

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

+ **FAO(OS) 212/2014**

MR L K KAUL THR LRS

..... Appellant

Through: Mr. Rattan K. Singh, Mr. Rajneesh Kumar, Mr. Akshay Malhotra, Mr. Shashi Bhushan, Mr. Suraj Prakash, Ms. Anjali, Advocates.

versus

SHRI PRADEEP KUMAR KHANNA

(HUF) & ORS

..... Respondents

Through: Mr. Sanjeev Anand, Mr. Yakesh Anand, Ms. Sonam Anand, Mrs. Kajal Chandra, Mr. Subham Tripathi, Advocates for respondent No. 1.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

30.10.2014

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KAILASH GAMBHIR, J. (ORAL)

1. The challenge in this first appeal is to the order dated 5th September 2013 passed by the learned Single Judge whereby I.A. No.8587/2011, seeking condonation of delay of 548 days in filing the application for restoration of the suit has been dismissed.

2. Addressing arguments on behalf of the appellant, Mr. Rattan K.

Singh, Advocate, vehemently contends that the learned Single Judge did not appreciate that Mr. L.K. Kaul, who was the plaintiff in the suit and is represented by his legal representatives (LRs) herein, was suffering from a serious medical ailment i.e. Alzheimer's disease since the year 2007, which was diagnosed sometime in October/ November 2008 and therefore, in such a state of mind, the appellant failed to remember having filed such a suit and thus he could not be blamed for non prosecution of the said suit, which came to be dismissed in default on 11th September 2009. He further submits that even the LR's of Late Mr. Kaul were not aware of any such suit having been filed by him and that they got to know about its dismissal in default only on 20th October 2010 through the written submissions filed by the respondents before the Hon'ble Supreme Court in the S.L.P. (C) Nos. 17156/2009, 11859/2009 and 11501/2009. He also submits that having learnt about the pendency as well as the dismissal of the suit by the learned Single Judge, the appellant posed necessary queries to his previous counsel and thereafter, took immediate steps to file an application to seek restoration of the suit alongwith an application to seek condonation of delay. He submits that the counsel who was conducting C.S. (OS) No. 425/1993 before the learned Single Judge stopped appearing in the matter and a different counsel had

appeared before the Hon'ble Supreme Court. It is submitted that the learned Single Judge was under a wrong impression that the counsel appearing before the Hon'ble Supreme Court was the same as the one who was representing the appellant in the suit. He also submits that the counsel who was representing the appellant in the suit did not seek his discharge by seeking the leave of the Court and therefore, in terms of Rule 4 (2) of Order III, CPC, the power of attorney of the counsel continues to remain in force.

3. Another contention raised by the learned counsel for the appellant is that the learned Single Judge has adopted a hyper technical approach while deciding the said two applications without giving any weightage to the fact that substantial injustice would be caused to the appellant because of the huge amount of recovery involved in the suit on which, an amount of Rs. 5, 90, 000/- has been affixed as Court fees. He also submits that it is a settled legal position that for deciding a condonation of delay application, the Courts have to adopt a liberal, lenient and pragmatic view so as to do substantial justice to the parties and not a stringent approach which would deflect the course of justice. He submits that Alzheimer's disease is a de-generate disease in which the death of brain cells results in memory loss and therefore, the appellant could not be blamed, because of

his failing memory to remember filing of the said suit by him or for his lack of follow up action with the counsel engaged by him in the suit. He also submits that this Court in the exercise of its appellate jurisdiction can examine all these questions afresh so as to do complete justice between the parties. To support his arguments, the learned counsel for the appellant has placed reliance on the following judgments:-

- a) N. Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123;*
- b) Balwant Singh (dead) v. Jagdish Singh and Others, (2010) 8 SCC 685;*
- c) Manoharan v. Sivarajan and ors., (2014) SCC 163.*

4. We have heard the learned counsel for the appellant at great length and given our thoughtful consideration to the arguments advanced by him.

5. C.S. (OS) No.1221/2005 was filed by Mr. L.K. Kaul (appellant). As per the appellant, Court fee of Rs. 5,90,000/- was affixed on the plaint. The said suit was although dismissed in default on 11th September 2009 but the record shows that the counsel representing the plaintiff (appellant herein) stopped appearing in the matter from 11th July 2008. Record also

shows that on 30th October, 2007, vakalatnama was filed by one Mr. Rakesh Kakkar, Advocate on behalf of the plaintiff and on that date, before the Court of Joint Registrar, he took an adjournment on the ground that the plaintiff's uncle had expired and that he was busy attending the last rites of his uncle. Taking note of the said submissions, the Court directed the plaintiff to be personally presence on the next date of hearing for admission/denial of the documents and the matter was accordingly adjourned to 29th January 2008. On 29th January 2008, nobody appeared on behalf of the plaintiff and the matter was adjourned to 7th March 2008 for further directions before the Court. On 7th March 2008, the previous counsel Mr. Anil Sapra had appeared on behalf of the plaintiff and the matter was again adjourned to 11th July, 2008 for admission/denial of the documents before the Joint Registrar. On 11th July, 2008, nobody entered appearance on behalf of the plaintiff and the matter was again adjourned to 17th October 2008 for admission/denial of the documents. On 17th October 2008 also, nobody appeared on behalf of the plaintiff and the matter was again adjourned to 16th April, 2009 for the same purpose. On 16th April, 2009 also, none appeared on behalf of the plaintiff and the matter was again adjourned to 19th August 2009. On 19th August 2009 also, the matter remained unrepresented on behalf of the plaintiff and the

counsel for the defendants made a request to the Joint Registrar for placing the matter before the Court, as for the last three dates, nobody was appearing on behalf of the plaintiff and the matter was accordingly taken up by the Court on the adjourned date i.e., on 11th September 2009, when the suit was dismissed in default due to absence of the plaintiff.

6. I.A. No. 8587/2011 to seek restoration of the suit (under Order IX Rule 9 of CPC) alongwith I.A. No. 8599/2011 (under Section 5 of the Limitation Act) for seeking condonation of delay in filing the application for restoration of the suit were filed by the appellant on 11th March, 2011. These applications were duly supported by the affidavit of Mr. L.K. Kaul. There was a delay of 548 days in filing the said application for restoration of the suit. In the application filed under Order IX Rule 9 of CPC and in the application seeking condonation of delay, the only reason that was given for the delay in filing the application was that since the plaintiff was suffering from Alzheimer's disease he therefore, could not issue necessary instructions to the previous counsel for properly pursuing the matter. It was also submitted that the plaintiff gathered information about the dismissal of the said suit from the counsel who was representing him in the Special Leave Petitions as in the written submissions filed therein on 22nd October 2011, the fact about the dismissal of C.S. (OS)

No.1221/2005 was disclosed. The plaintiff took a stand that after having learnt about the dismissal of the said suit, the plaintiff could not take up the matter immediately on account of his suffering from Alzheimer's disease. Alongwith the applications, the plaintiff had also placed on record medical certificate as proof of the said ailment. Both the said applications were contested by the defendants therein and by the impugned order dated 11th September 2009, both the applications were dismissed by the learned Single Judge.

7. In the impugned order, while referring to the medical prescriptions placed on record by the deceased plaintiff, the learned Single Judge found that the medical prescriptions and certificates were dated 27th January, 2011 and 6th January, 2011 while the non appearance on behalf of the plaintiff started from 11th July, 2008. The learned Single Judge has also noted that despite the fact that the plaintiff sought time to place on record medical papers for the relevant period, no further documents were filed by him to demonstrate that he was suffering from Alzheimer's disease during the relevant period. The stand taken by the counsel representing the legal representatives of the deceased plaintiff was that since the plaintiff had expired on 25th October 2011, therefore, his previous medical records could not be produced. This explanation given by the

counsel representing the legal representatives of the deceased plaintiff was found to be totally unconvincing by the learned Single Judge. The learned Single Judge also observed that the plaintiff was pursuing other legal remedies during the entire period, pertaining to the very same property, the ground of plaintiff suffering from Alzheimer's disease was taken only in the suit. The learned Single Judge also found that even no explanation had been offered by the plaintiff for not filing these applications for a period of nearly five months starting from 22nd October 2010, when the plaintiff became aware of the dismissal of the suit. Based on these reasons, the learned Single Judge found that the plaintiff had failed to explain the enormous delay of 548 days in moving the said applications.

8. There is no gainsaying the fact that the primary duty of the Court is to adjudicate the disputes between the parties on merits of the case after giving due opportunity to them. It is also a settled legal position that it is not the length of the delay which can destroy the rights of the parties but the acceptability of the explanation which is the only criterion to be examined by the Courts in the exercise of judicial discretion for condoning any delay in filing the restoration application. In *N.*

Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123, the Hon'ble

Supreme Court took a view that sometimes delay of the shortest range may be non-condonable due to want of an acceptable or reasonable explanation, whereas in certain other cases, delay of very long period can be condoned in case the explanation thereof is satisfactory. The relevant para of the said judgment is reproduced as under:-

“It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncontainable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.”

9. The expression ‘sufficient cause’ which has been used in Order IX Rule 9 of CPC which expression also finds mention under Section 5 of the Limitation Act, has been interpreted in a catena of judgments of the Hon’ble Supreme Court and various High Courts, including ***Balwant Singh (dead) v. Jagdish Singh and Others, (2010) 8 SCC 685*** wherein the Hon’ble Supreme Court held as under:-

“25. We may state that even if the term 'sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. The purpose of introducing liberal construction normally is to introduce the concept of 'reasonableness' as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. 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, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.

27. The application filed by the applicants lack in details. Even the averments made are not correct and ex-facie lack bona fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflect normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal construction cannot be equated with doing injustice to the other party.

34. Liberal construction of the expression 'sufficient cause' is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of bona fide is imputable. There can be instances where the Court should condone the delay; equally there would be cases where the Court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect 'sufficient cause' as

understood in law. [Advanced Law Lexicon, P. Ramanatha Aiyar, 2nd Edition, 1997]

35. The expression 'sufficient cause' implies the presence of legal and adequate reasons. The word 'sufficient' means adequate enough, as much as may be necessary to answer the purpose intended. It embraces no more than that which provides a plenitude which, when done, suffices to accomplish the purpose intended in the light of existing circumstances and when viewed from the reasonable standard of practical and cautious men. The sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one. These provisions give the Courts enough power and discretion to apply a law in a meaningful manner, while assuring that the purpose of enacting such a law does not stand frustrated."

10. In the facts of the present case, what we find to our surprise is that the appellant failed to disclose any reason, much less any plausible or adequate to be taken into consideration for condoning the delay of 548 days, except for stating that he was suffering from Alzheimer's disease. Moreover, no medical documents/ proof had been placed on record by the appellant which would *prima facie* disclose that he was suffering from the said disease during the relevant period. Whenever, an application for condonation of delay is filed, the burden of proof is *prima facie* on the applicant to show that there was sufficient cause for not filing the application within the prescribed period. We are conscious that in a matter for condonation of delay, when there is no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be

adopted to advance substantial justice. However, atleast an explanation is expected from the applicant to show sufficient cause for not filing the application in time. It is settled law that a litigant/ party cannot claim condonation of delay as a matter of right without offering any explanation for such delay, as non-filing of the application within the prescribed period of limitation creates a valuable right in favour of the other party. It is only when the delay is properly explained by disclosing sufficient cause, will the Court be able to come to the rescue of such a party and not otherwise. In the aforecited judgments, the Supreme Court had held that if a party has been thoroughly negligent and the delay is a direct result of such negligence, fault or inaction of that party or that the delay smacks of mala fides, then it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law by virtue of it acting vigilantly. Here is a case where the appellant seeks condonation of delay in filing the restoration application without offering any explanation, much less a reasonable or plausible explanation for condoning the delay of 548 days. Not only that, even from the date of knowledge i.e., 22.10.2010 the appellant failed to offer any explanation for not filing the restoration application till the expiry of the five months period.

In the light of the above discussion, we find no merit in the present appeal. It is hereby dismissed leaving the parties to bear their own costs.

KAILASH GAMBHIR, J

NAJMI WAZIRI, J

OCTOBER 30, 2014
Pkb/v