

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Hearing : 1st November, 2010

Date of Decision : 29th November, 2010

+ **CM Nos.10765/2009 & 10766/2009 in
RFA(OS) No. 61/2009**

M/S D.V.H INDUSTRIES Appellant
Through : Mr.Ravi Gupta, Sr. Advocate with
Mr. V.K.Malik Advocate.

versus

M/S HARTLEY KNITS Respondent
Through : Mr. Sunil Magon, Advocate.

CORAM:

* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE G.P.MITTAL

1. Whether reporters of local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not? yes
3. Whether the Judgment should be reported in the Digest? yes

G.P. MITTAL, J.

1. CM Nos. 10765/2009 and 10766/2009 in RFA 61/09 are (i) Application for condonation of delay in filing the appeal under Order XLI Rule 3 (A) CPC and Section 5 of the Limitation Act and (ii) Application for condonation of delay in refiling the appeal under Chapter 1(A) Rule 5(1) of the Delhi High Court Rules and Orders read with Section 5 of the Limitation Act and Section 151 of the Code of Civil Procedure (for short the 'Code')

2. A suit framed as a suit for mandatory injunction claiming a decree for \$ 1,27,085.50 with interest @ 20% p.a. was filed by Respondent No.1 (Plaintiff). Vide Order of the learned Single Judge dated 26.5.2000, Respondent No.1 was directed to pay ad-valorem court fee on the amount for which the decree was sought in the plaint. The deficiency in the court fee was made good; Defendants 1 & 2 put in appearance. Vide Order dated 31.10.2006 the name of original Defendant No.1 was ordered to be deleted from the array of parties on the finding reached by the learned Single Judge that the plaint did not disclose any cause of action against him. Consequently Defendant No.2 became Defendant No.1 and Defendant No.3 became Defendant No.2. The Defendants preferred not to contest the proceedings despite service. They were, therefore, ordered to be proceeded ex-parte. Vide Order dated 12.10. 2007 of the learned Single Judge an ex-parte decree for an amount of \$ 1,27,085.50 equivalent to Indian Rupees along with interest @ 7% p.a. from the date of institution of suit i.e.29.2.2000 till the date of realisation came to be passed. The Appellant moved an application under Order IX Rule 13 of the Code

for setting aside of the said ex-parte decree. The application was dismissed by the learned Single Judge on 1.4.2009. The said order was unsuccessfully challenged in appeal which came to be dismissed in FAO(OS) No.138/2009 on 13.5.2009. The Appellant has now preferred the Regular First Appeal to challenge the ex-parte decree dated 12.10.2007 on merits. Along with appeal two applications as aforesaid have been filed.

3. The grounds taken up by the Appellant are that the Appellant was informed by Respondent No.2 that an ex-parte decree had been passed by the learned Single Judge on 10.12.2007. The mother of the President of the Appellant had expired on 12.12.2007 which took some time for making an inquiry about the proceeding. Immediately thereafter an application under Order IX Rule 13 of the Code was filed on 15.1.2008. The application was dismissed by the learned Single Judge on 1.4.2009 and the FAO was dismissed on 13.5.2009. It has been stated in the application that the Appellant had been advised to file Special Leave Petition challenging the order dated 13.5.2009 (during hearing it was stated that the SLP preferred by the Appellant has also been dismissed.)

4. It has been averred that the Appellant was diligently pursuing the remedy under Order IX Rule 13 of the Code and thus the delay of 478 days in filing the appeal may be condoned. The Appellant further prays for condoning the delay of 34 days in refiling the appeal due to certain objections pointed out by the Registry on the ground that the Appellant was permanently based in United States of America and it took time to contact him.

5. The applications have been contested by Respondent No.1 on the ground that since the Appellant has availed the remedy under Order IX Rule 13 of the Code in respect of the decree dated 10.12.2007 it is precluded from filing an appeal as per ratio in the case titled as Rani Chaudhary Vs.Suraj Jit Chaudhary AIR 1982 SCC 1397. It has been averred that the appeal is frivolous, vexatious and misconceived and, therefore, the appellant cannot be permitted to delay the proceedings further. The Appellant could have preferred an appeal within a period of 30 days of passing of the ex-parte decree dated 10.12.2007 and there was no sufficient ground for condonation of delay.

6. The appellant has filed rejoinder to the reply.

7. We have heard Mr. Ravi Gupta learned Senior Advocate appearing for the Appellant and Mr. Sunil Magan, Advocate appearing for respondent No.1

8. As per Rule 3 (A) of Order XLI when an appeal is presented after the expiry of the period of limitation specified therefore, 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. The term sufficient cause has not been defined either in the Code or under Section 5 of the Limitation Act. Sufficient cause does not necessarily mean a cause beyond control of a party but includes absence of inaction want of bonafides or negligence.

9. The proposition of law is well-settled that the term sufficient cause should be liberally construed. In the case titled Collector, Land Acquisition, Anantnag and Anr. Vs. Katiji and Ors. (1987) 2 SCC 107, the Apex Court held as under:

“ 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being

defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in justice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

10. If the Court on the basis of facts presented before it comes to the conclusion that the delay deserves to be condoned then the Court is duty bound to save the party from unnecessary sufferance and would permit the appellant to go in to arena of their legal rights of the matter after removing the hurdle of

limitation.

11. In considering an application for condonation of delay, the Court is not guided by the length of delay but the sufficiency of the grounds for condonation of delay. The Apex Court has consistently held that the time taken to file a review application may be excluded unless the application has not been made in good faith. In the case of R.B.Ramlingam Vs. R.B.Bhvaneswari (2009) 2 SCC 689, the Supreme Court condoned the delay in filing an appeal as the Appellant was pursuing the review application and in para 6 of the judgment observed as under:

“..... Section 5 of the Limitation Act, 1963 does not lay down any standard or objective test. The test of “sufficient cause” is purely an individualistic test. It is not an objective test. Therefore, no two cases can be treated alike. The statute of limitation has left the concept of “sufficient cause” delightfully undefined, thereby leaving to the court a well-intentioned discretion to decide the individual cases whether circumstances exist establishing sufficient cause. There are no categories of sufficient cause. The categories of sufficient cause are never exhausted(sic exhaustive). Each case spells out a unique experience to be dealt with by the court as such.”

12. A reference can also be fruitfully made to Khurshed Banoo Vs. Vasant Mallikarjun Manthalkar in AIR 2003 Bombay

52 wherein delay of about four years in filing the appeal while the appellant was unsuccessfully pursuing the proceedings under Order IX Rule 13 of the Code was condoned.

13. Since in the instant case the appellant was bonafidely pursuing the legal remedy under Order IX Rule 13 of the Code, it would be just and reasonable to condone the delay in filing the appeal.

14. Rani Chaudhary Vs. Suraj Jit Chaudhary (supra) relied upon on behalf of the respondent No.1 is not attracted to the facts of the present case. The judgment was referred in Bhanu Kumar Jain Vs. Archana Kumar & Another (2005) 1 SCC 787 and it was held that simultaneous filing of an application under Order IX Rule 13 and an appeal against ex-parte decree under Section 96 (2) was permissible. It was observed that if appeal against ex-parte decree is dismissed, in the light of explanation to Order IX Rule 13 which is to be strictly construed, an application under Order IX rule 13 would not be maintainable. However, there is no bar to the statutory right of filing an appeal against an ex parte decree like any other decree after an application under Order IX Rule 13 CPC is dismissed.

15. In view of the aforesaid discussion we find there is sufficient cause for condonation of delay in filing the appeal. Delay in filing the appeal as also delay of 34 days in re-filing the appeal is condoned.

Both the applications are disposed of accordingly.

RFA(OS) No. 61/2009

Admit subject to just exceptions.

(G.P. MITTAL)
JUDGE

(VIKRAMAJIT SEN)
JUDGE

November 29th, 2010
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