

* **HIGH COURT OF DELHI : NEW DELHI**

+ **C.R. Petition No.321/2004**

Judgment reserved on : 17th September, 2008

Judgment pronounced on : 17th October, 2008

Universal Builders & Contractors ...Petitioner

Through : Mr. Harish Malhotra, Sr. Adv.
with Mr. Rajinder Aggarwal &
Mr. Vipul Gupta, Adv.

Versus

Sheila Singh Uppal & Others Respondents

Through : Mrs. C.M. Chopra, Sr. Adv. with
Ms. Maldeep Sidhu, Adv.

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether the Reporters of local papers may
be allowed to see the judgment?

2. To be referred to Reporter or not?

3. Whether the judgment should be reported
in the Digest?

Yes

MANMOHAN SINGH, J.

1. This revision petition has been filed against the order dated 13th May 2004 passed by Additional District Judge, Delhi in Suit No.286/2003, whereby the application of the plaintiff under Order IX Rule 9 for restoration of suit which was dismissed in default on 7th February, 1996 was allowed Respondent No.1 (hereinafter referred to as plaintiff) filed a suit for specific performance and damages on 5th February,

1988 in respect of the provisional booking of the flats at the fourth floor of the building called Praveen apartments(now known as golf apartments) at Sujan Singh Park South, New Delhi.

2. Learned Senior counsel for the petitioner (Defendant in the suit) has argued that the suit was dismissed in default on 7th February 1996, the respondent no. 1 was always negligent and had shown total callousness and utter disregard for prosecution of the suit and the conduct of the respondent no. 1 is apparent from the various orders passed by the learned trial court even prior to the dismissal of the suit. Learned senior counsel has also made his submission that after the dismissal of the suit on 7th February 1996 the respondent no. 1 filed an application under Order IX Rule 9 Code of Civil Procedure read with Section 151 Code of Civil Procedure for restoration of the suit on 10th May, 1996 which was also not in time. He has further argued that why respondent no. 1 did not enquire from Advocate for long years about the progress of the suit and even after filing of the application under Order 9 Rule 9 Code of Civil Procedure, the record for the period 10th November 1996 to 17th January 2000 reveals that the respondent no. 1 was thoroughly negligent in taking steps for service of notice of

the application to the petitioner. Lastly, it is submitted that the application is barred by limitation having been filed beyond 30 days from the date of dismissal of the suit without any application of the condonation of delay.

3. On the other hand learned Senior counsel for the respondent no. 1 has made her submissions that the earlier counsel for the respondent no. 1 was bed ridden from 31st May 1992 till he expired on 3rd February 1995. It was not disputed by the respondent no. 1 that no enquiry regarding the progress of the case was made by respondent no. 1 from 31st May 1992 when her earlier counsel who became bed ridden for a period of almost 4 years, she was also not aware about the death of Sh. G.R. Chopra, Advocate. Therefore, in view of above, sufficient cause exists within the meaning of Order 9 Rule 9 read with Section 151 Code of Civil Procedure. It is argued that the past conduct of the respondent no. 1 has not very much relevant while deciding the application under Order 9 Rule 9 Code of Civil Procedure and if the court is satisfied about the sufficient cause for non appearance then the said application is liable to be allowed. The submissions have been made that as per well settled law liberal approach should be adopted by the courts. It has been further argued that in case the

application under Order 9 Rule 9 has been filed beyond the time, no application under Section 5 of the Limitation Act is required and the delay should be condoned on the basis of the averments itself if the same discloses sufficient cause for delay in filing.

4.
 - a) In the instant case, no doubt on the date of filing of the application i.e. 10th May 1992 there was a delay of 62 days as per record and no application for condonation of delay under Section 5 of the Limitation act was filed.
 - b) It is not in dispute that Sh. G.R. Chopra was the earlier counsel engaged by the respondent no. 1 who was bed ridden between 31st May 1992 onwards till he died on 3rd February 1995 and due to his prolonged illness he was not appearing for long time before the courts and the suit was dismissed in default on 7th February 1996.
 - c) There is a delay in filing of the application but at the same time the explanation given by the respondent no. 1 is that the respondent no. 1 was not aware about the death of the Advocate nor did she enquire about the progress of the matter during the said period.
5. The trial court while allowing the application of the respondent no. 1 for restoration of the suit held that a party against whom an order of dismissal in default is passed has

a right to approach the court and satisfy it that he or she was prevented by sufficient cause from appearing before the court on the date when default occurred. Only ground for restoration of a suit under Order IX Rule 9 Code of Civil Procedure is the existence of sufficient cause for non-appearance of the party at the time the suit was called for hearing. The term 'sufficient' cause has not been defined anywhere.

6. It is further held by the learned trial court that it is a question of fact depending upon the circumstances of each case. The court should adopt liberal approach while determining whether sufficient cause exists. Prolonged illness of the advocate engaged by the applicant/plaintiff to conduct her cause and his death after prolong illness on 3rd February, 1995 do constitute sufficient cause required under Order IX Rule 9 of Code of Civil Procedure. The past conduct of the plaintiff during progress of the suit is not of much importance while the court is satisfied about the sufficiency of cause of non-appearance of the plaintiff on the date of hearing when the suit was dismissed in default.
7. As per Article 122 of the Limitation Act, the application should be filed within 30 days from the date of the dismissal of the suit in default for restoration. No separate

application is required and the delay can be condoned on the basis of averments in the application for the restoration of the suit, the separate application under section 5 of limitation act is not a necessity.

8. In the case of **Devinder Pal Sehgal & Anr. V. M/s Partap Steel Rolling Mills Pvt. Ltd. & ors.; JT 2001 (10) SC 463**, Apex Court clearly laid down the above proposition. An oral prayer for condonation under Section 5 of Limitation Act is sufficient. Formal application in writing is not necessary for granting relief under Section 5 of Limitation Act. Thus the trial court rightly condoned the delay in filing an application under Order 9 Rule 9 Code of Civil Procedure even in the absence of any separate application under section 5 of limitation act.
9. In the case of Devinder Pal Sehgal (supra) the Apex Court clearly laid down in para 7 as follows :-

“We have perused the restoration application as well as petition filed under Section 5 of the Limitation Act for condonation of delay in filing the same. It appears that in the application for restoration, all relevant facts have been stated not only to show that the plaintiffs had sufficient cause for non appearance on 24th August, 1988 but also to show sufficient cause for condonation of delay in filing the restoration application. This is the reason why in the petition for condonation of delay, it has been simply stated that facts stated in the restoration application may be taken into consideration for condonation of delay in filing the restoration application.

Therefore, merely because in the order of trial court, specifically, there is no reference to petition for condonation of delay, it cannot be said that it did not consider the same. From a bare perusal of the order, it would appear that the grounds stated in the restoration application for non appearance on 24th August, 1988 as well as delay in filing the restoration application having found favour with the trial court, the suit has been restored, therefore, it cannot be said that the order of restoration has been passed without condoning the delay in filing the restoration application. The submission of the learned counsel appearing on behalf of the respondent that application for restoration filed on behalf of the plaintiffs was dismissed earlier for non prosecution cannot be taken to be a ground for throwing out the restoration application as the High Court on the earlier occasion set aside order of the trial Court whereby restoration application was dismissed for non-prosecution and the said order attained finality. In view of these facts, we are of the opinion that trial court had not acted in the exercise of its jurisdiction illegally or with material irregularity and accordingly the High Court was not justified in interfering with its order in the exercise of revisional jurisdiction."

10. Section 5 of Limitation Act provides for the extension of the prescribed period in certain cases which reads as under :

"Section 5. Extension of prescribed period in certain cases

Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation.—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.”

11. From the bare reading of the above provision it can not even be implied in law that the power of the court to condone the delay is circumscribed by an application being filed. The power to condone delay can be exercised if the applicant satisfies the court that he had sufficient cause for not filing the appeal within the period prescribed. The court can be satisfied even from the affidavits or the documents on the record.
12. It is not necessary in law that an application must be filed. Of course as a matter of practice the applicant files such an application. But the power of the court is not necessarily dependent on a formal application being made by the applicant. If it is made, well and good; but if it is not made and only an oral prayer is made for condonation of delay the court is not powerless if there is material on the record to show facts constituting sufficient cause for condonation of delay.
13. In **Nand Singh v. Estate Officer & Ors.; AIR 1993 Delhi 38**, it was observed that even an oral application for

condonation is sufficient cause for condoning the delay, no formal application in writing is necessary. We consider in the interest of justice the averments in the restoration application should be entertained and the relief under Section 5 of the Act should be granted. Similar observations were made in AIR 1989 Gujarat 44.

14. The learned Senior counsel for the petitioner has relied upon *P.K. Ramachandran vs. State of Kerala & anr.* AIR 1998 Supreme Court 2276 and on *Badri Bhagat Jhandewalan Temple vs. Delhi Development Authority* 2003 IV AD (DELHI) 299. I feel that the said decisions cited by learned counsel for the petitioner are not applicable to the facts and circumstances of the present case. In the case *P.K. Ramachandran vs. State of Kerala & anr.* (supra) the application for condonation of delay was ordered to be dismissed on the ground that no explanation were offered by the applicant and there was a delay of 565 days. Similarly, in another case *Badri Bhagat Jhandewalan Temple vs. Delhi Development Authority* (supra), the decision was entirely based on different facts. In the said case, the application under Order 9 Rule 13 was filed after the suit was finally decided by the Court on merits when even plaintiff adduced the evidence by way of affidavit. In

the present case, suit in question is at an early stage. In this case, sufficient cause has been shown before the learned trial court who has given specific finding in this regard. Otherwise this court agrees that court should not show any latitude and indulgence to any irresponsible litigant.

15. In view of settled law on the subject, this court is of the view that no separate application to condone the delay under Section 5 of Limitation Act is necessary to set aside the order of dismissal in default in an application for restoration. If the ground seeking setting aside ex parte decree and condonation is one and the same, the delay can be condoned on the basis of the averments made in the restoration application.
16. In the present case although the respondent no. 1 appears to be not as vigilant as he ought to have been, but in view of the nature of the present case and by showing sufficient cause the application under Order 9 Rule 9 of the Code of Civil Procedure was allowed by the learned trial court by exercising its discretion subject to imposing the cost of Rs. 5,000/- for the said default and restore the suit to its original position.
17. In view of the nature of the present case and doing substantial justice for disposal of the matter on merit, this

court is not inclined to interfere with the discretion exercised by the learned trial court which has come to the conclusion that there is a sufficient cause shown by the respondent no. 1 for filing the application under Order 9 Rule 9 read with Section 151 Code of Civil Procedure.

18. In view of the above said reasons, the revision petition is hereby dismissed. No costs.

MANMOHAN SINGH, J.

October 17, 2008
sa/ns