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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 12th July, 2018

Pronounced on: 16th July, 2018

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CS(COMM) 982/2016

M/S VERSATILE COMMOTRADE PRIVATE LIMITED

..... Plaintiff

**Through: Mr.Ratan K. Singh, Mr.Nikhilesh
Krishnan and Mr.Gaurav Lavania,
Advocates.**

versus

SH BALRAJ

..... Defendant

Through: Mr.Kuldeep Sehrawat, Advocate

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

IA No.15265/2017

1. This being a suit under Order 37 CPC an application for leave to defend has been moved by the defendant along with this application for condoning the delay in refilling of the application under Order 37 Rule 3(5) CPC.

2. It is alleged by the learned counsel for the defendant though the application for leave to defend was filed in time i.e., within 10 days by the defendant but it went under objections. The counsel directed his clerk to correct the defects and to rectify the errors and though it was done but in the second week of March 2017 the clerk took a sudden leave for

going to his hometown due to some personal issues and did not return thereafter.

3. It was only on 20.05.2017 when the counsel for the defendant took the file for preparation of the case he found the said application even after removal of defects, is lying in the file, hence the same was filed immediately thereafter and the said delay in refiling the application was beyond his control as the clerk of the counsel, though rectified all the objections, did not inform the counsel about the same and did not file it.

4. However the learned counsel for the plaintiff relied upon various orders passed in this context viz., the order dated 14.03.2017 wherein it was noted the application for leave to defend has not come on record though an advance copy was supplied to the plaintiff and the plaintiff was directed to file the reply within four weeks.

5. Further on 22.05.2017, 12.09.2017 and on 15.11.2017 again it was noted the application for leave to defend was not on record and it was only on 19.12.2017 the leave to defend application was re-filed alongwith condonation of delay application.

6. It is pertinent to mention the plaintiff though has filed a reply to the application for condonation of delay but has not filed any reply to the application for leave to defend till date. In its reply for application for condonation of delay the plaintiff alleges no substantial reason for not refiling the application in time has been given and the plaintiff relied upon *J.L.Gugnani vs. Krishna Estate* 2011 RLR 84 (N) wherein the Court held as follows:

“61. It would be expected that having filed a case involving such a large sum of money, accompanied by the application seeking interim injunction, the plaintiff himself would have made at least a minimal inquiry from his counsel as to the orders passed therein or the fate thereof. Having regard to the nature of the case, any prudent and diligent litigant would be reasonably expected to ascertain the progress in his case. In the instant case, the plaintiff does not even suggest an explanation as to why he himself made no enquiries and took no steps at all in the matter. A period of almost seven months between 10th June, 2002 and 19th December, 2002 is permitted to pass. There is not even a remotest suggestion that the plaintiff ever inquired from his counsel as to what was the fate of his case after he signed the plaint and the application for interim relief. He does not disclose or explain why he did not enquire as to whether any interim protection was granted on his stay application for this long period. The conduct of the plaintiff would be unreasonable and negligent to say the least. It exhibits sheer arrogance in his belief that attribution of fault to the office of a counsel is sufficient for condoning delays and deficiency, irrespective of the correctness of the reasons put forth to explain the same.

62. At the same time, as noticed above, the explanation tendered for the delay in the refiling is completely unreliable. The same is not supported by the record of the instant case and does not inspire any confidence. No tenable grounds are disclosed by the plaintiff and it has to be held that the explanation given by the plaintiff for the delay in refiling is not bonafide. It is accordingly held that the plaintiff has failed to explain the reasons for the delay which has been occasioned.”

7. However the learned counsel for the defendant in his rejoinder had clarified the facts by saying the delay was only because of the negligence of the counsel's clerk and also there were various other cases pending between the plaintiff and the family members of the defendant viz., five of them were pending for disposal in District Court Dwarka and mediation was going on between the plaintiff company and the family members of the defendant, including the defendant's land, but it failed on 15.09.2017. It is further alleged by the learned counsel for the defendant that he received an SMS on his mobile from the Registry of the Delhi High Court to the effect the application has been refiled on 25.02.2017. However the fact it was again put under some technical objections was not conveyed and the counsel was under an impression since no further

SMS has been received qua the objections, the application was taken on record.

8. Heard.

9. It is not denied the application under Order 37 Rule 3(5) CPC for filing leave to defend was in fact filed within statutory period of 10 days and a copy thereof was handed over to the plaintiff to file its reply. Delay was only in refiling it after curing defects. rejoinder. In *S.R.Kulkarni vs. Birla VXL Ltd.* 1998 (5) AD (Delhi) 634 this Court has observed:

"7. Notwithstanding which of the aforesaid Rules are applicable, the question of condonation of delay in refiling of an application has to be considered from a different angle and viewpoint as compared to consideration of condensation of delay in initial filing. The delay in refiling is not subject to the rigorous tests which are usually applied in excusing the delay in a petition filed under Section 5 of the Limitation Act (See Indian Statistical Institute Vs. M/s. Associated Builders and others AIR 1978 S C 335. In the present case, the initial delay of 7 days in filing the application for leave to defend stood condoned and that has not been challenged by any of the parties. It is no doubt true that the counsel for the appellant had not been very diligent after filing of application for leave to defend on 19th August, 1995 as counsel did not check whether the application was lying in the Registry with any objection or not. Considering however, the nature of the objections, it was a matter of removal of the objections by the counsel and on the facts of the present case, it is difficult in this case to attribute any negligence to the party. On the facts of the case, the effect of negligence or 'casual approach', which would be appropriate term to be used here, of the counsel on his client, does not deserve to be so rigorous so as to deny condensation of delay in refiling the application. The casual approach of the counsel is evident as no timely efforts were made firstly to find out after filing application on 19th August, 1995 as to whether the Registry had raised any objection or not. Secondly, despite order of the Joint Registrar dated 9th January, 1996, the objection was removed only on 4th March, 1996 i.e. after the date which the Joint Registrar had fixed for the application being posted for hearing before the Court. When the application was refiled on 4th March, 1996, one would expect the person filing to be more careful thereby not giving an opportunity to the Registry to raise any other objection. But that was not so. The result was that the second objection was raised which, as noticed above, was removed on 21st March, 1996 but application was refiled only on 27th March, 1996. Apart from this casual approach, we do not find any mala fide intention on the part of the appellant to delay the proceedings. When there is negligence or causal approach in a matter like this in refiling of an application, though the court may not be powerless to reject an application seeking condonation and may decline to condone the delay but at the same time, passing of any other

appropriate order including imposition of cost can be considered by the court to compensate the other party from delay which may occur on account of refiling of the application.”

10. Considering the facts; viz. the mediation being going on between the family members of the defendant and the plaintiff on same issue; the negligence on the part of the clerk for which the counsel for the defendant has already placed on record his own affidavit, it would be in the interest of the justice if the delay in refiling the application is condoned but however, subject to the cost of ₹ 15,000 to be paid by the defendant. The application is allowed. The cost be paid within four weeks from today.

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11. List for further directions on 20.09.2018.

JULY 16, 2018

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YOGESH KHANNA, J