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

+ **Date of Decision: 15.10.2015**

% **RSA 222/2015**

ARUN GANGULI

..... Appellant

Through: Mr. J.K. Jain, Advocate

versus

AMARESH GANGULI

..... Respondent

Through: Mr. Sunil Malhotra, Mr. Amit Sanduja and Mr. Ajay Kumar, Advocates

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. Admit. The following substantial question of law arises for consideration in this second regular appeal:

Whether the approach of the First Appellate Court in dealing with the application of the appellant under section 5 of the Limitation Act to seek condonation of 30/38 days delay in filing the said appeal was in accordance with law while construing whether or not the appellant had not disclosed sufficient cause to explain the delay in filing of the said first appeal?

2. With the consent of learned counsels, I have heard their submissions on the appeal as a narrow issue arises for consideration in this appeal.

3. The present second appeal is directed against the order dated 15.04.2015 passed by the First Appellate Court, namely, JSCC/ASCJ (South) Saket Courts in RCA No.8/2013 preferred by the appellant/plaintiff. By the impugned order, the said first appeal to assail the judgment and decree dated 20.12.2012 in Suit No.211/06/89 filed by the plaintiff has been dismissed as being barred by limitation, consequent to the rejection of the application preferred by the appellant under section 5 of the Limitation Act.

4. The first appeal filed by the appellant was delayed by 38 days. The application filed by the appellant to seek condonation of delay in filing the first appeal disclosed that the delay had occurred for the reason that his counsel was not well due to viral fever and was unable to draft and file the same in time. The appeal and the application to seek condonation were filed by the appellant through Mr. Harish V Shankar, Advocate. The application was supported by the affidavit of the appellant.

5. The application was opposed by the respondent. The respondent filed its reply to the application dated 15.05.2013. Thereafter, the matter was adjourned on a few dates. On 30.11.2013, it was argued on behalf of the respondent that the ground taken by the appellant in the application to seek condonation of delay is false. The respondent stated that he will produce documentary evidence in this regard on the next date of hearing.

6. The respondent, on 22.11.2014, filed copies of : (i) the order dated 07.02.2013 passed by the Supreme Court; (ii) orders dated 04.01.2013, 08.01.2013 and 22.01.2013 passed by this court in certain other litigations,

wherein Mr. Harish V Shankar, Advocate had appeared as a counsel and his presence was recorded. On the same day, the appellant filed copies of the medical certificate issued by Dr. Manish Gupta dated 25.01.2013 certifying that Mr. Harish V Shankar, Male, 39 years was having viral fever and skin eruptions. He was advised bed rest and medications for one week. The appellant also filed the medical prescription of Mr. Harish V Shankar, Advocate dated 25.01.2013 issued by Dr. Manish Gupta, wherein the said Mr. Harish V Shankar was advised bed rest for one week.

7. The First Appellate Court, on 22.11.2014, accordingly, passed the following order:

“Hearing was adjourned for arguments on application u/s 5 of Limitation Act. Arguments advanced on behalf of both sides. Heard.

In support of his arguments, Ld. counsel for appellant filed certain citations alongwith list as well as one medical document with prescription. Copy supplied. Same be taken on record.

On behalf of respondent, ld. counsel for respondent filed certain citations alongwith list as well as some documents with list. Copy supplied. Same be taken on record.

To come up for clarification/order on 23.12.2014 at 04.00 pm.”.

8. Ultimately, the impugned order was passed by the First Appellate Court on 15.04.2015 declining the said application under section 5 of the Limitation Act moved by the appellant/plaintiff and held that the appellant had not disclosed sufficient cause to seek condonation of delay. Consequently, the appeal was dismissed as being barred by limitation.

9. The submission of counsel for the appellant is that, firstly, the approach of the First Appellate Court in dealing with the application seeking condonation of delay was not correct, and not in accordance with the view expressed by the Supreme Court in several decisions rendered lately. He submits that unless the delay is intentional or deliberate cause - with a view to gain undue advantage, the same should be condoned. He further submits that the period of delay itself was also not enormous. He further submits that the First Appellate Court has also not appreciated the documents filed by the appellant, namely, the medical certificate and the prescription issued by the doctor in respect of the illness of Mr. Harish V Shankar, Advocate, who was representing the appellant when the first appeal was filed. Learned counsel submits that the appellant changed his counsel after the filing of the first appeal and for this reason Mr. Harish V Shankar, Advocate was not cooperative when it came to filing of his own affidavit, as required by this court.

10. In support of his submission, counsel for the appellant has placed reliance on the following decisions:

- i) ***Rafiq v. Munshilal***, AIR 1981 SC 1400;
- ii) ***Collector, Land Acquisition, Anantnag v. Katiji***, AIR 1987 SC 1353;
- iii) ***Municipal Corporation, Gwalior v. Ramcharan (D) by LRs & Ors.***, AIR 2003 SC 2164;
- iv) ***State thru CBI v. R.P. Tiwari***, 2010 IX AD (Delhi) 722;
- v) ***S. Ganesharaju (Dead) Through LRs Vs. Narasamma (Dead) Through LRs and Others***, (2013) 11 SCC 341;

11. On the other hand, Mr. Malhotra, learned counsel for the respondent submits that the appellant has failed to explain the delay in filing the appeal. Learned counsel submits that the appellant only filed the medical certificate and the medical prescription of the erstwhile counsel Mr. Harish V Shankar belatedly, i.e. on 22.11.2014. The said documents were not filed along with the application. He submits that the said advocate had not even filed his affidavit in support of the application, even after this court had directed the appellant to file the affidavit of the counsel vide order dated 30.06.2015.

12. Mr. Malhotra submits that the medical certificate produced by the appellant - of Mr. Harish V Shankar, Advocate cannot be relied upon since the counsel was appearing before the courts as would be evident from the order dated 07.02.2013 passed by the Supreme Court, and the orders passed on 04.01.2013, 08.01.2013, 22.01.2013 by this court in other litigations. The said orders had been placed before the First Appellate Court by the respondent.

13. Mr. Malhotra has also placed reliance on the judgment of the Supreme Court in ***Balwant Singh (Dead) v. Jagdish Singh & Ors.***, (2010) 8 SCC 685 in support of his submission that liberal construction of the expression “sufficient cause” pre-supposes that there is no negligence or inaction on the part of the applicant. He submits that in the present case, there is gross negligence on the part of the appellant and his counsel in delaying the filing of first appeal by 38 days.

14. The suit had been filed by the appellant/plaintiff to seek a mandatory injunction directing the defendant to vacate the suit property and to pay mesne profits. The suit was premised on the claim of title to the suit

property by the plaintiff, wherein he claimed that the defendant/his brother was a licensee – whose license had since been terminated. The said suit had been dismissed by the Trial Court vide judgment and decree dated 20.12.2012. Thus, prior to the filing of the said suit, during its pendency and even after dismissal of the suit by the Trial Court, the position of the defendant remained unchanged inasmuch, as, he continued to remain in possession of the suit property. It is, therefore, abundantly clear that the delay of 30/38 days in filing the first appeal did not cause prejudice to the defendant inasmuch, as, it cannot be said that the defendant has altered his position on account of the said delay in filing the appeal. He was, and continued to remain in use and enjoyment of the suit property as before.

15. A perusal of the impugned order shows that the First Appellate Court proceeded on the basis that the application moved under section 5 of the Limitation Act by the appellant before the First Appellate Court did not reflect sufficient facts and lack details. The period of illness was not specified with certainty, and each days delay has not been explained reasonably by the appellant. No doubt, the application was poorly drafted by the counsel inasmuch, as, apart from stating that the counsel was not well, particulars of the illness; the nature of illness, and; the duration of illness were not disclosed. Along with the application, the appellant also did not file the medical certificate and medical prescription of Mr. Harish V Shankar, Advocate. However, subsequently, the said documents were indeed filed before the First Appellate Court on 22.11.2014 and they were even taken on record. On the same day, the respondent also filed certain documents, namely, the order sheets of the Supreme Court and this Court,

wherein the presence of Mr. Harish V Shankar, Advocate was recorded. Therefore, it was not correct on the part of the First Appellate Court to observe that there was no material produced to substantiate the plea of illness of the appellant's counsel Mr. Harish V Shankar, Advocate.

16. The medical certificate as well as the medical prescription filed on 22.11.2014 before the First Appellate Court clearly brought out that Mr. Harish V Shankar, Advocate was suffering from viral fever and skin eruptions. His medical certificate and medical prescription are both dated 25.01.2013. The same advised bed rest for one week. Thus, at least for a period of one week, the counsel Mr. Harish V Shankar, Advocate remained out of action. The order sheets filed by the respondent to show that Mr. Harish V Shankar, Advocate was appearing in courts are of no avail. This is for the reason that they pertained to the period either before his illness commenced on 25.01.2013, or after one week from 25.01.2013. The three order sheets of this court show that Mr. Harish V Shankar, Advocate had appeared before this court on 04.01.2013, 08.01.2013 and 22.01.2013. His illness commenced thereafter i.e. on or about 25.01.2013. He was advised bed rest for one week, i.e. till about 02.02.2013. He appeared before the Supreme Court on 07.02.2013. Thus, it cannot be said that the order sheets filed by the respondent demonstrated that the stand taken by the appellant with regard to the illness of his counsel Mr. Harish V Shankar, Advocate was false. Pertinently, both the appellant and the respondent filed the documents before the First Appellate Court on the same day, i.e. 22.11.2014. Thus, it could not be said that the appellant manipulated the date on the

medical certificate of Mr. Harish V Shankar, Advocate so as to be in tune with the order sheets relied upon by the respondent, as aforesaid.

17. The Supreme Court and this Court have time and again held that the expression “sufficient cause” in section 5 of the Limitation Act should receive liberal construction.

18. In *Katiji* (supra), the Supreme Court observed that the legislature had conferred the power to condone delay by enacting section 5 of the Limitation Act in order to enable the courts to do substantial justice to the 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 of the existence of the institution of courts. The Supreme Court observed that:

“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.”

19. A similar view was taken by the Supreme Court in **Ramcharan** (supra). In this case, there was a delay of 39 days in filing the second appeal. The explanation for the said delay was the failure of the counsel to appear on account of some confusion in noting the date of hearing and belated knowledge of the judgment and decree on the part of the counsel. The Supreme Court, inter alia, observed that the advocate of the applicant had nothing to gain by remaining absent at the time of hearing of the first appeal or by assigning a false cause for non-appearance at the time of hearing. Valuable rights of the parties in an immovable property were involved. Thus, the Supreme Court held that the High Court ought to have taken a liberal, and not a rigid and too technical view of the issue before it and should have condoned the delay in filing the appeal and concentrated on examining whether the appeal raised any substantial question of law worth being heard by the court.

20. In **R.P. Tiwari** (supra), this Court had taken the same view and observed:

“6. At the same time, it has been consistently held in a number of judicial pronouncements that the expression "sufficient cause" in Section 5 of the Limitation Act, must receive liberal construction so as to advance substantial justice and where there are no allegations of gross negligence, absence of bonafides, or intentional delay/inaction attributable to a party, generally, delays in preferring appeals, particularly when they are filed by the Government, are required to be condoned in the interest of justice, as also in public interest.(Refer: G. Ramegowda Major v. The Special Land Acquisition Officer, Bangalore, AIR 1988 SC 897)”.

21. The Supreme Court in **S. Ganesharaju** (supra) held that the expression “sufficient cause” as appearing in section of the Limitation Act has to be given a liberal construction so as to advance substantial justice. Unless the respondents are able to show malafides in not approaching the court within the period of limitation, generally as a normal rule, delay should be condoned. The trend of the courts while dealing with the matter with regard to condonation of delay is tilted more towards condoning the delay and directing the parties to contest the matter on merits, meaning thereby that such technicalities have been given a go-by. The Supreme Court held that the rule of limitation is not meant to destroy or foreclose the rights of parties. They are meant to see that the parties do not resort to dilatory tactics to seek their remedy promptly. In para 14 of the said decision, the Supreme Court observed:

14. We are aware of the fact that refusal to condone delay would result in foreclosing the suitor from putting forth his cause. There is no presumption that delay in approaching the

court is always deliberate. In fact, it is always just, fair and appropriate that matters should be heard on merits rather than shutting the doors of justice at the threshold. Since sufficient cause has not been defined, thus, the courts are left to exercise a discretion to come to the conclusion whether circumstances exist establishing sufficient cause. The only guiding principle to be seen is whether a party has acted with reasonable diligence and had not been negligent and callous in the prosecution of the matter. In the instant case, we find that appellants have shown sufficient cause seeking condonation of delay and same has been explained satisfactorily. ”

22. I may take note of another decision of the Supreme Court in ***Ram Nath Sao @ Ram Nath Sahu and Others Vs. Gobardhan Sao and Others***, (2002) 3 SCC 195. In this decision, the Supreme Court observed:

*“12. Thus it becomes plain that **the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependant upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should***

not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.

13. *In view of the foregoing discussions, we are clearly of the opinion that on the facts of present case, Division Bench of the High Court was not justified in upholding order passed by the learned Single Judge whereby prayers for condonation of delay and setting aside abatement were refused and accordingly the delay in filing the petition for setting aside abatement is condoned, abatement is set aside and prayer for substitution is granted.”*
(Emphasis Supplied)

In this decision, the Supreme Court cited several earlier decisions, including the decision in *N. Balakrishnan Vs. M. Krishnamurthy*, (1998) 7 SCC 123. In that case, the application filed to seek setting aside of the ex-parte decree was delayed by 883 days. The Supreme Court in the said decision observed as follows:

“8. *The appellant’s conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.*

9. *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 uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a 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.

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The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The timelimit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

In **N. Balakrishnan** (supra), the Supreme Court further observed:

“11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on

public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain v. Kuntal Kumari* (1969) 1 SCR 1006 and *State of W.B. v. Administrator, Howrah Municipality* (1972) 1 SCC 366.

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses.

23. The Supreme Court in *Vedabai alias Vaijayanatabai Baburao Patil v. Shantaram Baburao Patil & Ors.*, (2001) 9 SCC 106 observed that where the delay is of a few days, the court should adopt a liberal approach. The Courts while exercising discretion under section 5 of the Limitation Act should adopt a pragmatic approach. A distinction must be made between a

case where the delay is inordinate and a case where the delay is of few days. Where the delay is inordinate, the consideration of prejudice to the opposite party will be a relevant factor calling for a more cautious approach, but in the latter case where the delay is of few days, no such consideration may arise, and such a case deserves a liberal approach. The Supreme Court observed that the exercise of discretion on the facts of each case, keeping mind that in construing the expression “sufficient cause”, the principle of advancing substantial justice is the prime importance.

24. In the present case, a perusal of the application filed by the appellant to seek condonation of delay before the First Appellate Court shows that the then counsel attributed the delay entirely to himself on account of his illness. The application, though not supported by his affidavit, was signed by him, namely, Mr. Hari V Shankar, Advocate, and he also filed the appeal and the said application. No doubt, the said application along with the documents filed subsequently explained the delay of about a week, since it could be presumed that the said counsel was taken ill - may be a day or so before he went to the doctor, and recovered after about a week. The delay in filing the appeal is to the tune of 30/38 days, meaning thereby that there was a further delay of about three weeks. Certainly, it cannot be said that the delay was enormous. It also cannot be said that the same was intentional, deliberate or as a result of gross negligence on the part of the appellant. It appears that the appellant took steps that were required of him by engaging the counsel to file the appeal. The delay occurred at the hands of the counsel. The Supreme Court in *Rafiq* (supra) has observed that a litigant who has appointed and briefed an advocate and paid his fee remain supremely

confident that his lawyer will look after his interest. Such an innocent party who has done everything in his power and expected of him, should not suffer for the inaction, deliberate omission or misdemeanor of his counsel.

25. The respondent really has suffered no prejudice, and for the slight inconvenience by the respondent on account of the delay in filing the first appeal, the respondent could have been compensated by way of costs. The dismissal of the application under section 5 of the Limitation Act preferred by the appellant has meant that his valuable statutory right of first appeal has been denied to him. As observed by the Supreme Court, the trend of the decisions has been towards adopting a liberal approach in the matter of exercise of discretion for condonation of delay and of granting opportunity to the parties to litigate their rights on merits rather than on mere technicalities.

26. The decision in **Balwant Singh** (supra) relied upon by the respondent is not appropriate in the facts and circumstances of the case. In this case, condonation of delay was sought in moving the application to bring on record the LRs of the deceased appellant. The death of the appellant had taken place on 28.11.2007, whereas the application to bring his LRs on record had been filed on 15.04.2010, thereby entailing a delay of 778 days. The application was opposed on the plea that the appeal had abated. The Supreme Court observed that the delay in filing the application to bring on record the LRs of the deceased appellant was considerable. To explain the delay, a one page application had been filed by the applicants stating that they were not aware of the pendency of the appeal before the Supreme Court and that they came to know of the same only in March 2010 from their

counsel. Consequently, the application had been filed on 15.04.2010. It was in this background that the Supreme Court observed that the applicants had been callous in pursuing the appeal and that they had acted irresponsibly and even with negligence. The Supreme Court also found that they had not come to court with clean hands. Though they had claimed that they were not residing at the same address, they were in fact residing at the same address in Ambala City. Their claim that they were not aware of the pendency of the appeal before the Supreme Court was also belied by the fact that one of the LRs (son of the deceased) was examined as a witness before the Trial Court. In para 12, the Supreme Court observed as follows:

“12. The cumulative effect of the above conduct of the legal representatives of the sole deceased, appellant clearly shows that they have acted with callousness, irresponsibly and have not even stated true facts in the application for condonation of delay. The approach and conduct of the applicants certainly would invite criticism. Moreover, it will be difficult for the Court to exercise its discretionary power in favour of the applicants. There is not even a whisper in the entire application as to why, right from the death of the deceased in November, 2007, the appellant did not take any steps whatsoever till 15th April, 2010 to inform their counsel about the death of the deceased and to bring the legal representatives on record”.

27. Thus, it is seen that the decision in **Balwant Singh** (supra) turned on its own facts. So far as the legal position is concerned, the Supreme Court in **Balwant Singh** (supra) reiterated the same principle as taken note of herein above. In para 26, the Supreme Court observed:

“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”.

28. In para 34 and 36, the Supreme Court observed:

“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]”.

“36. We find it unnecessary to discuss the instances which would fall under either of these classes of cases. The party should show that besides acting bona fide, it had taken all possible steps within its power and control and had approached the Court without any unnecessary delay. The test is whether or not a cause is sufficient to see whether it could have been avoided by the party by the exercise of due care and attention. [Advanced Law Lexicon, P. Ramanatha Aiyar, 3rd Edition, 2005]”.

29. There could be no quarrel with the aforesaid propositions of law. The same are not different from those taken note of by the Supreme Court in the above referred decisions in the case of **N. Balakrishnan** (supra); **Ram Nath Sao** (supra) and **S. Ganesharaju** (supra). However, as noticed above, the decision in **Balwant Singh** (supra) cannot come to the aid of the respondent

because it cannot be said that the appellant has acted negligently in the facts of the present case. The appellant acted with reasonable dispatch and the same is evident from the fact that he engaged the counsel; entrusted the papers to him, and; the counsel delayed the filing of appeal on account of his ill-health.

30. The inconvenience suffered by the respondent can very well be compensated with costs.

31. For all the aforesaid reasons, the present appeal is allowed. The impugned judgment is set aside. The question of law is answered in favour of the appellant. The first appeal is remanded back to the First Appellate Court. The respondent shall be compensated with costs on account of the delay in filing the first appeal to the tune of Rs.10,000/-. The costs shall be paid by the appellant either when he appears before the First Appellate Court, or on the subsequent date as may be fixed by the First Appellate Court. The parties shall appear before the First Appellate Court on 23.11.2015.

VIPIN SANGHI, J

OCTOBER 15, 2015

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