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HIGH COURT OF DELHI AT NEW DELHI

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R.S.A. No.164/2014

Decided on : 12th March, 2015

RAMNATH GARG

..... Appellant

Through: Mr. Sugriva Dubey, Advocate.

Versus

BSES YAMUNA POWER LTD. & ANR.

..... Respondents

Through: Mr. Deepak Kumar Vijay, Adv. for R-1.
Mr. Kshitij Sharda, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. This is an appeal filed by the appellant against the respondents on account of rejection of his appeal by the learned Additional District Judge vide order dated 19.4.2014 of disallowing the application of the appellant under Section 5 of the Limitation Act.

2. Briefly stated the facts leading to filing of the present appeal are that the appellant filed a suit bearing No.437/09 for permanent and mandatory injunction against the Municipal Corporation of Delhi and Delhi Electric Supply Undertaking (DESU) in the year 1995 in which

subsequently, BSES Yamuna Power Limited, a service provider company, was impleaded in lieu thereof DESU.

3. The case which was setup by the appellant was that the appellant had purchased property No.4/47, Sarvaria Market, Vishwas Nagar, Shahdara, Delhi-110032 by way of a registered sale deed and his name was mutated in the record of the MCD. He was also paying house tax to the MCD. The appellant temporarily allowed respondent No.2, Roshan Lal, to occupy the property No.4/47 at his request that he would vacate the same as and when an alternative accommodation is available to him. There was an old electricity connection sanctioned by the respondent's predecessor-in-interest, that is, DESU, at property No.4/48. Since there was no electricity granted for the use of property No.4/47, Vishwas Nagar. It was revealed that the aforesaid connection granted in respect of property No.4/48, Vishwas Nagar, was on the basis of industrial license and the respondent was threatening to proceed against the appellant and disconnect the electricity alleging him to be misusing the connection in contravention to provisions of law. This resulted in filing of a suit for a decree of permanent injunction seeking a restraint order against DESU and subsequently against BSES and Roshan Lal that they should not

disconnect the electricity connection. The matter was contested by both the respondents.

4. On the pleadings of the parties, following issues were framed :-

“(i) *Whether plaintiff has concealed material facts from this court? OPD-2*

(ii) *Whether suit of plaintiff against defendant is barred u/O 2 R 2 CPC? OPD-1*

(iii) *Whether plaintiff is entitled to relief of permanent injunction as claimed? OPP*

(iv) *Whether plaintiff is entitled to relief of mandatory injunction as claimed? OPP*

(v) *Relief.”*

5. The learned trial court after recording of evidence dismissed the suit of the plaintiff. It is not necessary for this court to go into the reasons of dismissal of the suit.

6. The appellant filed an appeal bearing No.45/14 along with an application seeking condonation of delay under Section 5 of the Limitation Act. There was a delay of nearly seven months in filing the appeal. The reasons which were given for condonation of delay were that the judgment of the trial court was delivered on 17.1.2013. On 16.2.2013, the certified copy of the judgment was applied for and on

11.3.2013, the certified copy of the judgment was ready for delivery. On 19.3.2013, the certified copy of the judgment was collected; however, on 19.3.2013 itself, the file is alleged to have been misplaced by the clerk of the counsel which could be traced only on 14.8.2013. On 18.8.2013, the appeal was alleged to have been prepared. On 23.8.2013, the supporting affidavits were got signed from the appellant and ultimately on 6.9.2013, the appeal was filed. Thus, there was roughly a delay of seven months as alleged by the appellant in filing the appeal which, in the averments made by the appellant, were beyond the control of the appellant and according to him, it constituted 'sufficient cause' for which he sought condonation of delay.

7. The learned trial court heard the arguments and rejected the application seeking condonation of delay by giving the reasons that the law does not come to the rescue of the appellants, who are lethargic and grossly negligent in filing the appeal. In this regard, the learned first appellate court had taken note of the fact that although certified copy of the judgment was ready on 11.3.2013 yet it was collected on 19.3.2013. The name of the clerk, who had misplaced the file and then recovered on 14.8.2013, has not been given and the details as to how this had happened

has also not been explained. The appellate court has observed that although the appeal was prepared on 18.8.2013 and the affidavit got attested on 23.8.2013 yet, the appellant took almost two weeks in filing the appeal which clearly showed that he was lethargic and negligent. The learned first appellate court referred to the judgments of the Apex Court in *Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy & Others*; (2013) 12 JT 450 as well as the case titled *Shakuntala Devi Jain vs. Kuntal Kumar*; AIR 1969 SC 575 in order to justify its reasoning of rejecting the application.

8. I have heard the learned counsel for the appellant and have also gone through the record. No fault can be found with the proposition of law which has been referred to by the learned appellate judge as enunciated in the two Supreme Court judgments that the court normally does not come to the rescue of a negligent and lethargic litigant for the purpose of condonation of delay in not filing the appeal timely but at the same time the broader principle which the Supreme Court has laid down is that the law of limitation right starting from *Ramlal, Motilal and Chhotelal vs. Rewa Coalfields Limited*; 1962 AIR 361 till 2013 of *Esha Bhattacharjee's* case (*supra*) has considerably been liberalised by

observing that the appellant seeking condonation of delay need not explain each day's delay and similarly he is not to be asked a question as to why he did not file the appeal within the time prescribed.

9. In *Collector, Land Acquisition, Anantnag and Anr. Vs. Mst. Katiji and Ors.*; AIR 1987 SC 1353, the Hon'ble Apex Court has held as follows:-

“The legislature has conferred the power to condone delay by enacting Section 5 (any appeal or any application, other than an application under any of the provisions of Order XXI of the CPC, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period) of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on ‘merits’. The expression “sufficient cause” employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice-that being the life-purpose for the existence of the institution of courts. It is common knowledge that this court has been making a justifiably liberal approach in matters instituted in this court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that :-

- 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 injustice 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 mala fides. 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 legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”*

10. The aforesaid findings provide the framework to be adopted while dealing with the applications of condonation of delay. It is true that one cannot ignore the findings rendered by the Hon’ble Apex Court in *Esha Bhattarcharjee’s* case (*supra*) but the same needs to be read in the light of the observations made in *Collector, Land Acquisition’s* case (*supra*).

Meaning thereby that both the judgments must be harmonised and merely because *Esha Bhattacharjee's* case (*supra*) is latter in point of time, does not necessarily, what has been held by the Apex Court earlier, deserves to be ignored altogether.

11. In view of the observations made in *Ramlal's* case (*supra*) was that after the last day's delay, each day's delay was to be scrupulously explained by a party before a condonation of delay application could be allowed. But this principle was diluted so as to observe that the quantum of delay is not important. What is important is the *bona fide* of a person, who is seeking condonation of delay in pursuing his remedy. It has also been observed that while considering the question of delay, the court must also *prima facie* glance through the merits of the matter so as to see as to whether the matter has any merit to be considered by the first appellate court. Meaning thereby that merely because of the default of a counsel, the person should not be made to suffer and it should not result in gross injustice to the appellant. It is trite true observation that a meritorious case must not be expelled only on the grounds of inordinate delay which can be reasonably explained.

12. Every litigant cannot be expected to be legally education and having engaged the counsel of repute is justified in their contention that the mistake committed by the counsel or his clerk cannot prejudice the party.

13. In the background of the aforesaid broader principles of law, I find that the learned first appellate court has fallen into an error in following the dictum of *Ramlal's case (supra)* inasmuch as it has specifically observed in the impugned order that each and every day delay has not been explained by the appellant. Similarly, at another place, it has been observed that the appellant was bound to explain as to why he did not apply for certified copy well within time. I feel, these two observations are not in tandem with the preposition of law laid down by the Supreme Court. In the light of the findings rendered in *Collector, Land Acquisition's case (supra)*, it is not practically possible to expect a litigant to explain the delay of every day and every hour. The expression "every days' delay must be explained" has to be dealt with a positive approach. If the applicant has given a possible and a plausible explanation then in such circumstances, a *bona fide* litigant must not be given a *litigant non-*

grata status merely due to the deficit of a minute to minute account of the events leading to the delay.

14. The person concerned is not supposed to explain as to why he did not apply for certified copy of the judgment within the period of limitation. The only thing to be seen is that in case, he applies for a certified copy within the period of limitation then the period which is taken by the office in preparation of the certified copy will be deducted from the total number of days within which the appeal is filed. In case, a party applies for a certified copy after the period of limitation, it does not get him any extension of time for the purpose of filing an appeal. Meaning thereby, there is no deduction of time spent by a party in obtaining certified copy. In the instant case, the copy was belatedly applied within the prescribed period of limitation and it was ready on 11.3.2013 but the copy has been collected on 19.3.2013. In such an event, there is no inordinate delay in collecting the copy so as to attribute any *mala fide* to the appellant. The appellant is not required to show as to why he did not collect the copy on 11.3.2013 itself as no litigant is expected to visit the counter for collection of copy on each and every date after having applied for the same. Therefore, the benefit of six days delay

in collection of the copy is not such a huge delay which should come in the way of the court in taking a view against him. In *O.P. Kathpalia vs. Lakhmir Singh*; AIR 1984 SC 1744, a full Bench of the Hon'ble Supreme Court held that if the refusal to condone the delay results in gross miscarriage of justice, it would be a ground to condone the delay. In the instant case, the first appellate court ought to have considered the fact that the first appeal is always a matter of right so as to give an opportunity to the first appellate court to oversee the correctness and finding of the trial court.

15. Therefore, in my considered opinion, on account of the aforesaid reasons, the first appellate court ought to have taken a liberal view and condoned the delay of seven months in filing the appeal on account of the reasons which were given that the file was misplaced. The learned court ought to have seen the merits of the matter or at least *de hors* the view it has taken with regard to non-condonation of delay, applied its mind to see as to whether on merits, the learned trial court has not gone wrong and pronounced some observations. In the absence of all this, I feel it will cause greater injustice to the appellant in case his application is rejected on the sole ground of limitation and thereby foreclosing of his right to

have review of the evidence and its appreciation by the first appellate court.

16. For the aforesaid reasons, I am inclined to accept the plea of the appellant that the averments made in the application are constituting 'sufficient cause' and the appellant was not expected to show each day's delay in filing the appeal. Therefore, the appeal is allowed and the first appellate court's order dated 19.4.2014 is set aside. The delay is condoned and the matter is remanded back to the trial court for the purpose of consideration of the same on merits. Let the parties appear before the learned District Judge on 23rd April, 2015.

V.K. SHALI, J.

MARCH 12, 2015
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