

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.106 OF 2017

Charanjit Kaur Jolly and Ors

..Applicants.

Vs

Neeta Kaur Inderpal Singh Flora
w/o Mr Inderpal Singh S. Flora

.. Respondents

Mr. Ramesh Tiwari i/b Mr. Alok Kumar Mohanlal Bagla , Advocate
for Applicants.

**CORAM : R.G.KETKAR,J.
DATE : 06/02/2017**

PC:

1. Not on Board. At the request of Mr.Tiwari, taken up for admission. Heard Mr.Tiwari, learned counsel for the applicants. at length.
2. By this Application under section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the applicants, hereinafter referred to as 'defendants', have challenged the Judgment and order dated 22.12.2016 passed by the learned Principal Judge, Greater Bombay in Notice of Motion no.4551 of 2016 in Suit No. 106788 of 2004 (High Court Suit No. 1532 of 2004). By that order, the learned trial Judge allowed the Notice of Motion taken out by the respondent, hereinafter referred to as 'plaintiff', in terms of prayers clause (a) and (b) subject to costs of Rs. 20,000/- to the defendants and Rs. 10,000/- to be deposited with D.L.S.A. on or before the next date.
3. In support of this Application, Mr.Tiwari submitted that in

the affidavit in support of Motion, no explanation is given for condoning the delay in filing the Notice of Motion. He submitted that in fact the plaintiff has to file separate application for condonation of delay. In other words, the plaintiff cannot simply pray for condoning delay in filing the Motion. He relied upon the following decisions:

(1) Dipak Chandra Ruhidas Vs chandan Kumar Sarkar, AIR 2003 SC 3701;

(2) Sneh Gupta Vs. Devi Sarup, (2009) 6 SCC 194 and in particular paragraph 48.

In paragraph 48, the Apex Court has observed that in the absence of any application for condonation of delay, the Court had no jurisdiction in terms of section 3 of the Limitation Act, 1963 to entertain the application for setting aside the decree.

4. He submitted that the learned trial Judge has not given any reasons for condoning the delay. The learned trial Judge, though has referred to 10 Judgments in paragraph 4 of the impugned order, has not commented upon those decisions. He, therefore, submitted that the impugned order deserves to be set aside.

5. I have considered the submissions advanced by Mr.Tiwari. I have also perused the material on record. As noted earlier, the plaintiff took out Motion for setting aside the order dated 8.9.2016. prayers (a) and (b) read thus:

(a) That this Hon'ble Court be pleased to quash and set aside the order dated 8/9/2016 whereby this Hon'ble Court in

view of the Advocate for the plaintiff remaining absent at the time of the hearing of the matter, has dismissed the suit for default.

(b) That this Hon'ble Court be pleased to condone the delay in taking out the present Notice of Motion and thereby be pleased to set aside the order dated 8th September, 2016 and restore the suit back to file along with the earlier order passed in the suit."

The plaintiff has filed her affidavit dated 25.11.2016 in support of the motion. In paragraph 5, the plaintiff averred that in view of the enhancement of the pecuniary jurisdiction, the matter was transferred from the High Court to the City Civil Court. Issues were framed on 11.6.2013 and the matter was thereafter adjourned for the purpose of recording plaintiff's evidence. She filed affidavit of evidence on 13.1.2014. Documents were marked on 1.4.2014 and the matter was adjourned to 23.4.2014. The defendant filed Chamber Summons for recasting of issues on 23.4.2014. In January, 2015 defendant filed another Chamber Summons for framing of issues under section 9A of C.P.C. Again in August 2015 the defendant filed Chamber Summons for framing of additional issues. Matter was listed on 1.4.2016 when her attorney inadvertently missed the matter and next adjourned date remained to be noted in the diary. Her attorney realized that in the last week of November, 2016 the matter remained unattended and realized that by order dated 8.10.2016 suit is dismissed in default.

6. Defendant filed reply inter alia contending that the Motion

is not maintainable as there is delay in challenging the order and as such it is liable to be set aside. Plaintiff has not given any sufficient cause for condoning delay and further no application for condonation of delay has been taken out by the plaintiff. Conduct of the plaintiff in not making any inquiry with her Advocate about the case papers does not entitle her for any relief and it does not constitute sufficient cause and if fact it amounts to negligence.

7. The learned trial Judge noted that the suit was dismissed in default on 8.9.2016 and motion is taken out on 25.11.2016 for recalling that order. There is delay of 53 days in filing the Motion. In paragraph 4, the learned trial Judge observed that the Judgments referred in paragraph 5 are not applicable in the facts and circumstances of the present case. The learned trial Judge further observed that the plaintiff has been prosecuting the suit for almost 12 years and if a date is missed by Advocate, the plaintiff cannot be non- suited on this count. The learned trial Judge therefore recorded a finding that the plaintiff has made out a case for restoration of the suit by condoning delay subject to imposing costs. The learned trial Judge allowed the Motion in terms of prayers (a) and (b) subject to costs of Rs. 20,000/- to the defendants and Rs. 10,000/- to be deposited before DSLA on next date.

8. It is settled principles of law that while considering the

application for delay, the Court has to adopt liberal approach. Apart from that, what counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. The expression 'sufficient cause' should be considered with pragmatism in a justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay, as held by the Apex Court in the case of *State of Nagaland Vs. Lipok AO*, 2005 (3) Supreme Court Cases 752.

9. Mr. Tiwari relied upon the decision of *Sneh Gupta* (supra) and in particular paragraph 48 thereof. In that case, the application for condonation of delay was not filed. Two applications were filed for recalling of the order. Those applications were filed after expiry of limitation and none of those applications were accompanied with an application for condonation of delay. In the absence of any application for condonation of delay, the Court had no jurisdiction in terms of section 3 of the Limitation Act to entertain the application for setting aside *ex parte* decree. The Apex Court has also considered its earlier decision in *Dipak Chandra Ruhidas* (supra). The said judgments are not applicable to the facts of the present case. I have already extracted prayer clause (b) of the Motion. By that prayer, the plaintiff has specially prayed for condonation of delay in taking out condonation application. In view thereof, no case is

made out for interfering with the order which is discretionary in nature. As noted earlier, the suit was dismissed in default. The plaintiff took out Notice of Motion for restoration of the suit as also for condonation of delay of 53 days. By the impugned order, the learned trial Judge has allowed the Motion. Instead of contesting the suit on merits, the defendants have challenged that order by filing the present Civil Revision Application. The learned trial Judge allowed the Motion subject to plaintiff paying costs of Rs.20,000/- to the defendants. In the facts and circumstances of the present case, I find that the direction for payment of costs to the defendants deserves to be modified. The plaintiff shall pay costs of Rs.20,000/- to Tata Memorial Hospital, Dr. E. Borges Road, Parel, Mumbai-400 012 and Rs. 10000/- to D.L.S.A. on the next date of hearing and produce receipt before the trial Court. Subject to this modification, Petition fails and the same is dismissed.

(R.G.KETKAR, J.)