy, which was received by them on 21/05/2018. Thereafter, the appellants filed M.C.A. No.610/2018 on 30/07/2018. Therefore, there is a delay of one year and seven months in filing the appeal, which is caused due to non issuance of communication by their Counsel.

06. The learned Counsel appearing for the appellants canvassed that, the learned trial Court passed the judgment and decree dated 05/10/2016 in S.C.S. No.1184/2010 due to lapses and negligent on the part of their Counsel and they cannot made to suffer for the acts of their Counsel. Therefore, they have *bonafidely* and satisfactorily explained the delay, hence, the learned trial Court ought to have granted the application for condonation of delay caused while lodging the appeal against the *ex parte* judgment and decree. However, the learned First Appellate Court, by the impugned order dated 20/10/2022, declined to condone the delay without taking into consideration the facts and circumstances of the case, hence, prayed for quash and set aside the impugned order.

07. In support of this submission, the learned Counsel appearing for the appellants invited the attention of this Court to Rule 658 of Chapter XXIII of the Civil Manual of this Court, wherein it is provided that an Advocate shall be bound to appear in Court on any day which, by notice duly given or in accordance with the practice of the Court, is fixed for the hearing of a

proceeding in which he is engaged by a party. Further, if an Advocate for a party is not able to instruct another Advocate on account of any sudden or unexpected cause, the said Advocate is required to intimate in writing to the Court the cause which prevented him from appearing and conducting the proceedings.

08. The learned Counsel appearing for the appellants further invited the attention of this Court to Rule 660 of Chapter XXXIII of the Civil Manual, wherein it is provided that in civil cases, the appointment of an Advocate shall be deemed to be in force to the extent provided in that behalf by Rule 4 of Order III of the CPC. In sub-rule (4) of Rule 660, it is provided that, when an Advocate who has filed a Vakalatnama for a party wishes to withdraw his appearance, he shall serve a written notice of his intention to do so on his client at least seven days in advance of the case coming up for hearing before the Court. Leave of the Court to withdraw appearance may also be applied for if the client has instructed the Advocate to that effect, and upon being satisfied, the Court may permit withdrawal of the Advocate's appearance. However, in the present case, the Advocate for the appellants never issued any communication regarding the stoppage of her practice. Therefore, there was no opportunity for the appellants to engage another Counsel to defend the case on their behalf.

09. The learned counsel appearing for the appellant further placed reliance on the case of *Govinda Bhagoji Kamable and others vs. Sadu Bapu Kamable and others – 2005(1)Mh.L.J. 651* wherein the Coordinate Bench of this Court held that, Advocate cannot withdraw his vakalatnama without obtaining leave of the Court. Further, once an Advocate filed his vakalatnama, the same continues to be in force till he obtains leave of the Court to withdraw his vakalatnama and the practice of courts discharging Advocates on mere filing of no instruction pursis is deprecated. He further relied on the case of *Secretary, Department of Horticulture, Chandigarh and another vs. Raghu Raj – (2008) 13 SCC 395*, wherein the Hon'ble Supreme Court considered the law laid down in the case of *Rafiq vs. Munshilal – 1(1981) 2 SCC 788*; *Lachi Tewari vs. Director of Land Rcords – (1984 Supp.SCC 431)* and *Mangilal vs. State of M.P. - (1994) 4 SCC 564* and held in paragraph 28 as under :

> *"28. From the case law referred to above, it is clear that this Court has always insisted on advocates to appear and argue the case as and when it is called out for hearing. Failure to do so would be unfair to the client and discourteous to the court and must be severely discountenanced. At the same time, the Court has also emphasised doing justice to the cause wherein it is appropriate that both the parties are present before the court and they are heard. It has been noted by the Court that once a party engages a counsel, he thinks that his*

advocate will appear when the case will be taken up for hearing and the court calls upon the counsel to make submissions. It is keeping in view these principles that the Court does not proceed to hear the matter in absence of the counsel."

10. *Per contra*, the learned Counsel appearing for the respondents/ plaintiffs canvassed that, the substantial question of law already framed by this Court on 18/09/2024, however, the appellants/defendants have not satisfactorily explained the delay. The learned Counsel for the respondents/ plaintiffs canvassed that, on 05/10/2016, the learned trial Court passed the judgment and decree in S.C.S. No.1184/2010. Thereafter, the present appellants filed M.C.A. No.610/2018 on 30/07/2018. In the meantime, the present respondents/plaintiffs instituted execution proceedings bearing S.D. No.21/2017 for execution of the judgment and decree dated 05/10/2016. After issuance of notice in S.D. No.21/2017, the respondents/plaintiffs (DH) issued to the present appellants (JD) by speed post. Accordingly, appellant Nos.1 and 2 were served with notice on 27/11/2017 in the execution proceedings. Therefore, the appellants are having knowledge of the judgment and decree dated 05/10/2016 in S.C.S. No.1184/2010, but they fail to approach the Court within the stipulated period, i.e. from 27/11/2017 till 30/07/2018. It is further canvassed that, the explanation given by the appellants is neither plausible nor *bona fide*, so also, the reasons assigned by the appellants are not justifiable, hence, prayed for dismissal of the appeal.

11. In support of these submissions, the learned Counsel appearing for respondent Nos.1 to 3 placed reliance on the following case laws:

i. *University of Delhi vs. Union of India and others – (2020) 13 SCC 745.*

ii. *Majji Sannemma alias Sanyasirao vs. Reddy Sridevi and others – 2021 SCC OnLine SC 1260.*

iii. *Salil Dutta vs. T.M. and M.C. Private Ltd. - (1993) 2 SCC 185.*

iv. *Balwant Singh (dead) vs. Jagdish Singh and others – (2010) 8 SCC 685.*

v. *Kanta alias Shanti w/o Subhash Karkale vs. Manjulabai alias Kholki w/o Haribhau Tarare and another – 2020(1) Mh.L.J. 918.*

vi. *Mahendara P. Shah vs. Gurupreet Kamaljeet and others – 2015(5) Mh.L.J. 207.*

vii. *Chandrakant s/o Shrimantrao Patil and others vs. Vikas s/o Balaji Parsewar – 2011 (2) Mh.L.J. 94.*

12. It is a well-settled principle of law that the second appeal under Section 100 of the CPC can be decided only on the basis of a substantial question of law. A question of law having a material bearing on the decision of the case, i.e., a question the answer to which affects the rights of the parties to the suit, would be a substantial question of law, if it is not covered by any specific provision of law or settled legal principle emerging from binding precedents and involves a debatable legal issue. A substantial question of law will also arise in a converse situation, where the legal position is clear either on account of an express provision of law or binding precedents, but the Court

below has decided the matter by either ignoring or acting contrary to such legal principle. This view is supported by the judgment of the Hon'ble Supreme Court in *Nazir Mohamed vs. J. Kamala and others, (2020) 19 SCC 57*. In the case at hand, on 18/09/2024, this Court framed the substantial question of law, *"Whether the first Appellate Court was justified in refusing to condone the delay in filing of the first appeal*"?

13. It is not in dispute that, the present respondent Nos.1 to 3/ plaintiffs instituted S.C.S. No.1184/2010 on 22/10/2010 and prayed for a decree of specific performance of contract on the basis of an agreement executed on 27/04/2010. It is an admitted fact that the present appellants/ original defendant Nos.1 and 2 appeared in the matter through Advocate Ms. Shabana Karim and filed their written statement on 15/07/2011. The record indicates that, the learned trial Court framed the issues at Exh.28 on the basis of the pleadings of both sides. However, it appears that the Counsel for the present appellants/defendants never appeared in the matter after filing of the written statement and did not conduct cross-examination of the plaintiffs' witnesses. Therefore, on 05/10/2016, the learned trial Court passed the *ex parte* Judgment and decree against the present appellants.

14. The present appellants/original defendants have specifically contended that their Counsel Ms. Shabana Karim had left practice during the pendency of the suit, and no written communication was issued to them

informing that she was no longer in practice and that they were required to engage another Counsel in place of their earlier Advocate.

15. On the face of the record it further appears that subsequent to passing of *ex parte* judgment and decree, the present respondents/plaintiffs instituted execution proceedings being S.D. No.21/2017. After the order issuing notice was passed by the Executing Court, the respondents/plaintiffs issued notice to the present appellants (JD) through speed post, which is stated to have been delivered at the address of the appellants on 27/11/2017. As per the Postal track report the postal consignment as well as the postal acknowledgment it does not reflect that the notice in the execution proceedings was personally served upon the present appellants. Admittedly, there is no bailiff report to show that, the present appellants were duly served with notice in the execution proceedings personally. It is the specific contention of the appellants that, they came to know about passing of *ex parte* judgment and decree dated 05/10/2016 in S.C.S. No.1184/2010 only in the month of March, 2018, and thereafter, they immediately applied for a certified copy and received the same on 21/05/2018. Therefore, there is a delay of one year and seven months in filing the appeal against the *ex parte* judgment and decree, which is *bona fide* and substantial.

16. As per Rule 658 of Chapter XXXIII, Rules framed by the High Court under Section 34(1) of the Advocate's Act, 1961, provides that an

Advocate shall be bound to appear in Court on any day which, by notice duly given or in accordance with the practice of the Court, is fixed for the hearing of a proceeding in which he is appointed by the party. Once, Advocate files his vakalatnama, he remains on record and cannot withdraw his vakalatnama without obtaining leave of the Court and merely fling no instruction pursis. As per the law laid down in the case of *Govinda Bhagoji Kamable (supra)*

17. Sub-rule 4 of Rule 660 of Chapter XXXIII of the Civil Manual provides as under :

> ***660**. (1) In Civil Cases, the appointment of an Advocate shall be deemed to be in force to the extent provided in that behalf by Rule 4 of Order 3 of the Code of Civil Procedure, 1908.*

18. In the case at hand, though the present appellants engaged Advocate Ms. Shabana Karim and filed their written statement at Exh.19 but subsequently the Counsel for the appellants/original defendants never appeared in the matter and no written communication was served upon the present appellants/original defendants about discontinuation of legal practice. Therefore, there was no occasion for the present appellants to defend their case and to cross-examine the respondents/plaintiffs' witnesses. Ultimately, on 05/10/2016, the learned trial Court passed *ex parte* judgment and decree. Thus it prima facie appears that due to lapses and negligent on the part of the Counsel, the appellants/original defendants were deprived of an opportunity to defend their case. Therefore, considering the law laid down in *Rafiq vs.*

Munshilal, Lachi Tewari vs. Director of Land Records, and *Mangilal vs. State of M.P.*,*cited supra,* no fault can be attributed to the present appellants and the delay caused in filing the appeal against the judgment and order dated 05/10/2016 appears to be *bona fide* and justifiable.

19. In the case of *University of Delhi* (cited supra), the Court is required to take liberal approach in the matter of condonation of delay. Consideration for condonation of delay would not depend on the status of the party, namely, the Government or the public bodies so as to apply a different yardstick, but the ultimate consideration should be to render even-handed justice to the parties. Even in such cases, the condonation of long delay should not be automatic since the accrued right or the adverse consequence to the opposite party is also to be kept in perspective. "Sufficient cause" to justify the delay will depend on the backdrop of each case.

20. In the case of *Majji Sannemma (cited supra)*, there was a delay of 1011 days in filing the second appeal. In the said case, the appellant had not furnished a sufficient explanation for the period from 15/03/2017 till the second appeal was preferred in the year 2021. In these circumstances, the Hon'ble Supreme Court declined to quash and set aside the order of the High Court condoning the delay of 1011 days.

21. In case of *Salil Dutta (cited supra)*, the Hon'ble Supreme Court held in paragraph 8 as under:

"8. The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. It is true that in certain situations, the court may, in the interest of justice, set aside a dismissal order or an ex parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. The observations made in Rafiq must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition. As we have mentioned hereinabove, this was an on-going suit posted for final hearing after a lapse of seven years of its institution. It was not a second appeal filed by a villager residing away from the city, where the court is located. The defendant is also not a rustic ignorant villager but a private limited company with its head-office at Calcutta itself and managed by educated businessmen who know where their interest lies. It is evident that when their applications were not disposed of before taking up the suit for final hearing they felt piqued and refused to appear before the court. Maybe, it was part of their delaying tactics as alleged by the plaintiff. Maybe not. But one thing is clear -they chose to non-cooperate with the court. Having adopted such a stand towards the court, the defendant has no right to ask its indulgence. Putting the entire blame upon the advocate and trying to make it out as if they were

> *totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and ought not to have been accepted."*

22. Though the learned Counsel appearing for respondent Nos.1 to 3 placed reliance on the case of *Balwant Singh (cited supra)*, however, in my conscious view, it is not applicable to the facts and circumstances of the present case. In the said case, the issue was pertaining to condonation of delay in setting aside abatement for bringing the legal heirs of the deceased on record.

23. In the case of *Kanta (cited supra)*, a Coordinate Bench of this Court held in paragraphs 4 and 7 as under:

> *"4. This submission, at the first blush, appears very attractive and tends the Court to interfere with the matter. However, after hearing the learned counsel for the applicant, especially when a query was put to the learned counsel in respect of the conduct on the part of the applicant as to whether at any point of time, she on her own, contacted her advocate, the reply was in negative. A litigant who approaches to the Court must be diligent. He or she must take all steps to pursue his or her litigation. It is expected from the litigant that he or she is in contact with the lawyer who is representing his or her cause in the Court of law. A litigant cannot take a specious plea that once the case is entrusted with arm advocate his or her work is over and the advocate will take care of the matter. Advocate always discharges his duties on the instructions given to*

him by client.

7. It is very easy for a litigant to make allegations against an advocate behind his back. If the applicant wishes to make allegations against the advocate, the applicant should have a courage to join the advocate as a party and in his presence should make allegation against him. Here, the applicant wants to condemn the advocate behind his back. In my view, it is impermissible and unacceptable. Further, no steps are also being taken by the applicant against any advocate under the provision of the Advocates Act."

24. The other judgments cited by the respondents in the cases of *Mahendra Shaha* and *Chandrakant Patil (cited supra)* are based on entirely different facts and circumstances, hence, ratio laid down in both the cases are not applicable to the facts and circumstances of the present case.

25. Considering the facts and circumstances of the present case, the present appellants had engaged Advocate Ms. Shabana Karim, through whom they filed their written statement. However, subsequently, the appellants did not receive any written communication from their earlier Counsel regarding discontinuation of her practice provided under Chapter XXXIII of the Civil Manual as discussed hereinabove. Therefore, due to fault on the part of their Counsel, *ex parte* judgment and decree came to be passed on 05/10/2016. Therefore, taking into consideration of the law laid down by the Hon'ble Supreme Court in case of *Secretary, Department of Horticulture (cited supra)* as well as other case laws cited, I am of the view that the present appellants

have made out a substantial ground for condonation of delay of one year and seven months caused in filing the appeal against the *ex parte* judgment and decree dated 05/10/2016 passed in S.C.S. No.1184/2010. However, the learned First Appellate Court, by the impugned order dated 20/10/2022 held that the present appellants were not diligent in prosecuting the suit, which appears to be illegal, bad-in-law and liable to be quashed and set aside.

26. However, at the same time, the respondents/plaintiffs would suffer due to the inaction on the part of the Counsel for the present appellants. Therefore, the respondents can be compensated by awarding appropriate costs. In view of the above discussion, I answer the substantial question of law in the affirmative holding that the learned First Appellate Court failed to justify while refusing to condone the delay caused in filing the appeal. Accordingly, I proceed to pass the following order:

O R D E R

i. The Second Appeal is hereby allowed.

ii. The impugned order dated 20/10/2022 passed by the learned Ad hoc District Judge-2, Nagpur in M.C.A. No.610/2018 is hereby quashed and set aside.

iii. The delay of one year and seven months caused in filing the appeal against the judgment and decree dated 05/10/2016 is

hereby condoned subject to payment of costs of Rs.50,000/- (Rupees Fifty Thousand Only) payable by the present appellants to respondent Nos.2 and 3.

iv. The present appellants shall directly pay the costs to respondents 2 and 3 or they shall deposit the said costs before the learned *Ad hoc* District Judge-2, Nagpur within a period of 15 days from the date of receipt of certified copy this order.

v. Upon compliance of the condition of costs, the First Appellate Court shall register the appeal and dispose of the same on its own merits as expeditiously as possible.

vi. All pending civil applications stand disposed of.

(Y.G. Khobragade, J.)

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