

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

INTERIM APPLICATION NO. 616 OF 2021  
IN  
COUNTER CLAIM NO. 10 OF 2017  
IN  
SUIT NO. 154 OF 2015

Ahsan @ Mansur Hasan Khan & Anr. ... Applicants

*In the matter between :*

Saleem Hasan Khan ... Plaintiff

Versus

Ahsan @ Mansur Hasan Khan & Ors. ... Defendants

WITH  
SUIT NO. 154 OF 2015  
WITH  
NOTICE OF MOTION NO. 1977 OF 2019  
WITH  
NOTICE OF MOTION NO. 867 OF 2016  
WITH  
NOTICE OF MOTION NO. 2271 OF 2016  
WITH  
INTERIM APPLICATION (L) NO. 9070 OF 2020  
WITH  
INTERIM APPLICATION (L) NO. 1518 OF 2021  
WITH  
INTERIM APPLICATION NO. 555 OF 2022  
WITH  
INTERIM APPLICATION (L) NO. 25193 OF 2022  
WITH  
COUNTER CLAIM NO. 10 OF 2017  
IN  
SUIT NO. 154 OF 2015  
WITH  
SUIT NO. 498 OF 2015  
WITH

**INTERIM APPLICATION NO. 2833 OF 2021  
IN  
SUIT NO. 498 OF 2015**

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Mr. Mangal Bhandari i/by Akshay R. Kapadia for the Plaintiff in Suit No. 154 of 2015 and for Defendant No.4 in CC/10/2017 and for Defendant No.4 in Suit No. 498 of 2018.

Mr. Atul Daga a/w Ms. Poorva Garg and Mr. Simon Mascarenhas i/by Mulla & Mulla and Craigie Blunt & Caroe for Defendant No.1 in Suit No. 154 of 2015.

Mr. Shanay Shah a/w Ms. Saumya Brajmohan, Ms. Mallika Joshi and Ms. Khushi Merchant i/by M/s.Solomon & Co. for Plaintiff in Suit No.498 of 2018 and for Defendant No.3 in Suit No.154 of 2015.

Mr. Mutahhar Khan i/by Mr. Hafeezur Rahman for Defendant No.4 in CC/10/2017.

Ms. Swati Chandan a/w Ms.Divyae Patel i/by D. H. Law Associates for Defendant No.5 in CC/10/2017.

Adv. Uzair Kazi a/w Ms. Dhanashree Hublikar i/by Yogendra Kanchan for Defendant Nos.6 and 7 in CC/10/2017.

Mrs. S. S. Dukhande, Section Officer, office of Court Receiver.

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**CORAM: MANISH PITALE, J.**

**DATE : 1<sup>st</sup> APRIL 2024**

**P.C. :**

- . Heard learned counsel for the parties.
2. By this application, the applicants i.e. original defendant Nos. 1 and 2 to the counter claim are seeking condonation of delay of 1429 days i.e. 3 years 11 months in filing the written statement to the counter claim. The counter claim was filed by the original defendant No.1 in Suit No. 154 of 2015. The said counter

claimant has filed reply affidavit in the present application opposing the prayer for condonation of delay.

3. The learned counsel appearing for the applicants submits that although the delay is considerable, in the application, the applicants have explained the circumstances in which such a delay has occurred. It is emphasized that after the counter claim was filed, Notice of Motion No. 378 of 2017 was taken out on behalf of the applicants seeking dismissal of the counter claim, *inter alia*, for non-joinder of necessary parties. It is submitted that the said notice of motion is still pending for consideration of this Court.

4. It is further emphasized that Notice of Motion No. 567 of 2017 was filed in the counter claim for interim reliefs. In the said notice of motion, the applicants promptly filed their reply affidavit, indicating that they were indeed pursuing the matter through their advocates before this Court. It is further brought to the notice of this Court that there are other notices of motion and applications pending in the suit, wherein the applicants had taken diligent steps for pursuing the matter.

5. The learned counsel for the applicants submits that the applicants were constrained to change advocates during the pendency of proceedings and it appears that till the latest set of advocates were engaged, the applicants were not advised to file written statement in the counter claim, perhaps because the

aforesaid notice of motion for dismissal of counter claim continued to remain pending. It was perhaps believed that if Notice of Motion No. 378 of 2017 was to be allowed, the occasion to file the written statement would not arise. It is specifically stated that in January 2021, the latest set of advocates were engaged, who perused the papers and submitted that even though the notice of motion for dismissal of the counter claim continued to remain pending, written statement ought to be filed in the counter claim. Accordingly, the written statement was affirmed on 15<sup>th</sup> February 2021 along with the present application and that the application was lodged on 16<sup>th</sup> February 2021.

6. In these circumstances, it is submitted that this Court may consider showing indulgence to the applicants and condoning delay, so that the written statement to the counter claim can be taken on record and the applicants would have an opportunity to pursue their case on merits, insofar as the counter claim is concerned.

7. On the other hand, the learned counsel appearing for the original defendant No.1 in the suit i.e. the party who has filed the counter claim, submits that the contents of the present application would show that other than blaming the advocates who were changed from time to time by the applicants, no substantial reasons have been put-forth for condoning huge delay of 3 years and 11 months. It is submitted that the tendency of litigants to

blame advocates in such a manner has been frowned upon and that it has not been found to be a cogent reason for condoning delay, particularly, because the Court accepting such submissions would amount to forming an adverse opinion against advocates who are not even before the Court. In support of these submissions, the learned counsel appearing for the counter claimant relied upon judgment of this Court in the case of ***Kanta alias Shanti w/o Subhash Karkale v/s. Manjulabai alias Kholki w/o Haribhau Tarare & Anr., 2020 (1) Mh.L.J. 918.*** Judgment of Gujarat High Court in the case of ***Samusunisha Begaum & Ors. v/s. Vishnukumar Ambelal Patel & Ors., 2012 SCC OnLine Guj 6312*** and ***Heirs of Deceased Allahbux Bharuchwala v/s. Hanifaben wd./o Kasamji Devdiwada, 2018 SCC OnLine Guj 2202,*** and the judgment of Orissa High Court dated 29<sup>th</sup> September 2023, passed in Interim Application No. 348 of 2019 of ***Shankarlal Patwari v/s. Shri Jagannath Mahaprabhu & Ors.***

8. This Court has heard the learned counsel for the rival parties in the backdrop of the material placed on record. The learned counsel appearing for the counter claimant has emphasized upon the huge delay of about 3 years and 11 months in filing the written statement to the counter claim. It is emphasized that the applicants have failed to give proper reasons while seeking condonation of delay.

9. In that context, this Court has perused the contents of the

application, particularly, from paragraph 4 onwards. It appears that according to the applicants, the three sets of advocates engaged prior to the advocates now representing the applicants did not advise the applicants to file written statement to the counter claim. It was the opinion of the advocates as gathered by the applicants that since the aforementioned Notice of Motion No. 378 of 2017 seeking dismissal of the counter claim continued to remain pending before this Court, the occasion to file written statement had not arisen. It is submitted that the applicants not being aware of the technicality of the matter, were unable to place the written statement on record and as soon as the advocates now representing the applicants advised them to place the written statement on record, on 15<sup>th</sup> February 2021, the written statement was affirmed and the present application was filed immediately on 16<sup>th</sup> February 2021, seeking condonation of delay and permission to place the written statement on record of this Court.

10. The tenor of explanation given in the application does appear to indicate that the earlier sets of advocates could not advise the applicants to file the written statement to the counter claim, notwithstanding, pendency of Notice of Motion No.378 of 2017.

11. The learned counsel for the counter claimant has submitted that this amounts to blaming the advocates behind their back.

12. This Court is of the opinion that while considering the reasons put-forth for condonation of delay, the Court is required to consider all the surrounding circumstances. In the present case, it is relevant to note that a number of notices of motion and applications have remained pending, while even issues have not been framed in the original suit, which was filed as far back as in the year 2015. The pendency of the notices of motion and the applications is due to the heavy docket of the Court, for which the applicants cannot be blamed.

13. It is also relevant to note that in Notice of Motion No.567 of 2017, filed by the counter claimant seeking interim reliefs in the counter claim, admittedly, the applicants did file their reply affidavit. It appears that one of the interim reliefs sought in the said notice of motion was granted by this court and the said notice of motion is also pending for consideration. It is also a matter of record that applicants have been pursuing their case in the pending notices of motion and applications. There is no dispute about the fact that the applicants have been pressing for orders in their Notice of Motion No. 378 of 2017 for dismissal of the counter claim.

14. The surrounding circumstances in the present case do indicate that the applicants cannot be said to be responsible for not pursuing the pending matters or not remaining in touch with their advocates. It is a matter of record that the applicants appear

to have changed their advocates on three occasions. This Court need not comment on the said aspect of the matter, as it is the wish of the litigant to continue or not to continue with a set of advocates.

15. The statements made in the application do indicate that the advocates engaged at various points of time by the applicants could not advise the applicants to file the written statement in the counter claim, notwithstanding pendency of the notice of motion filed on their behalf for dismissal counter claim. This Court is not accepting the statements made in the application as putting blame on the advocates engaged from time to time. Therefore, there is no question of an adverse observation against the set of advocates, while allowing the present application.

16. In any case, the judgments upon which the learned counsel for the counter claimant has placed reliance can be distinguished on facts. In the case *Kanta alias Shanti w/o Subhash Karkale* (supra), this Court was dealing with a situation where the applicant was seeking condonation of delay of about twenty years in filing an appeal. Apart from the quantum of delay in the said case, the present case can be distinguished on the basis that the litigation between the parties is still pending and it is not as if the applicants have delayed in challenging any order that has reached finality before the District Court.

17. As regards the judgments of the Gujarat High Court in the case of *Samusunisha Begaum & Ors.* (supra) and *Heirs of Deceased Allahbux Bharuchwala* (supra), this Court finds that the same are distinguishable on facts. In the said case, as a matter of fact, the Court found that the applicants had been recalcitrant and that they had not remained in contact with their advocates to pursue the matter before the Court. Such cannot be the allegation against the applicants in the facts of the present case.

18. Even with regard to the judgment of Orissa High Court in the case of *Shankarlal Patwari* (supra), the Court found that the change of advocates was being used as an excuse by the applicants to allege incompetence on the part of the advocates and in that context, it was found to be inappropriate to accept the reasons put-forth while seeking condonation of delay.

19. As noted herein above, in the present case, although the statements made in the present application may appear to indicate that the earlier sets of advocates could have advised the applicants for filing written statement, notwithstanding pendency of the Notice of Motion No. 378 of 2017 for dismissal of counter claim, this Court is not attributing any blame to the earlier sets of advocates.

20. This is particularly in the backdrop of the fact that insofar as the pending notices of motion and applications are concerned, the

applicants cannot be blamed for not pursuing the same or delaying the matter unnecessarily.

21. In such circumstances, this Court is of the opinion that delay in filing written statement on the part of the applicants can be condoned, so that their version on merits as regards the counter claim is on record. In the event, the notice of motion seeking dismissal of the counter claim is eventually dismissed, the applicants would have an opportunity to place their case on merits before this Court.

22. The Court is ultimately required to examine the claims of the rival parties on merits, so that the truth of the matter is ascertained.

23. In view of the above, the application is allowed and the delay is condoned. The applicants are directed to file their written statement on record within one week from today.

24. List on 4<sup>th</sup> April 2024, for framing of issues, to be included in the supplementary list.

**MANISH PITALE, J.**