IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.655 OF 2018(delay)
AND
CIVIL APPLICATION NO.656 OF 2018 (stay)
IN
FIRST APPEAL (S.T.) NO.25979 OF 2017

Shriram General Insurance Company
Limited Through
Mr. Satpalsingh Rajput Manager Legal ...Applicant/Appellant
V/s.
Sou. Jyoti Vithoba Nahire and Anr ...Respondents

WITH
INTERIM APPLICATION NO.14068 OF 2023(delay)
AND
INTERIM APPLICATION NO.14070 OF 2023 (stay)
IN
FIRST APPEAL (S.T.) NO.13289 OF 2023

Mr. Hiralal Bhansilal Khinvasara ...Applicant/Appellant
V/s.
The New India Assurance Co. Ltd
and Anr ...Respondents

WITH
INTERIM APPLICATION NO.13789 OF 2023 (delay)
AND
INTERIM APPLICATION NO.13790 OF 2023(stay)
IN
FIRST APPEAL (S.T.) NO.15533 OF 2023

United India Insurance Co. Ltd
Mumbai ...Applicant/Appellant
V/s.
Mr. Amit Satish Puri and Ors ...Respondents

WITH
INTERIM APPLICATION NO.14002 OF 2023 (delay)
WITH
INTERIM APPLICATION NO. 14003 OF 2003 (stay)
IN
FIRST APPEAL (S.T.) NO.16797 OF 2023

IFFCO Tokio General Insurance Company Ltd ...Applicant/Appellant

V/s.

Smt. Vimal Suresh Borage and Ors ...Respondents

Mr. Pandey, learned Counsel (upon invitation by Court)

Mr. Rahul Mehta i/b KMC legal Ventures, Advocate for the Applicant/Appellant in CAF/655/2018, CAF/656/2018 and FA(ST) No./25979/2017,

Mr. Yuvraj P Narvankar with Mr. Sandesh S. Darade, Advocates for the Applicant/Appellant in IA/14068/2023, IA/14070/2023 and FAST NO/13289/2023,

Ms. Varsha Chavan, Advocate for the Applicant/Appellant in IA/13789/2023, IA/13790/2023 and FAST NO/15533/2023.

Mr. Rahul Mehta i/b KMC legal Ventures, Advocate for the Applicant/Appellant in IA/14002/2023, IA/14003/2023 and FAST NO/16797/2023.

CORAM : ABHAY AHUJA, J.
RESERVED ON : 11TH AUGUST, 2023
PRONOUNCED ON : 21st September, 2023

ORDER:-

1. By these interim applications, the Applicants are seeking stay of the operation, implementation and execution of the respective

impugned judgments and awards passed by the respective Motor Accident Claims Tribunals.

2. Since an issue was raised with respect to the interpretation/construction of sub-rule (3) of Rule 3-A of Order XLI of the Code of Civil Procedure, 1908 (the "CPC") which directs that the Court shall not make order of stay of execution pending disposal of the application for condonation of delay made under Order XLI Rule 3-A (1) as to whether the said Rule was imperative or permissive, this Court had vide order dated 3rd August, 2023 in Interim Applications no. 13789 of 2023 and 13790 of 2023 in First Appeal Stamp No. 15533 of 2023 after briefly hearing the learned Counsel for the applicant in the light of Division Bench decision of this Court (by Hon'ble Shri Justice G. H. Guttal and Hon'ble Shri Justice P. V. Nirgudkar, as their Lordships then were) in the case of ***Bhagwan s/Ganpantrao Godsay Vs. Kachrulal s/Bastimal Samdariya and in connected matters***[1] had invited other learned Counsel appearing in similar applications and desirous of addressing the Court on the issue

1 Civil Revision Applications No. 6, 8, 9 and 10 of 1986 decided on 23rd January, 1987.

whether the use of the word “shall” in Order XLI Rule 3-A (3) is permissive or imperative.

3. Accordingly, on 11th August, 2023, learned Counsel had addressed this Court on the issue and the arguments had been concluded and orders were reserved. The learned Counsel were also granted liberty to summarise their arguments and submit the same in the form of written submissions.

4. I have now had the occasion to consider the submissions made on behalf of the learned Counsel and also perused the judgments in support.

5. Mr. Pandey, learned Counsel upon invitation of this Court has drawn the attention firstly to the provisions of Rule 279 of the Maharashtra Motor Vehicles Rules, 1989 (the “MV Rules”) to submit as to how the provisions of Order XLI of the CPC apply to appeals under Section 173 of the Motor Vehicles Act, 1988 (the

"MV Act"). For the sake of convenience, the said Rule is usefully quoted as under:-

> *" 279. Form of appeal and contents of memorandum.- (1) Every appeal against the award of the Claims Tribunal shall be preferred in the form of a memorandum signed by the appellant or an Advocate or Attorney of the High Court duly authorised in that behalf by the applicant and presented to High Court or to such officer as it appoints in this behalf. This memorandum shall be accompanied by a copy of the award.*
>
> *(2) The memorandum shall set forth concisely and under distinct heads the grounds of objection to the award appealed from without any argument or narrative, and such grounds shall be numbered consecutively.*
>
> *(3) Save as provided in sub-rules (1) and (2) the provisions of Order XXI and Order XLI in the First Schedule to the Code of Civil Procedure, l908 (V of l 908), shall, mutatis mutandis apply to appeals preferred to High Court under Section 173."*

6. For the sake of completeness Section 173 of the MV Act, which provides for appeals under the Act is also usefully quoted as under:-

> *"173. Appeals.—(1) Subject to the provisions of sub-section (2), any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:*
>
> *Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court, unless he has deposited with it twenty-five thousand rupees or fifty per cent. of the amount so awarded, whichever is less, in the manner directed by the High Court:*

> *Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.*
>
> *(2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees."*

7. Referring to the above Section, Mr. Pandey would submit that Section 173 (1) of the MV Act provides for filing of an appeal by any person aggrieved by an award of a Claims Tribunal to the High Court, subject to the provisions of sub-Section (2), within 90 days from the date of the award. Sub-Section (2) provides that no appeal shall lie against any award of the Claims Tribunal, if the amount in dispute in the appeal is less than Rs. 1 lakh. It is submitted that the second proviso to Section 173(1) bars entertaining the appeal after expiry of the period of 90 days, but if the High Court is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time, it may entertain the appeal. Learned Counsel submits that the MV Act does not provide for the procedure for the appeals to be filed under the said Section though it provides the forum of the appeal i.e. the High Court, however, as mentioned above it is Rule 279 (3)

of the MV Rules, which makes it clear that the provisions of Order XXI and Order XLI in the first schedule to the CPC shall apply to appeals preferred to the High Court under Section 173.

8. Order XLI Rule 3-A of the CPC is usefully quoted as under:-

> *"3-A. Application for condonation of delay— (1) When a appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.*
>
> *(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.*
>
> *(3) Where an application has been made under sub-rule (1), the Court shall not made an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal."*

9. Learned Counsel would submit that a plain reading of sub-Rules 3-A (1) and (3) would suggest that where an application has been made under sub-Rule (1) for condonation of delay, the Court pursuant to sub-Rule (3) shall not make an order for stay of execution of decree against which the appeal is proposed to be

filed, so long as the Court does not after hearing under Rule 11 decide to hear the appeal.

10. Learned Counsel refers to the decision of the High Court of Andhra Pradesh in the case of ***M/s United India Insurance Co. vs. Undamatla Varalakshmi & Ors.***[2] and submits that the Andhra Pradesh High Court has held that Order XLI Rule 3-A is a mandatory provision and is a clear bar for passing an order of stay of execution of a decree before the Court decides to hear the appeal and there is no discretion in the Court in a time barred appeal to grant stay of execution of the award or decree conditionally or unconditionally. Learned Counsel would submit that the Andhra Pradesh High Court relying upon the decision of the Hon'ble Supreme Court in the case of ***Hindusthan Commercial Bank Limited Vs. Punnu Sahu***[3]***,*** has observed that the expression "entertain" means "adjudicate upon" or "proceed to consider on merits". The Andhra Pradesh High Court also relied upon the decision of the Hon'ble Supreme Court in a more recent decision in the case of ***Arcelormittal Nippon Steel (India) Ltd. Vs. Essar Bulk***

2 IA No. 2 of 2023 in M. A. C. M. A.No.221 of 2023 decided on 5th July, 2023.
3 1971 (3) SCC 124

Terminal Ltd.*[4]*, to elucidate on the expression "entertain" and held that the said word means to consider by application of mind to the issues raised. That the Court entertains the case when it takes a matter up for consideration, which process of consideration could continue till the pronouncement of judgment. Citing the aforesaid decision, in paragraph 44, the Hon'ble Andhra Pradesh High Court held that thus there was no question of entertaining an appeal to proceed to consider the merits of the appeal with respect to the order under appeal in a time bound appeal so long as the condonation of delay matter is not decided.

11. The Andhra Pradesh High Court in paragraph 45 also went on to hold that for deciding an application for interim relief, the Court has to see if it is a case for grant of interim relief or not. The Court has to satisfy, if any *prima facie* case is made out; if the order under appeal is erroneous and if the operation is not stayed, some irreparable injury is going to be caused to the appellant then that may be a *prima facie* case. The Andhra Pradesh High Court further observed that any such view, even a *prima facie* view, cannot be taken unless the Court proceeds to consider the appeal

4 (2022) 1 SCC 712

on its merits and demerits. Interim relief as such cannot be entertained till the appeal is entertained and, it cannot be entertained, so long as the delay condonation matter is not decided. Interim relief cannot be granted just for the asking in a time barred appeal. The Andhra Pradesh High Court after considering the decision of the Hon'ble Supreme Court in the case of ***Brahampal vs National Insurance Co.***[5], which relied upon ***Balwant Singh Vs. Jagdish Singh***[6] held that the law of limitation is a substantive law and has definite consequence on the right and obligation of a party to the lis. It was held that once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant. The Andhra Pradesh Court accordingly held in paragraph 51 that in a time barred appeal, so long as the matter for condonation of delay was not considered and decided in favour of the applicant for condonation of delay, the valuable right of the successful litigant acquired on the basis of judgment / award under challenge cannot be interfered with or restricted to the execution of the decree only to

5 (2021) 6 SCC 512
6 (2010) 8 SCC 685

a limited extent. That by grant of any such interim order at the stage would put a restriction on the right of the claimant to get execution of the award before the Tribunal. That the claimants had acquired a right to treat the award as having attained finality on expiry of the limitation period for filing an appeal, which could not be interfered with pending consideration of the condonation of delay application. It was accordingly held that in a time barred appeal under Section 173 of the MV Act before the High Court, stay of execution of the award cannot be granted, so long as the delay condonation matter is not decided finally, in view of 2nd proviso to Section 173 of the MV Act & Order XLI Rule 3A (3) of the CPC.

12. Mr. Pandey, learned Counsel has also referred to the decision of the Hon'ble Supreme Court in the case of ***Brahampal vs National Insurance Co.(supra)*** and drawn the attention of this Court to paragraph 8 of the said decision to submit that while passing the said judgment, the Hon'ble Supreme Court was fully aware that Chapter XII of the MV Act was a beneficial legislation intended to protect the rights of the victims affected in road

accidents. That it was a self contained code in itself providing for procedures for filing claims, for passing award and for preferring an appeal. That even the limitations for preferring the remedies are contained in the code itself.

13. Learned Counsel then referred to the decision of the Hon'ble Supreme Court in the case of ***Navinchandra N. Majithia Vs. State of Maharashtra and others.***[7] Learned Counsel would submit that in the said case the Hon'ble Supreme Court has while considering rejection of an appeal filed in the Madhya Pradesh High Court which was filed out of time unaccompanied by an application for condonation of delay, while allowing the SLP permitting the appellant to rectify and to file an application for condonation of delay, observed that from a combined reading of sub Rules (1) and (2) of Rule 3-A of Order XLI, it was manifest that the purpose of requiring the filing of an application for condonation of delay under sub Rule (1) alongwith a time barred appeal, was mandatory in the sense that the appellant could not without such application being decided, insist upon the Court to hear his time barred appeal. It is submitted by the learned Counsel that, that

7 Decided on 4th September, 2000

was the very purpose sought to be achieved by insertion of sub Rules (1) and (2) of Rule 3A. Learned Counsel has quoted the following paragraphs:-

> *"The following passage from the judgement of the Division Bench of the Karnataka High Court can usefully be quoted in this context: A combined reading of sub-rules (1) and (2) of R.3A makes it manifest that the purpose of requiring the filing of an application for condonation of delay under sub-rule (1) along with a time barred appeal, is mandatory, in the sense that the appellant cannot, without such application being decided, insist upon the Court to hear his time barred appeal. That was the very purpose sought to be achieved by insertion of sub-rules (1) and (2) of R.3A becomes clear from the legislative history of new R.3A to which we have already adverted.*
>
> *We may also point out that a Division Bench of the Patna High Court has adopted the same view even earlier in State of Bihar & ors. vs. Ray Chandi Nath Sahay and ors. (AIR 1983 Patna 189).*
>
> *The object of enacting Rule 3-A in Order 41 of the Code seems to be two-fold. First is, to inform the appellant himself who filed a time barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the court has to deal with application for condonation of delay as a condition precedent."*

14. Mr. Pandey would submit that despite the clear wordings of the Apex Court, it is presumed by the appellants that seeking stay

in time barred appeals without even issuing notice to the other parties is a matter of right.

15. The above decision in my view only refers to the construction of the word "shall" used in sub-rule (1) but not with reference to the use of the word "shall" in sub-rule (3) of Rule 3-A of Order XLI. The context in both the rules are different: in sub-rule (1) it is with respect to whether a condonation of delay application supported by Affidavit is to accompany an appeal whereas in sub-rule (3) it is in the context of making an order of stay of execution of the decree against which the appeal is proposed to be filed. In any event in the case of ***Navinchandra N. Majithia Vs. State of Maharashtra and others (supra)*** although the Hon'ble Supreme Court held that sub-rule (1) was mandatory it also observed that the rule is not intended to operate as unremediably or irredeemably fatal against the appellant if the Memorandum is not accompanied by any such application at the first instance and the deficiency is a curable defect. The Hon'ble Supreme Court allowed the appeal and set aside the impugned judgment allowing the appellant to pursue the condonation of

delay application in filing the second appeal. Therefore, the said decision of the Hon'ble Supreme Court may not be of much assistance to the arguments advanced by Mr. Pandey.

16. On the other hand, Ms. Varsha Chavan, Mr. Devendranath S. Joshi, Mr. Yuvraj Narvankar, Mr. Amol Gatne, Mr. Rahul Mehta, learned Counsel have argued that if the stay application is not entertained till the disposal of the delay application, the appeal could become infructuous as then, the impugned judgment and order may have been executed.

17. The main plank of their arguments rest on a decision of the Division Bench of this Court in the case of ***Bhagwan Ganpatrao Godsay Vs. Kachrulal Bastimal Samdariya and connected matters (supra)***. Learned Counsel would submit that this decision was pursuant to a reference made by a single judge who differed from a view adopted by another judge of this Court on the construction of Rule 3-A (3) of Order XLI of the CPC. It is submitted on their behalf that the very question that has arisen herein has been answered by the Division Bench in the said case and therefore, the

views of the Division Bench of this Court would be binding on a Single Judge of this Court.

18. It is pointed out that there were two questions formulated by the Division Bench and the first question was the relevant one. The said first question is set out hereunder:

> *"(1) Having regard to the prohibition enacted by Rule 3-A (3) of Order XLI of the Code of Civil Procedure which directs that "the Court shall not make order of stay of execution", is the appellate Court empowered to make interim orders of stay of execution of decrees appealed from, pending disposal of the application for condonation for condonation of delay made under Order XLI, Rule 3-A (1)?*

19. The Division Bench has while considering question (1) recorded that the said question raises certain further questions; (a) whether the prohibition enacted by the words "shall not make order of stay of execution" in Rule 3-A (3) is mandatory. (b) Whether the Legislature intended that during the interregnum between the making of the application for condonation of delay and the hearing under Order XLI, Rule 3-A, the decrees appealed from should be executed thereby rendering the appeal infructuous.

(c) Whether the Court can resort to its inherent powers to prevent the failure of justice by granting interim stay notwithstanding the aforementioned prohibition.

20. Since question (2) concerned the Hyderabad Rent Act, it would not be necessary to discuss the same as the question does not relate to the discussion at hand.

21. The Division Bench of this Court firstly considered the scheme of Order XLI Rule 3-A as well as its history and the mischief it sought to plug. After recounting the same in paragraph 11, the Division Bench records the reason for passing Rule 3-A stating that it was obviously to change the existing law and therefore, the reason for the passing of the Act must lie in some defect in the existing law. That if the existing law is not defective, Parliament would not want to change it. It is the mischief to which the amendment is directed. The Division Bench also gave a background and quoted the statement of objects and reasons for the enactment of Rule 3-A as under:-

"Where an appeal is filed after the expiry of the period of limitation, it is the practice to admit the appeal subject to the provisions as to limitation being raised at the time of hearing. This practice has been disapproved by the Privy Council which has stressed the expediency of adopting a procedure for securing the final determination of the question as to limitation even at the stage of admission of the appeal. New Rule 3-A is being inserted to give effect to the said recommendation".

Clause 87(ii) reads:-

"The Committee is of the view that the Court should not be empowered to grant ad interim stay of execution of the decree unless the Court has, after hearing under Rule 11 of Order XLI, decided to hear appeal, Sub-rule (3) in the proposed Rule 3-A of Order XLI has been inserted accordingly"

22. Thereafter, it summarized the following facts appearing from statement of objects and reasons as under:-

"(i) The practice "to admit appeal subject to the provisions as to the limitation being raised at the time of hearing" was intended to be curbed. This was the mischief sought to be suppressed.

(ii) It was expedient to adopt a procedure for securing the final determination of the question as to limitation even at the stage of admission of the appeal.

(iii) The Court should not be empowered to grant ad interim stay of execution of the decrees unless the Court has decided to hear the appeal under Rule 11.

What was sought to be curbed by the Legislature was the practice to admit appeals without deciding the question of limitation. The dominant object of the legislative purpose was to ensure that the courts do not admit appeals and postpone the consideration of the question of limitation beyond the stage of admission. For this

> *purpose the Legislature thought it expedient to evolve a procedure. In other words, the mischief was in the practice of the courts of granting interim stay of execution of the decrees without admitting appeals. The practice left the consideration of limitation open until the appeals were finally disposed of. The purpose was not to frustrate the right of appeal itself but to regulate it in such manner that the Courts consider condonation of delay before admission of appeals. This would be clear from the words "the expediency of adopting a procedure for securing the final determination of the question as to limitation" used in the statement of objects and reasons".*

23. The Division Bench observed that what was sought to be curbed by the legislature was the practice to admit appeals without deciding the question of limitation. The dominant object of the legislative purpose was to ensure that the Courts do not admit appeals and postpone the consideration of the question of limitation beyond the stage of admission. It is for this purpose the legislature thought it expedient to evolve a procedure. The mischief was in the practice of the Courts granting interim stay of execution of the decrees without admitting appeals. The practice left the consideration of limitation open until the appeals were finally disposed. The purpose was not to frustrate the right of appeal itself but to regulate it in such manner that the Courts consider condonation of delay before admission of appeals. This

the Division Bench said would be clear from the words "the expediency of adopting a procedure for securing the final determination of the question as to limitation" used in the statement of objects and reasons.

24. After considering in great detail the application of rules of construction, observing that the consequences of literal construction of Rule 3-A of Order XLI as being undesirable which the Parliament could not have intended, relying upon the decisions of this Court in the case of ***N. Dasgupta Vs. Prakash K. Shah***[8] as well as the decision of the Hon'ble Supreme court in the case of ***Govindlal Chaganlal Patel Vs. APMC Godhra and ors.***[9], as well as the scheme of Order XLI Rule 3-A as expounded earlier that the application for condonation of delay must be disposed before the hearing of the appeal under Rule 11 and after considering the legislative intent of inserting Rule 3-A was that the right of appeal created by Section 96 should be advanced as the intent was that the Court should not admit appeals and stay execution of decrees without deciding the question of limitation, the Division Bench

8. *AIR 1984 Bombay 390*

9 *1975 (2) SCC 482**

held that the legislature intended that the Appellate Court may exercise its power of granting stay during the 60 days in which the right of appeal could be exercised without extending such period without admitting the appeal.

25. The Division Bench observed that in Rule 3-A (3) the reference is to the "proposed appeal" and not to appeal. Rule 1 of Order XLI employs the word 'appeal'; this distinction implies that the memorandum of appeal which is barred by limitation and therefore accompanied by an application for condonation of delay under Rule 3-A (1) is not an appeal but a proposed appeal. The legislature implied that the proposed appeal be transformed into an appeal after which the delay is condoned and the appeal is heard under Rule 11. Rule 11-A enjoins the Court to endeavour to conclude the hearing of appeal within 60 days from the date from which the memorandum of appeal is presented. In other words the hearing under Rule 11 must conclude within 60 days from the date of presentation of the proposed appeal. In order that the proposed appeal is transformed into an appeal, the proceedings must not be short circuited by execution of decree. The Division Bench

observed that it stands to reason therefore that in order to fulfil the legislative intent of transformation of proposed appeal into an appeal, the proceeding should not be frustrated by execution of a decree. The Division Bench then went on to consider the difference between appeals against decrees and appeals against orders which were not decrees and observed that Order XLI Rule 3-A would not apply to appeals from orders. It also observed that it was unlikely that the legislature intended that an appeal from a decree may be frustrated by operation of Rule 3-A and the appeal from an order should not be subjected to similar consequence. Then the Court went on to expound on Rule 1-A of Order XLIII after which Rule 3-A was discussed as being applicable to an Appellate Court and not to a Trial Court, from whose decree the appeal is preferred.

26. Rule 3-A applies to Appellate Court and not trial Court from whose decree the appeal is preferred. Under Rule 5 (2) “the Court which passed the decree” is empowered to “order the execution to be stayed” if the decree is appealable. The only restriction on this power is that the application for stay must be made “before the expiration of the time allowed for appealing therefrom”. There is

no restriction which limits the exercise of this power, so that the stay does not extend beyond the period of limitation prescribed for the appeal. The application may be made within the period of limitation but the Court's order may result in staying the execution which may well extend beyond the period of limitation prescribed for the appeal. While an order of the Court from whose decree the appeal is preferred may result in staying execution beyond the period of limitation, yet the Appellate Court which is seized of the "proposed" appeal cannot stay the execution even for a few days. The Division Bench observed that such an absurd result was not in the intendment of the legislature and that in their opinion, the power to stay the execution of decrees during the period of 60 days referred to in Rule 11-A was intended to be conferred on the Appellate Courts.

27. Thereafter, the question as relevant to the discussion at hand whether the use of the word "shall" in Order XLI Rule 3-A (3) indicates legislative imperative was considered by the Division Bench in paragraph 21. The Division Bench, while observing that the words "shall" and "may" are often treated as interchangeable,

raised a question whether in the instant case did the legislature intend that in all situations and at all events its command shall be obeyed or did it expect the courts to comply with it substantially. Citing the decision of the Hon'ble Supreme Court in the case of ***Govindlal Patel Vs. Agricultural Produce Market Company***[10], the Division Bench noted that ordinarily the answer depends upon the language in which the intent is clothed. The meaning and intention of the legislature must govern and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design and the consequences, which would follow from construing it one way or the other. The Division Bench relying upon the decision of the Hon'ble Supreme Court in the case of ***Haridwar Singh Vs. Begum Sumvrui***[11]**,** observed that no universal rule can be laid down and the subject matter should be looked into and the importance of the provision that is disregarded and the relation of that provision to the general object intended to be secured, is to be considered.

10 1975 (2) SCC 482
11 1973 (3) SCC 889

28. The Division Bench thus held that the construction of the word "shall" whether it is mandatory or imperative should be consistent with the object of the legislature to expedite disposal of the cases of condonation of delay and to ensure that such applications subserve the remedy of appeal itself. The provision of 60 days for transformation of the proposed appeal (Rule 3-A(3)) into an appeal (Rule 11) are consistent with the permissive nature of the word "shall". The object of the enactment is merely to provide a regulatory procedure to prevent appeals being admitted without considering the question of condonation of delay. The permissive or directory use of the word "shall" fully conforms to this legislative intent and that if the same is construed as mandatory, the appeal may become infructuous thereby destroying the regulatory content or Rule 3-A for, then there is nothing left to regulate. Holding thus, the Division Bench opined that the word "shall" in Rule 3-A (3) has not been used to denote the imperative. It is permissive while the application for condonation of delay is pending during the 60 days provided by the statute. Paragraph 21 of the decision of the Division Bench of this Court is usefully quoted as under:-

"21. Another question raised is whether the use of word 'shall' in Order 41, Rule 3-A(3) indicates Legislative imperative. The words 'shall' and 'may' are often treated as inter-changeable. As the Supreme Court held in Govindlal Patel v. Agriculture Produce Market Committee, 1975(2) SCC 482 the word 'shall' must normally mean 'shall' and not 'may'. But in the instant case did Legislature intend that in all situations and at all events its command shall be obeyed or does it expect the courts to comply with it substantially? Ordinarily the answer depends upon the language in which the intent is clothed. The meaning and intention of the legislature must govern and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design and the consequences, which would follow from construing it the one way or the other. (Crawford on Statutory Construction-quoted by the Supreme Court in Govindlal v. Agriculture Produce Market Committee, 1975(2) SCC 482. No universal rule can be laid down in this matter. In such case, we must look to the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured Hardwarsingh v. Begun Sumbrui,1973(3) SCC 889. Thus, is the construction of the word 'shall' as mandatory or imperative consistent with the object of the Legislature to expedite disposal of the cases of condonation of delay and to ensure that such applications subserve the remedy of appeal itself? The provision of 60 days for the transformation of the 'proposed' appeal [R. A(3)] into an 'appeal' (Rule 11) the situations like those set out in paragraphs 19 and 20 are consistent with permissive nature of the word 'shall'. The object of the enactment is merely to provide a regulatory procedure to prevent appeals being admitted without considering the question of condonation of delay. The permissive or directory use of the word 'shall' fully conforms to this Legislative intent. If construed as mandatory, the appeal may become infructuous, thereby destroying the regulatory content of Rule 3-A for, then there is nothing left to regulate.

> *In our opinion, therefore, the word 'shall' in Rule 3-A has not been used to denote the imperative. It is permissive while the application for condonation of delay is pending during the 60 days provided by the statute."*

29. Justice Guttal's views were concurred by Justice Nirgudkar holding that the word "shall" used in Order XLI Rule 3-A (3) is directory and not mandatory. Justice P. V. Nirgudkar referred to the famous quotation from the decision by Justice **V. R. Krishna iyer in the case of The State of Punjab and another Vs. Shamlal Murari and another**[12] as under:-

> "*Procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are not the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, though procedural, will thwart fair hearing of prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, the court should not enthrone a regulatory requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end product on technicalities"*

30. The learned Counsel have also cited a few other decisions viz. a decision of a Single Judge of this Court in the case of ***Shaikh Ibrahim Janmohammad Vs. Tekchand Alias Ravindra Fakirchand***

12 1976 (1) SCC 719

Rathod[13] where also the word "shall" was construed as "may" in the interest of justice relying upon the decision of the Gujarat High Court in the case of ***Naran Annappa Shethi Vs. Jayantilal Chunilal Shah.***[14] The following paragraph in the case of Shaikh ***Shaikh Ibrahim Janmohammad Vs. Tekchand Alias Ravindra Fakirchand Rathod (supra)*** is usefully quoted as under:-

> *"In view of the amended provisions of Order 41 of the Civil Procedure Code an application to condonation of delay in filing an appeal has to be decided before admitting the appeal and issuing notice to the Court below under Rule 13 of Order 41 of the Civil Procedure Code. Sub-clause (3) of Rule 3-A of O.41 reproduced above provides that an order for stay of execution of decree shall not be made as long as the Court does not after hearing under Rule 11 decide to hear the appeal. The Civil Procedure Code has to be interpreted so as to advance the cause of justice. In case a decree is allowed to be executed before deciding the application for condonation of delay and also before hearing under Rule 11 C.P.C., the judgment-debtor would be put to a great loss and inconvenience in case later on the Court condones the delay and also admits the appeal on hearing under Rule 11. This Rule was considered by the Gujrat High Court in Naran Annappa Shethi v. Jayantilal Chunilal Shah, 1986 Guj. L. R. 206 and after exhaustive discussion held that the rule was not mandatory and despite the word "shall" the provision made in sub-clause(3) of Rule 3-A was only directory. I fully agree with the reasoning given in that judgment and on the same reasoning I find that the rule is not mandatory. Therefore, if in the interest of justice the Court thinks necessary to stay*

13 Civil Revision Application No. 723 of 1985 dated 23rd October, 1986.
14 1986 Guj. L. R. 226

the execution for the decree pending hearing of the application for condonation of delay, it can certainly stay the execution pending hearing and decision of the application for condonation of delay and admission of appeal"

31. Paragraph 7 of the decision in the case of ***Naran Annappa Shethi Vs. Jayantilal Chunilal Shah (supra)*** is also usefully quoted as under-

"7. The provisions of R. 3-A cannot be said to be mandatory for the following reasons:

(a) The provision contained in O. 41, R. 3A of the Code is in the realm of procedure. The procedural law as far as possible cannot and should not be interpreted in such a way so as to take away the rights of the parties.

In this connection the observations of the Supreme Court in the case of Sangram Singh v. Election Tribunal, Kotah, reported in AIR 1955 SC 425, may be referred to:

"Now a Code of Procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties: not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it."

Therefore, unless there is compulsion, the procedural law should be read so as to advance the cause of justice and should not be strictly construed so that the vested rights of the parties to get a matter adjudicated on merits are frustrated.

(b) The contention that having regard to the wordings of R. 3-A of O. 41 of the Code, the provision has got to be construed as mandatory cannot be accepted. It is true that looking to the phraseology of the provisions of O. 41, R. 3-A, one may be tempted to say that the provision is mandatory. This is because of the use of the phrase "it shall be accompanied by an application supported by affidavit." While adopting the literal construction of the provision, one has got to keep in mind the intention of the Legislature in enacting the provision. As stated above, the intention of the Legislature was to see that the practice of deferring the question of limitation and deciding the same together with the final hearing of the appeal was not proper and that was required to be stopped. Therefore, the provision for an application for condonation of delay and for deciding the same before admitting the appeal has been made. There is no other virtue in insisting upon an appeal memo being accompanied by such an application supported by affidavit as held by the Supreme Court in the case of State of M.P. v. Azad Bharat Finance Co. reported in AIR 1967 SC 276, if a statute leads to absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies meaning of words and even the structure of the sentence. In Para 5 of the judgment, the Supreme Court has observed:

"It is well settled that the use of the word "shall" does not always mean that the enactment is obligatory or mandatory; it depends upon the context in which the word "shall" occurs and the other circumstances."

(c) In the instant case, if strict adherence to the provisions of R. 3-A is insisted upon, it is likely to result into immense hardship, inconvenience and in many cases, it will surely lead to miscarriage of justice. There are likely to be cases in which the appellant may be bona fide believing that his appeal was within time; or the Court may, while considering the appeal at the final hearing stage, think that the appeal was filed beyond the period of limitation. At the stage of final hearing only, it may come to the notice of the Court or it may be

pointed out by the other side that the appeal was in fact filed beyond the period of limitation. The Court may come to the conclusion that the appeal, as a matter of fact, was filed after the expiry of the period of limitation. The Court may also find that it was a case of bona fide mistake. In such cases, if strict adherence to the provisions of O. 41, R. 3-A is insisted upon, the appeal will have to be dismissed as being time-barred without considering the question of condonation of delay because there was no application accompanying the appeal memo praying for condonation of delay. Such an absurd result would never be intended by the Legislature. As a matter of fact, the Legislature never wanted to cover such type of cases. The only intention of the Legislature was to see that the question of limitation should be decided initially before admitting the appeal. For achieving this object it is not necessary that there must be a written application praying for condonation of delay and that such application should be accompanied with the appeal memo.

(d) Despite the use of the word 'shall', the provision made is only directory. The surest test for determination as to whether the provision is mandatory or directory is to see as to whether the sanction is provided therein. If one looks at the provision of O. 41, R. 3-A it is clear that there is no such sanction provided in the rule itself. In this view of the matter, the provision has got to be construed as directory.

(e) At this stage, reference may be made to a Division Bench judgment of the Patna High Court in the case of State of Bihar v. Ray Chandi Nath, AIR 1983 Patna 189. In that case also the provisions of O. 41, R. 3-A came up for interpretation and the view taken by the Patna High Court is that the provision is directory and not mandatory.

(f) In both the decisions relied upon by the counsel for the respondent-landlord, the provisions of O. 41, R. 3-A have been held to be mandatory. No reasons have been assigned why the provision is held to be mandatory.

Probably the learned Judges of the High Court of Kerala and High Court of Karnataka who decided the aforesaid cases were persuaded to hold the provision mandatory on account of the language of the provision. With utmost respect, it is not possible to agree with the view taken by the Kerala and Karnataka High Courts. The view taken in these two decisions is literal one and it would frustrate the ends of justice.

(g) The following passage from Crawford on Statutory Construction (Ed. 1940, Article 261, p. 516) may be seen:

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also while considering its nature, its design and the consequences which would follow from construing it the one way or the other."

The aforesaid passage has been approvingly quoted by the Supreme Court in the case of Govindlal Chhaganlal Patel v. Agricultural Produce Market Committee, Godhra, reported in AIR 1976 SC 263. Applying this well recognised canon of construction of statutes, the conclusion is inescapable that the word 'shall' used in the provision is directory and not mandatory and, therefore, it must be read as 'may'."

32. No doubt that the decision of the Division Bench of the Andhra Pradesh High Court in in ***M/s United India Insurance Co. vs. Undamatla Varalakshmi & Ors (supra)*** presents a possible interpretation of sub-rule (3) of Rule 3-A of Order XLI of the Code

of Civil Procedure, when it holds that in a time barred appeal so long as the matter for condonation of delay is not considered and decided in favour of the applicant for condonation of delay the valuable right of the successful litigant acquired on the basis of the judgment/award under challenge cannot be interfered with or restricted and that in a time barred appeal under Section 173 of the MV Act before the High Court, stay of execution of the award cannot be granted, so long as the delay condonation matter is not decided finally, in view of 2nd proviso to Section 173 of the MV Act and Order XLI Rule 3A (3) of the CPC.

33. However, what the Hon'ble Andhra Pradesh High Court with respect, does not appear to have considered is what has been considered by the Division Bench of this Court in ***Bhagwan Ganpatrao Godsay Vs. Kachrulal Bastimal Samdariya and connected matters (supra)*** that if the word "shall" in sub-rule (3) is construed as mandatory the appeal may become infructuous as the decree may have been executed by then. The whole object of bringing in Rule 3-A was to ensure that the Courts do not admit appeals and postpone the consideration of the question of limitation beyond the stage of admission. The mischief was in the practice of the Courts

granting interim stay of execution of decrees without admitting appeals and the consideration of limitation was left open until the appeals were finally disposed. The purpose was not to frustrate the right of appeal itself but to regulate it in such manner by evolving a procedure that the Courts consider condonation of delay before admission of appeals. Also what the Hon'ble Andhra Pradesh High Court did not consider that the reference in sub-rule (3) in Rule 3-A is to a proposed appeal and not to an appeal.

34. Although the Learned Counsel have referred to the decision of the Hon'ble Supreme Court on the interpretation of the word "shall" in Sub-Rule (1) of Rule 3-A of Order XLI in the case of ***State of M.P. and Anr. Vs. Pradeep Kumar and Anr.(2000) 7SCC 372*** , however, no decision of the Hon'ble Supreme Court with respect to the interpretation/construction of the word "shall" in sub-rule (3) of Rule 3-A of Order XLI contrary to the decision of the Division Bench of this Court in the case of ***Bhagwan Ganpatrao Godsay Vs. Kachrulal Bastimal Samdariya and connected matters (supra)*** has been brought to my notice.

35. Ergo, considering the authoritative pronouncement of a Division Bench of this Court in the case of ***Bhagwan Ganpatrao Godsay Vs. Kachrulal Bastimal Samdariya and connected matters (supra)*** that the word "shall" used in sub-rule (3), of Rule 3-A in Order XLI of the CPC be construed as permissive and not mandatory in the absence of any decision to the contrary, I am bound by the same.

36. In this view of the matter, the applications for stay of the impugned judgment and award passed under the MV Act in a proposed First Appeal can be considered for ad-interim/interim stay even if the condonation of delay application is pending.

37. Although the Learned Counsel have referred to other decisions, however, considering that there is an authoritative pronouncement on a reference, by a Division Bench of this Court on the interpretation of sub rule (3), of Rule 3-A, I do not deem it necessary to deal with the same. For the same reason, the other arguments of the learned Counsel need not be gone into.

38. This Court would like to place on record its appreciation for the presentation made by all the Learned Counsel.

39. In view of the aforesaid, I now proceed to consider each of these applications.

CIVIL APPLICATION NO.656 OF 2018 (stay)
IN
FIRST APPEAL (S.T.) NO.25979 OF 2017

Shriram General Insurance Company
Limited Through
Mr. Satpalsingh Rajput Manager Legal ...Applicant/Appellant
V/s.
Sou. Jyoti Vithoba Nahire and Anr ...Respondents

40. Learned Counsel would submit that the implementation, operation and execution of the judgment and award dated 25th January, 2017 be stayed, subject to deposit of entire decretal amount.

41. Having heard learned Counsel and having perused the application, let the implementation, operation and execution of the judgment and award dated 25th January, 2017 be stayed, subject to deposit of the entire decretal amount along with interest in the concerned Tribunal within a period of four weeks.

42. List on **19th October, 2023** alongwith Interim Applications No. 655 of 2023.

WITH
INTERIM APPLICATION NO.14070 OF 2023 (stay)
IN
FIRST APPEAL (S.T.) NO.13289 OF 2023

Mr. Hiralal Bhansilal Khinvasara ...Applicant/Appellant
V/s.
The New India Assurance Co. Ltd
and Anr ...Respondents

43. Learned Counsel would submit that the implementation, operation and execution of the judgment and award dated 28th November, 2018 be stayed, subject to deposit of entire decretal amount.

44. Having heard learned Counsel and having perused the application, let the implementation, operation and execution of the judgment and award dated 28th November, 2018 be stayed, subject to deposit of the entire decretal amount along with interest in the concerned Tribunal within a period of four weeks.

45. List on **19th October, 2023** alongwith Interim Applications No. 14068 of 2023,

WITH
INTERIM APPLICATION NO.13790 OF 2023(stay)
IN
FIRST APPEAL (S.T.) NO.15533 OF 2023

United India Insurance Co. Ltd
Mumbai ...Applicant/Appellant
V/s.
Mr. Amit Satish Puri and Ors ...Respondents

46. Learned Counsel would submit that the implementation, operation and execution of the judgment and award dated 12th January, 2023, be stayed, subject to deposit of entire decretal amount.

47. Having heard learned Counsel and having perused the application, let the implementation, operation and execution of the judgment and award dated 12th January, 2023 be stayed, subject to deposit of the entire decretal amount along with interest in the concerned Tribunal within a period of four weeks.

48. List on **19th October, 2023** alongwith Interim Applications No. 13789 of 2023.

WITH
INTERIM APPLICATION NO.14003 OF 2023 (stay)
IN
FIRST APPEAL (S.T.) NO.16797 OF 2023

IFFCO Tokio General Insurance
Company Ltd ...Applicant/Appellant
V/s.
Smt. Vimal Suresh Borage and Ors ...Respondents

49. Learned Counsel would submit that the implementation, operation and execution of the judgment and award dated 9th March, 2003 be stayed, subject to deposit of entire decretal amount.

50. Having heard learned Counsel and having perused the application, let the implementation, operation and execution of the judgment and award dated 9th March, 2023 be stayed, subject to deposit of the entire decretal amount along with interest in the concerned Tribunal within a period of four weeks.

51. List on **19th October, 2023** alongwith Interim Applications No. 14002 of 2023.

(ABHAY AHUJA, J.)