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

+ CRL.A. 665/2007

G.S.MAYAWALA

..... Appellant

Through: Ms. Mala Goel, Advocate.

versus

RATTAN BOTHRA

..... Respondent

Through: Mr. B. Mohan & Ms. Harsh Lata,  
Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE VIPIN SANGHI**

**ORDER**

**29.09.2016**

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1. The present appeal is directed against the order dated 25.08.2004, whereby the learned MM, Delhi dismissed the complaint of the appellant petitioner under Section 138 of the Negotiable Instruments Act, in default.

2. The record shows that on 12.01.2014, the file was received by the learned MM on transfer. He directed that the complaint be checked and registered. He further directed that the complainant should comply with the appearance order. The next date given in the matter was 25.08.2004. On the said date, neither the complainant, nor his counsel appeared. After waiting for the complainant and his counsel, at 03:35 p.m., the learned MM dismissed the complaint in default by observing that a perusal of the file

shows that the complainant is not appearing since long.

3. The leave petition was preferred by the appellant/ complainant on or about 14.05.2007, i.e. about 3 years after the passing of the impugned order by the learned MM on 25.08.2004. Consequently, the appellant has also preferred an application to seek condonation of 992 days delay in filing the petition, being Crl. M.A. No. 6166/2007.

4. In the leave petition/ appeal, the appellant has stated that due to non-availability of correct address of the respondent, summons could not be served on him despite repeated efforts. During the years 2003-04, the counsel for the appellant was suffering from heart-attack and was paralysed on the left side of the body. He was confined to bed for considerably long period of time and could not pursue the matter personally in the Court. He also stated that the constituted attorney of the complainant was attending the case as the appellant is a senior citizen. The constituted attorney of the appellant Mr. Girish Kumar informed the counsel the dates of hearing for service of summons as 16.12.2004 (i.e. after the passing of the impugned order) and thereafter as 01.07.2005, 22.03.2006, 17.11.2006, and lastly 22.04.2007. It is averred in the petition that the counsel personally tried to locate the case in the earmarked Court but it was not found on checking. By that time, the attorney of the appellant had already left his service and could not be contacted. The appellant states that it came to the knowledge of his counsel that the matter had been dismissed in default way back on 25.08.2014. In the aforesaid background, the appellant seeks not only condonation of delay of 992 days in filing the appeal, but also to provide sufficient cause for non-appearance of the complainant and his counsel

before the Court when the impugned order dated 25.08.2004 was passed.

5. Learned counsel for the petitioner has opposed both the appeal and the application seeking condonation of delay.

6. Mr. Mohan states that there is absolutely no justification for condonation of delay as the appellant, apart from making a bald assertion with regard to the attendance of the case by the attorney even after its dismissal in default, has not placed any material whatsoever in support of the averments made in the appeal and the application. Neither the affidavit of the counsel, who preferred the leave petition, nor the affidavit of the attorney was filed. No record with regard to the medical condition of the counsel, who is stated to have suffered heart-attack and paralysis, has been filed. Even the case diary maintained by the counsel showing the entry of the dates of the case has not been filed.

7. He also placed reliance on the decision of the Supreme Court in ***S. Rama Krishna Vs. S. Rami Reddy (D) By His LRs & Ors.***, 2008 (6) Scale 450, to submit that there is a distinction between civil cases and criminal cases. Considering the fact that speedy trial is fundamental right of an accused, the delay in such matters cannot be condoned in routine. The Supreme Court observed in this decision as follows:

*“10. The provisions of Section 256(1) mandate the Magistrate to acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case. If an exceptional course is to be adopted, it must be spelt out. The discretion conferred upon the learned Magistrate, however, must be exercised with great care and caution. The conduct of the complainant for the said purpose is of immense significance. He cannot allow a case to*

*remain pending for an indefinite period. The appellant had been attending the court for a long time, except on some dates where when (sic) remained absent or was otherwise represented by his advocate. He had to remain present in court. He attended the court on not less than 20 occasions after the death of the original complainant. If in the aforementioned situation, the learned Magistrate exercised his discretionary jurisdiction, the same, in our opinion, should not have been ordinarily interfered with.*

*11. The High Court was exercising its jurisdiction under subsection (4) of Section 378 of the Code of Criminal Procedure. The appeal preferred by the respondents was against a judgment of acquittal. The High Court should have, therefore, exercised its jurisdiction keeping in view the limited role it had to play in the matter.*

*12. The High Court itself had come to the finding that the respondents were not interested in getting the matter prosecuted. Despite the same, it allowed their appeal, opining that any lis between the parties should be decided on merits rather than on technicalities. On what basis such a statement of law was made is not known. No precedent was cited; no reason has been assigned. The High Court failed to take into consideration the fact that it was dealing with an order of acquittal and, thus, the principle of law which was required to be applied was that, if two views are possible, a judgment of acquittal should not ordinarily be interfered with.*

*13. The High Court, in our opinion, therefore, misdirected itself in passing the impugned judgment. It can therefore not be sustained. We set aside the order of the High Court accordingly. The appeal is allowed.”*

8. It is further submitted by Mr. Mohan that the respondent has already arrived at a settlement inasmuch as the appellant has accepted an amount of Rupees One Lakh from the respondent towards settlement. The cheque in question was for Rupees Six Lakhs.

9. In rejoinder, Ms. Goel submits that the amount of Rupees One Lakh was not accepted in full and final settlement and the complainant is still interested in pursuing the complaint.

10. Having heard learned counsel for the appellant as well as the learned counsel for the respondent, I am of the view that there is no merit in the appeal or in the application seeking condonation of delay.

11. As noticed above, there is no material placed on record by the appellant to justify condonation of delay or disclosing sufficient cause for non-appearance before the learned MM on 25.08.2004, when the complaint was dismissed in default. Neither any document has been placed on record with regard to the alleged medical condition of the counsel, nor his case diary has been produced. Though the entire blame has been sought to be placed on the attorney of the appellant by claiming that he was informing incorrect dates to the counsel, his affidavit has not been produced and no action appears to have been taken against him by the appellant for misleading the appellant or his counsel. Once the complaint had already been dismissed on 25.08.2004, this Court fails to understand as to how the counsel could have been informed that the matter was listed on 16.12.2004, 01.07.2005, 22.03.2006, 17.11.2006, and 22.04.2007. It appears to the Court that these dates have been mentioned with a view to cover up the period of delay in preferring the petition before this Court. The respondent cannot be subjected to criminal proceedings in respect of dishonour of the cheque which took place in the year 1998 and the complaint dismissed in the year 2004 after such length of time.

12. The application and the appeal are, accordingly, dismissed.

**VIPIN SANGHI, J**

**SEPTEMBER 29, 2016**

*B.S. Rohella*