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

% **Date of Decision : 15th February, 2013**

+ C.R.P. 33/2013

VIKAS DEDEECH

..... Petitioner

Through : Mr.Rahul Sharma and Mr.Uzma
Ashraf, Advs.

versus

RICHLOOK GARMENTS (P) LTD.

..... Respondent

Through :

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

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PRATIBHA RANI, J. (ORAL)

CM. No.2742/2013 (Condonation of Delay in re-filing the petition)

1. In view of the reasons given in the application, the delay in re-filing the petition is condoned.
2. The application stands disposed of.

CRP No.33/2013 & CM No.2741/2013 (Stay)

1. The petitioner is aggrieved by the order dated 04.10.2012 whereby the learned Addl. District Judge, Delhi dismissed the applications of the petitioner moved under Order IX Rule 7 CPC and under Section 5 of Limitation Act.

2. The grievance of the petitioner is that learned Trial Court has passed the impugned order in great haste without looking into the peculiar circumstances that prevented the petitioner from appearing and contesting the case. It has been submitted that learned Trial Court, while dismissing the application under Section 5 of Limitation Act, hurriedly disposed of the application under Order IX Rule 7 CPC observing that it is hopelessly barred by limitation.

3. Learned counsel for the petitioner submitted that the petitioner is not disputing that he was duly served with the summons in Civil Suit No.348/2010. The ground on which the order has been impugned is that issue of delay in filing the application under Order IX Rule 7 CPC is not relevant as the limitation is governed by Article 137 of the Limitation Act, 1963. Further the petitioner was prevented from contesting the suit due to the illness and death of his parents. His father died on 26.11.2010 and mother died on 01.12.2010. The petitioner remained occupied in performing last rituals on death of his parents. Subsequently, on 18.04.2012, he engaged another counsel who filed fresh Vakalatnama and thereafter on 24.07.2012, the application under Order IX Rule 7 CPC was moved alongwith application under Section 5 of Limitation Act, which have been dismissed vide impugned order.

4. Learned counsel for the petitioner has relied upon ***Ramhet & Ors. Vs. Ajaypal & Ors. 2002 (35) Civil CC(M.P.)*** and ***Prem Nath Monga Foods & Beverages Pvt. Ltd. Vs. Jainco Industries & Ors. 1996 Civil CC 423*** in support of his contention that application under Order IX Rule 7 CPC should be liberally allowed and the good cause should be liberally construed. Reliance has also been placed by learned counsel for the

petitioner on *Rajaji vs. R.Krishnaji* (2005) 3 MLJ 379, *C.L.Cleetus vs. South Indian Bank Ltd. and Anr.* AIR 2007 Ker 301, *Palani Nathan vs. Devanai Ammal* (1989) 2 MLJ 259, and *Kasturi & Ors. vs. Saravanan @ Sakthi Saravanan in CRP (PD)(MD) Nos. 1267 & 1268 of 2008 decided on 20.04.2010* in support of the contention that applications under Order IX Rule 7 CPC are governed by Article 137 of Limitation Act.

5. I have considered the submissions made by learned counsel for the petitioner.

6. In another report *Y.Daniel vs. Annamma in OP(FC) No.10 of 2012 (R) decided on 15.03.2012 (MANU/KE/0205/2012)* also, it was held :

‘It was true that unlike applications under Order IX Rule 13 of Code of Civil Procedure, 1908, there was no article in Limitation Act providing any specific period of limitation for applications under Order IX Rule 7 of CPC and such applications would be governed by Article 137 of Limitation Act, residuary article which prescribed period of three years’.

7. The apprehension of the petitioner that on the basis of discussion on the application under Section 5 of Limitation Act, his application under Order IX Rule 7 CPC has also been disposed of in haste, is not well founded. Learned Trial Court has taken note of all the grounds while considering the two applications.

8. The contention of learned counsel for the petitioner that the applications under Order IX Rule 7 CPC are governed by Article 137 of Limitation Act, requires no discussion in view of the legal position as laid down in the above referred decision.

9. Thus, the application under Order IX Rule 7 CPC can be considered by the Court ignoring the order of learned Trial Court dismissing the application being barred by limitation.

10. However, it has to be noted that the grounds on which condonation of delay was sought by the petitioner also formed part of application under Order IX Rule 7 CPC in which prayer for setting aside the exparte order was made.

11. Perusal of the averments made in the revision petition shows that a suit for recovery of Rs.7,80,197/- was filed on 20.02.2010 against the petitioner impleading him as defendant. After service of summons, counsel for the petitioner appeared on 04.05.2010 and filed his Vakalatnama seeking time to file written statement. Thereafter on 27.07.2010, again memo of appearance was filed on behalf of petitioner. It is further mentioned that on 04.08.2010, counsel for the petitioner assured to keep him informed about the developments in the case. Thereafter, father of the petitioner expired on 26.11.2010 and mother expired on 01.12.2010.

12. The petitioner has been proceeded exparte on 13.12.2010 i.e. after the death of his parents. The exparte evidence, in the suit, was recorded on 27.02.2012 and thereafter the plaintiff's evidence was closed. It is further the case of the petitioner that on 18.04.2012, another counsel appeared on behalf of the petitioner and filed his Vakalatnama. On 24.07.2012, an application under Order IX Rule 7 CPC was filed which was disposed of vide impugned order.

13. Learned Trial Court considered all the grounds referred to in the applications while dismissing the two applications i.e. under Section 5 of

Limitation Act and under Section IX Rule 7 CPC giving following reasons :-

- (i) The averment made in the application that on 04.08.2010, he engaged a counsel who filed Vakalatnama, was contrary to record as on that date, defendant appeared in person and sought time to engage a counsel which was allowed.
- (ii) Learned Trial Court has also observed that Vakalatnama had already been filed by the counsel for the petitioner on 04.05.2010 and thereafter sought time to file the written statement.
- (iii) On 27.07.2010 again written statement was not filed and adjournment was sought to file written statement which was granted.
- (iv) The negligence attributed to the counsel in not keeping the defendant informed, was ignored for the reason that no complaint was ever made against the counsel and defendant has tried to shift the entire burden on the shoulder of earlier counsel.
- (v) Defendant was fully aware about the pendency of the case and the proceedings going on.
- (vi) As per avements made in the application, defendant frequently remained out of station in connection with his business and if it was so, then how he could claim condonation of delay or non-appearance in the case due to illness or death of his parents when he was giving due attention to his business.
- (vii) On 04.08.2010 when defendant appeared in person, he did not inform the Court that his counsel was not vigilant.

(viii) He failed to explain the steps taken by him to know the status of the matter from 13.12.2010 (when he was proceeded exparte) till 24.07.2012 (when the application under Order IX Rule 7 CPC was filed).
(ix) The litigant cannot be allowed to take advantage of his own wrong.

14. A perusal of the impugned order shows that though the entire discussion on the grounds taken by the petitioner, was in respect of condonation of delay but at the same time, same grounds were taken for getting the exparte order set aside. It is petitioner's own case that after the plaintiff's evidence was concluded on 27.02.2012, the new counsel engaged by the petitioner filed fresh Vakalatnama on 18.04.2012. Even at that time, no steps were taken to file an application under Order IX Rule 7 CPC and the two applications were filed after lapse of more than three months on 24.07.2012 without any explanation as to what prevented the petitioner from moving this application at the time when new counsel was engaged and filed Vakalatnama. The above conduct of the petitioner clearly reflects that at the fag end of trial, when the case is listed for final arguments, the present application has been filed.

15. The petitioner, for the first time, appeared before the Trial Court on 04.05.2010 and now after a period of more than 2½ years, by praying for an opportunity to file the written statement, he wants the trial to be started denovo in the garb of application under Order IX Rule 7 CPC.

16. In the case ***Mohammed Yusuf vs. Faij Mohammad & Ors. (2009) 3 SCC 513*** written statement was not filed within time. After about three years, written statement was sought to be filed which application was rejected by the Trial Court. Revision against the order of Trial Court

was dismissed. However, the High Court, in exercise of writ jurisdiction, allowed the petition thereby granting an opportunity to file the written statement after such an inordinate delay. In the appeal filed before the Apex Court, it was urged that provisions of Order VIII Rule 1 CPC have been held to be directory in nature in ***Kailash vs. Nankhu & Ors. AIR 2005 SC 2441***. The Apex court, while dealing with the contention and the effect of non-filing the written statement within the stipulated period, observed as under :-

'13. Although in view of the terminologies used therein the period of 90 days prescribed for filing written statement appears to be a mandatory provision, this Court in Kailash (supra) upon taking into consideration the fact that in a given case the defendants may face extreme hardship in not being able to defend the suit only because he had not filed written statement within a period of 90 days, opined that the said provision was directory in nature. However, while so holding this Court in no uncertain terms stated that defendants may be permitted to file written statement after expiry of period of 90 days only on exceptional situation. The question came up for consideration before this Court in M. Srinivasa Prasad and Ors. v. The Comptroller & Auditor General of India and Ors. MANU/SC/1638/2007 : AIR2007SC1574 , wherein a Division Bench of this Court upon noticing Kailash (supra) held as under:

7. Since neither the trial Court nor the High Court have indicated any reason to justify the acceptance of the written statement after the expiry of time fixed, we set aside the orders of the trial Court and that of the High Court. The matter is remitted to the trial Court to consider the matter afresh in the light of what has been stated in Kailash's case(supra). The appeal is allowed to the aforesaid extent with no order as to costs.

14. The matter was yet again considered by a three-judge Bench of this Court in R.N. Jadi & Brothers and Ors. v. Subhashchandra

MANU/SC/7775/2007 : AIR2007SC2571 . P.K. Balasubramanyan J., who was also a member in Kailash(supra) in his concurring judgment stated the law thus:

14. It is true that procedure is the handmaid of justice. The court must always be anxious to do justice and to prevent victories by way of technical knockouts. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered. I am conscious that I was a party to the decision in Kailash v. Nanhku which held that the provision was directory and not mandatory. But there could be situations where even a procedural provisional could be construed as mandatory, no doubt retaining a power in the Court, in an appropriate case, to exercise a jurisdiction to take out the rigour of that provision or to mitigate genuine hardship. It was in that contest that in Kailash v. Nanhku it was stated that the extension of time beyond 90 days was not automatic and that the court, for reasons to be recorded, had to be satisfied that there was sufficient justification for departing from the time-limit fixed by the Code and the power inhering in the court in terms of Section 148 of the Code. Kailash is no authority for receiving written statement, after the expiry of the period permitted by law, in a routine manner.'

17. Here in the instant case, though the plaintiff's evidence was closed on 27.02.2012, the newly engaged counsel filed his vakalatnama on 18.04.2012, but for another three months, there was no sign of any application under Order IX Rule 7 CPC or taking part in the proceedings. After the plaintiff closed his exparte evidence, the case was only at the stage of final arguments and without getting the exparte order set aside, the petitioner could have only participated in the proceedings going on.

18. The petitioner, now, wants to file written statement. Though date of service is not available in this petition but even if it is counted from 04.05.2010 (date of first appearance in the suit), now after lapse of more

than 2½ years the petitioner cannot be allowed to file written statement and contest the suit especially when there is absolutely no sufficient cause shown by the petitioner for setting aside the exparte order. It is nowhere the case of the petitioner that till filing of this application on 24.07.2012, the petitioner was not doing anything except mourning for her parents as death of parents of the petitioner could have been considered by the Court as sufficient cause had the application been moved on behalf of the petitioner soon after 13.12.2010.

20. The conduct of the petitioner is such that despite being aware of the pendency of the case, plaintiff's evidence being already led and closed , he failed to wake up and when the case was just at the stage of final arguments, he filed this application praying for a relief which was not available to him in view of the provisions of Order VIII Rule 1 CPC.

21. The contention of learned counsel for the petitioner that good cause shown by the petitioner in his application under Order IX Rule 7 CPC should be construed liberally, does not come to his rescue for the simple reason that lame excuses have been taken by the petitioner like blaming the counsel for non-appearance, having ample time to attend the business activities but no time to take part in the proceedings going on before the Trial Court either through counsel or by inspecting the record. It is also matter of common knowledge that cause-list and all the proceedings as well as orders of the District Courts can be accessed through Internet. The defendant could have accessed the status of the case through Internet and taken timely action or at least could have taken part in the proceedings by cross examining the plaintiff. He remained busy in the business and perhaps did not consider it necessary to ensure

that he is properly represented during the trial through his counsel. This shows that he had absolutely no cause what to talk of good or sufficient case for setting aside the exparte order.

19. In view of above discussion, since the impugned order does not suffer from any infirmity or illegality, the present petition is hereby dismissed.

20. All pending applications are also dismissed.

PRATIBHA RANI, J

FEBRUARY 15, 2013/‘st’