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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RFA 64/2008

% ***Judgment dated on: 14.07.2010***

BALRAJ DANG Appellant
Through Mr. Pankaj Vivek, Adv.

versus

ANAND KUMAR Respondent
Through Mr. Aman Mehta, Adv.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI

1. Whether the Reporters of local papers may be allowed to see the judgment? **YES**
2. To be referred to Reporter or not? **YES**
3. Whether the judgment should be reported in the Digest? **YES**

G.S.SISTANI, J. (ORAL)

CM No. 2310/2008 (under Section 5 of Limitation Act for condonation of delay)

CM No.2312/2008 (condonation of delay in refilling the appeal)

1. Both these applications have been head together and the same are being disposed of by a common order.
2. In the present case the judgment and decree was passed on 18.8.2005. The appellant applied for certified copy of the judgment and decree on 20.9.2005 which was received by him on 24.9.2005. According to the appellant the last date of filing of the appeal was 21.11.2005. Learned counsel for the appellant submits that there are sufficient, reasonable and cogent grounds for condonation of delay in filing the appeal as well as the delay in refilling the appeal. Counsel for the appellant submits that the respondent had filed a suit under the provisions of Order XXXVII CPC. The High Court had passed a decree which led to the filing of Execution Petition N0.64/1994. It is contended that the parties herein

arrived at an amicable settlement which was duly recorded by the High Court in its order dated 18.11.2005. It is submitted that in compliance with the settlement the appellant herein paid the respondent Rs.26.50 lakhs in full and final settlement of all the disputes arising out of litigations pending between the parties. Counsel for the appellant submits that the appeal was prepared by him and was ready on 18.11.2005 but in view of the settlement arrived at between the parties, which is also evident from the subsequent order dated 7.12.2005, passed in the execution petition, as per which the sum of Rs.26.50 lakhs were paid to the respondent herein, the appellant did not file the appeal. It is submitted that in utter violation of the terms of settlement the respondent herein in a mala fide manner filed an execution petition in the trial court. The appellant herein filed objections in the execution petition based on the amicable settlement. It is submitted that the objections were dismissed on 23.3.2007 and thereafter the appellant filed an EFA which was withdrawn on 30.1.2008. The order by which the objections of the appellant herein were dismissed was also challenged by filing CM(M) which was dismissed on 20.12.2008. Learned counsel submits that the appeal was filed on 31.5.2007 beyond the period of limitation on account of the fact that the appellant was of the firm belief that parties have resolved their disputes and differences and thus he seeks condonation on this ground.

3. As far as the application for condonation of delay in refiling the appeal is concerned it is submitted that the appeal was filed on 31.5.2007, however, as the appellant herein was suffering from T.B. and acute back pain for which he was advised rest from 12.6.2007 to 18.1.2008, the appellant could not pursue the appeal and it is only after he recovered from his illness that he contacted his counsel on 21.1.2008 and thereafter on the same date it was found that appeal was lying under

objection. The appeal was taken back, objections removed and refilled on 25.1.2008. Learned counsel has placed strong reliance on the medical certificate which was issued by one Dr. Vinod Raina, as also copies of prescriptions in support of his arguments that the appellant was advised rest during the relevant period and thus he could not contact his counsel and the objections could not be removed and thus appeal could not be refilled. Counsel submits that the appellant has a strong case on merits and even otherwise there are sufficient reasons for condoning the delay. He also submits that the Court must take a liberal view in the matter and the delay in filing the appeal as well as the refilling of the appeal be condoned.

4. Learned counsel for the respondent has vehemently opposed both the applications on the ground that the applications are devoid of any merit and the stand taken by the appellant is false and dishonest. It is further contended that the parties had arrived at a settlement with respect to the suit filed by the respondent under Order XXXVII CPC based on a written contract in the sum of Rs.27.50 lakhs. A settlement was recorded and the respondent had agreed to accept a sum of Rs.1.00 lakh less than the principal amount and also did not press for interest which was due and payable. It is contended that reliance placed on the order dated 18.11.2005 and 7.12.2005 is misplaced in view of the fact that the settlement was only with respect to the litigation arising out of the suit filed under Order XXXVII and not the present litigation. He further submits that reading of the order itself would show that there is no specific mention of the present suit in which a decree had already been passed on 18.8.2005. It is submitted that even otherwise the stand of the appellant that the order of 18.11.2005 pertains to all the litigations between the parties has been rejected by the trial court by an

order dated 23.3.2007 the objections based on the settlement was rejected.

5. Counsel next submits that the order dated 23.3.2007 was assailed by the appellant by filing a CM(M) before this Court and the same stand taken by the appellant herein that parties had arrived at an amicable settlement including present litigation was disallowed by the High Court in the order dated 19.12.2008.
6. Counsel for the respondent next submits that CM.No.2312/2008 cannot be treated as an application for refilling, as the appellant admittedly failed to remove the objections within the time allowed. While relying on Chapter-IA (a) and Rules 5(i), (ii) and (iii) of the Delhi High Court Rules and Orders, counsel for the respondent submits that the objections not having been removed within the time allowed which is 30 days and not refilling the same within the period allowed would amount to a fresh filing as per Rule 5(3) of the Delhi High Court Rules and Orders. It is, thus, contended that the application for condonation of delay in refilling is liable to be rejected on this ground alone. Counsel, however, submits that the grounds taken in this application are false, dishonest and misleading. Learned counsel for the respondent has drawn the attention of the Court to the medical certificate which has been placed on record and relied upon by the appellant. It is submitted that the medical certificate is not valid for court cases as per the endorsement on the medical certificate itself. Mr. Mehta submits that the medical certificate and the prescription do not suggest that the appellant was either bedridden or was not in a position to instruct his counsel. He submits that even otherwise the medical certificate apparently is a false certificate which has been obtained by the appellant which is also evident from the fact that during this period the appellant was appearing before other courts. Counsel has placed

reliance on the copies of orders which have been placed on record which show that the appellant herein being a judgment debtor in the proceedings initiated by the respondent herein had appeared on 27.7.2007, 27.8.2007, 23.11.2007 and 8.1.2008 during this very period, when appellant was stated to be indisposed, suffering from acute pain in the back.

7. I have heard learned counsel for the parties and carefully perused the pleadings and the documents filed along with the pleadings.
8. The admitted facts which emerge after hearing the counsel for the parties are that a judgment decree was passed against the appellant on 18.8.2005, the appellant applied for certified copy on 20.9.2005 which was obtained by him on 24.9.2005 and the last date for filing the appeal was 21.11.2005. The stand taken by the counsel that the parties had arrived at an amicable settlement on 18.11.2005 is not borne out from the order which is sought to be relied upon for the reason that when the order recording settlement between the parties was passed a decree had already been passed in the second suit, subject matter of the present appeal, while in the settlement there is no mention of the second suit. Even otherwise, this very contention of counsel for the appellant was rejected on 23.3.2007 when the objections were dismissed and also this submission did not find favour with the single Judge of this Court in CM(M) No.192/2008 which was filed by the appellant herein assailing the order dated 23.3.2007. Reading of the order dated 18.11.2005 itself would show that despite the present decree having been passed there is no mention or reference to this litigation and even otherwise the respondent herein had settled the matter with the appellant for an amount of less than Rs.1.00 lakh of the principal amount and also the respondent did not press for interest and cost. Even assuming for the sake of argument that the appellant did not

file the appeal as he was under the belief that all disputes stood resolved which contention of course already stand rejected, there is no sufficient cause which has been shown as to why the appeal was not filed after 23.3.2007 when the objections were rejected. The appeal admitted was filed only on 21.5.2007. I find force in the submissions of counsel for the respondent that the application CM No.2312/2008 cannot be treated as an application seeking condonation of delay in refiling of the appeal in view of the settled position of law and also taking into consideration the Delhi High Court Rules and Orders as per Rule 5(iii) in case the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar/Assistant Registrar/Incharge of filing which is to be considered as a fresh institution.

9. I am fortified by this view by a decision of Division Bench of this Court in **Asha Sharma & Ors. V Sanimiya Vanijiya P. Ltd. and Ors.** reported in 162 (2009) DLT 542. The relevant paragraphs read as under:-

“11. No doubt the term "sufficient cause" appearing in Section 5 of Limitation Act and Order XLI Rule 3 of the Code of Civil Procedure needs to be liberally construed so as to advance justice. As was held by the Hon'ble Supreme Court in Indian Statistical Institute v. Associated Builders and Ors. AIR 1978 SC 335, the delay in re-filing is not subject to the rigours - which are usually applied in excluding the delay in a petition filed Under Section 5 of the Limitation Act. While considering condonation of delay in re-filing, the court has also to consider the nature of the defects which led to return of the document. If the objections are minor and technical in nature, the courts ought to be more liberal in condoning the delay. The standard for testing bonafides of the Appellant have to be more strict, in a case where mandatory documents are not filed with the Memorandum of Appeal. The approach of the court, therefore, has to be different where it is found that the Memorandum of Appeal was not accompanied by documents such as certified copy of the impugned judgment/order/decreed or the requisite court fee was not paid. The court has to be mindful that when there is delay in filing the appeal, a vested right accrues in favour of the respondent who, on account of

non-filing of the appeal, becomes entitled to benefit of the judgment/decreed/order against which the appeal is preferred. Non registration and consequent non listing of an Appeal within the prescribed period leads the opposite party to believe that the judgement/order passed in his favour has been accepted by the opponent and that is the reason for not filing the Appeal. Therefore, even while adopting a liberal approach in such matters, the courts cannot mechanically condone even if no reasonable cause is shown at all.

23. It is trite law that Rules of Procedure being hand-mades of justice, a party should not be refused relief merely because of some mistakes, negligence or inadvertence. Rules of Procedure are designed to facilitate justice and further its ends. But, even if we take a rather liberal approach in this matter, we are unable to find any good ground for condonation of delay in filing this appeal. None of the reasons given in the application is convincing or logical. The impression we gather is that the appellants deliberately delayed filing of the appeal so as to prolong the litigation. It cannot be said that even if the appellants were totally negligent and careless and have not come forward with any worthwhile explanation for the delay, the court ought to condone the delay in re-filing. The Rules framed by the High Court cannot be allowed to be taken so casually and there will be no sanctity behind the rules if every delay in re-filing, is to be condoned irrespective of howsoever unreasonably long and unexplained it be, and howsoever mandatory be the nature of the documents, non-filing of which renders the Appeal defective. We cannot condone the delay merely because an application for condonation of delay has been filed. No court would not like to reject an appeal as time barred unless there are strong reasons, which compel the court to take such a view. Some indulgence and a liberal view in such matters is well-accepted but to say that the court has no option in the matter and must accept the Memorandum of Appeal irrespective of the nature of the objections and delay in re-filing, even where there is no reasonable explanation to justify the delay, would only be travesty of justice and will be as good as removing the relevant Rule in High Court Rules and Orders, from the Statute Book.”

10. While the present application CM No.2312/2008 cannot be treated as an application for condonation of delay in refiling the appeal. I find that

the reasons which have been mentioned for not refilling the appeal not to be bona fide in view of the fact that the medical certificate sought to be relied upon by the appellant clearly states that the same is not to be used in court cases and secondly according to this application the appellant was suffering from acute back pain and he could not pursue the matter with his counsel nor he could remove the objections on the other hand copies of the orders which have been placed on record, show that the appellant herein was appeared in Execution Petition No.1596/2006 on 27.7.2007, 27.8.2007, 27.11.2007 and 8.1.2008 while in the application it has been stated that from 15.6.2007 to 18.1.2008 the petitioner was unwell. The stand taken by the appellant is dishonest and thus it cannot be said that the appellant was prevented in filing the appeal for sufficient or cogent reasons. While deciding the application under Section 5 of the Limitation Act the Court is duty bound to record its satisfaction that the grounds for condonation of delay were reasonable and there is satisfactory explanation for the delay in filing the appeal.

11. While dealing with an application for condonation of delay under Section 5 of the Limitation Act, the Court must bear in mind two important considerations. Firstly, the expiration of limitation for filing an appeal gives rise to a legal right to a decree-holder to treat the decree as binding between the parties and this right should not be lightly disturbed. Second, if sufficient cause is shown for condonation of delay, the delay should be condoned. It has been repeatedly held by the Supreme Court of India that the words "sufficient cause" should receive a liberal construction so as to advance substantial justice. In the same breath, it has been held that the discretion should be exercised, when there is no negligence or inaction nor want of bona fides imputable to

the appellant the Court must be satisfied that there was due diligence on the part of the appellant.

12. The facts of this case are to be considered on the touchstone of the broad principles which have been laid down by the Supreme Court of India while considering the present application for condonation of delay. The conduct of the appellant in the present case shows total callousness and negligence. I find no merit in the applications, the same are accordingly dismissed.

RFA No. 64/2008 & CM No. 2541/2008

13. In view of the order passed in CM No.2310/2008 & CM No.2312/2008, the appeal as also CM No.2541/2008 stand dismissed.
14. Interim order stands vacated.

JULY 14, 2010
'aj/ssn'

G.S.SISTANI,J