

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1992 OF 2016
IN
APPEAL (L) NO.274 OF 2016

Mr. Kamal Mukut	 Applicant
IN THE MATTER BETWEEN	
Mr. Kamal Mukut	 Appellant
V/s	
Khalid Mohammed Sami & Ors.	 Respondents

Mr. A.M. Saraogi for the Applicant/Appellant.
Mr. Khalid M. Sami – Respondent No.1 in person.

CORAM : A.S. OKA &
A.A. SAYED, JJ.

DATED : 16 AUGUST 2016

ORDER:

1 Heard the learned Counsel appearing for the Applicant in support of this Notice of Motion for condonation of delay of 288 days in preferring an Appeal. We have heard the Respondent No.1 appearing in person who is the original Plaintiff.

2 The impugned decree has been passed on 13 October 2015. The present Appeal had been filed on 28 July 2016. In paragraphs 3 to 5 of the Affidavit-in-support the Applicant has stated thus:

“3. I say that though the impugned order came to be passed by this Hon'ble Court on 13/10/2015 however, due to sickness of my Advocate as he had gone under various

*surgery including angioplasty since October till April 2016 and there was no communication between my Advocate and accordingly I am annexing the medical history and certificate of my Advocate in respect of his illness and treatment and accordingly hereto annexed and marked **Exhibit-"A"** is a copy of said certificate.*

4. I say that I have been came to know about the impugned order only in the first week of June 2016 when I have attended the office of my Advocate and immediately I have instructed my Advocate preferred Appeal challenging the impugned order accordingly present appeal came to be filed before this Hon'ble Court.

5. I say that in view of the aforesaid facts as mentioned hereinabove there is a delay of 288 days in filing the present appeal before this Hon'ble Court accordingly I am taking out the present Notice of Motion seeking indulgence of this Hon'ble Court that to condone the delay of 288 days in filing the present appeal before this Hon'ble Court on such terms as this Hon'ble Court may deem fit and proper."

3 There is a Reply filed by the first Respondent. In clauses (B) and (C) of the Affidavit-in-Reply, he has dealt with paragraph 3 of the Affidavit-in-support. The factual statements made in paragraph 3 are not disputed but it is contended that the Advocate for the Applicant was aware that the period of limitation would expire on 12 November 2015.

4 The opposition of the first Respondent is that even going by the medical certificate annexed to the Affidavit in support, the Appeal could

have been always filed on or before 12 November 2015 as there is nothing on record to show that the Advocate for the Applicant was hospitalized till that date. The first Respondent relies upon a decision of the Delhi High Court in the case of **Ashok K. Khurana vs. M/s. Steelman Industries and another**¹. He also relied upon a decision of the Apex Court in the case of **Range Forest Officer vs. S.T. Hadimant**².

5 As far as the decision of the Delhi High Court is concerned, that is in the facts of the case before the Delhi High Court. The issue before the Delhi High Court was whether the provision in the Limitation Act, 1963 regarding condonation of delay will apply to the suits. The said issue does not arise in the present Notice of Motion as the delay is in preferring an Appeal against the decree. Perusal of the decision of the Apex Court in the case of **Range Forest Officer** shows that no law has been laid down as far as section 5 of the Limitation Act, 1963 is concerned.

6 The Medical Certificate of the Advocate for the Applicant attached to the Affidavit-in-support shows that there is a history of complaints right from 30 November 2015. A detailed history of the case of the Advocate for the Applicant has been set out in the said Certificate. It also records the history of hospitalization of the Advocate for the

1 AIR 2000 Delhi 336.

2 2002 (1) SCR 1080

Applicant. He lastly stated that on 6 January 2016 the Advocate was discharged and advised to take bed-rest for six weeks.

7 As far as section 5 of the Limitation Act, 1963 is concerned, the law is well settled. The Court is required to adopt justice oriented and liberal approach. Occasion for seeking condonation of delay arises only when there is some default from the part of a litigant.

8 In view of what is stated in paragraph 3 of the Affidavit in support and the documents annexed to the Affidavit-in-support regarding the health condition of the Advocate for the Applicant, in our view, sufficient cause is made out to condone the delay, the prejudice which may be caused to the first Respondent/original Plaintiff can be compensated by ordering payment of costs.

9 Accordingly, the Notice of Motion is made absolute in terms of prayer clause (a) subject to Applicant paying costs of Rs.15,000/- to the first Respondent/Plaintiff within a period of six weeks from today. The payment of costs will be condition precedent. Only if order of costs is complied with, the Appeal shall be fixed for admission in the category of "fresh admission" on 19 September 2016.

(A.A. SAYED, J.)

(A.S. OKA, J.)