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

% *Date of Decision: January 13, 2017*

+ **RFA(OS) 3/2017**

PODDAR GLOBAL PRIVATE LIMITED Appellant
Represented by: Mr.V.K. Garg, Sr. Adv.
instructed by Mr.Sunil Kumar,
Adv.

versus

SERVANTS OF PEOPLE SOCIETY & ANR Respondents
Represented by: None

+ **FAO(OS) 379/2016**

PODDAR GLOBAL PRIVATE LIMITED Appellant
Represented by: Mr.V.K. Garg, Sr. Adv.
instructed by Mr.Sunil Kumar,
Adv.

versus

SERVANTS OF PEOPLE SOCIETY & ANR Respondents
Represented by: None

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE YOGESH KHANNA

PRADEEP NANDRAJOG, J. (ORAL)

CM Nos.47546-47547/2016 in FAO(OS) 379/2016

Allowed subject to all just exceptions.

CM Nos.1451-1452/2017 in RFA(OS) 3/2017

Allowed subject to all just exceptions.

FAO(OS) 379/2016 & CM No.47545/2016
RFA(OS) 3/2017 & CM No.1450/2017

1. There is a delay of 62 days in filing FAO(OS) 379/2016. There is a delay of 98 days in filing RFA(OS) No.03/2017. We propose to decide the two appeals and the two applications seeking condonation of delay in filing FAO(OS) 379/2016 and 98 days delay in filing RFA(OS) 03/2017 and the reason would be apparent from the present decision.
2. Chamber Appeal, registered as OA No.166/2016 filed by the appellant against the order dated August 14, 2015 passed by the learned Joint Registrar, closing evidence of the appellant, has been dismissed by the learned Single Judge vide order dated September 02, 2016. Said part of the order is challenged in FAO(OS) 379/2016.
3. As a consequence of dismissing OA No.166/2016, the suit filed by the appellant has been dismissed on account of the appellant leading no evidence. The suit being dismissed is challenged in RFA(OS) 03/2017.
4. It is apparent that unless the impugned order dismissing the Chamber Appeal is allowed, the appellant would have nothing to argue as regards RFA(OS) 03/2017.
5. We now note the relevant facts.
6. The appellant filed a suit for recovery of payment outstanding, alleging that it had supplied paper to the defendants and full payment had not been received.
7. The suit is a commercial suit.
8. Issues were settled on May 16, 2014 with a direction that the

appellant shall file affidavits by way of examination-in-chief of all its witnesses within eight weeks. The matter was placed before the learned Joint Registrar for September 15, 2014, as recorded in the order when issues were settled.

9. The appellant did not file either the list of witnesses nor affidavit by way of examination-in-chief of the witnesses. Noting the default and imposing cost in sum of ₹5,000/- to recompense the defendants the inconvenience caused due to adjournment ensuing, the learned Joint Registrar directed that within eight weeks from September 15, 2014 compliance would be made. The suit was adjourned to March 03, 2015 for recording evidence.

10. Yet again there was a default. Imposing further cost in sum of ₹10,000/-, the appellant was permitted to file affidavit by way of examination-in-chief of its witnesses. The suit was adjourned for recording evidence to August 14, 2015.

11. Affidavit by way of evidence of one witness was filed. But the witness was not present for tendering affidavit by way of evidence for it being treated as the examination-in-chief of the witness and to be cross-examined. Previous costs in sum of ₹8,000/- and ₹10,000/- were not paid. Noting that the three previous orders were not complied with in full, learned Joint Registrar closed appellant's evidence.

12. It is apparent from aforesaid facts that the appellant was prosecuting the suit in a most careless manner evincing hardly any interest to prosecute the suit diligently.

13. Though as per the Original Side Rules of this Court, Chamber Appeal has to be filed within fifteen days of an order passed by a learned Joint

Registrar, surprisingly the Chamber Appeal was filed with a delay of 243 days. Not only that. The registry raised objections to the Chamber Appeal and these objections were removed after further delay of 74 days.

14. It is apparent that reason as to why the witness could not be present on August 14, 2015 had to be the sufficient cause to be shown to the learned Single Judge in the Chamber Appeal. Further, why were the previous two costs imposed not paid had also to be justified.

15. We are shocked and surprised to note that in the Chamber Appeal no such attempt has been made.

16. It is simply pleaded - *It is submitted that absence of the appellant/plaintiff was unintentional and bona fide.* Not a word has been uttered as to what was the fact or the reason based on a fact, for the witness not to be present on August 14, 2015.

17. Dismissing the Chamber Appeal the reason given by the learned Single Judge in para 9 of the impugned order is as under :-

“9. The plaintiff still did not act with promptitude and has filed this appeal after much delay as aforesaid. In the applications for condonation of delay in filing and re-filing it is stated that the reasons for the delay are set-out in the Chamber Appeal. However a perusal of the Memorandum of Chamber Appeal shows the plaintiff to have merely stated “that absence of appellant/plaintiff was unintentional and bona fide”. Not even an iota of reason for the delay is disclosed and no reason for non-payment of costs and for non-appearance of the witness and as to why the witness whose affidavit had been filed could not be available is given.”

18. We fully agree with the view taken by the learned Single Judge.

19. It is not a simple case of negligence. It is a case of supine indifference.

20. The Chamber Appeal be filed with a delay of 243 days tells the story of the supine indifference. 74 days delay in re-filing the Chamber appeal adds on to the supine indifference.

21. We find that the appellant continues to be in slumber evidenced by the fact that even the two appeals are filed much after the period of limitation had expired. The appellant awakes at its convenience.

22. Learned counsel for the appellant has cited two decisions. It is our duty to deal with both.

23. The first is the decision reported as (1998) 7 SCC 123 *N.Balakrishnan v. M.Krishnamurthy*.

24. The judgment lays down the well known legal principles holding that a liberal approach must be taken by Courts to consider sufficient cause shown for a default. As the law has developed in India, the same is that as far as possible courts must strive to decide a lis on merits and substantive rights should not be sacrificed at the altar of procedural law. But this does not mean that in each and every case delay and default has to be condoned. For if this be so, the mandate of the law requiring sufficient cause to be shown would be negated.

25. There is a difference in a liberal approach to be taken when a cause is shown, vis-à-vis where no cause whatsoever is shown.

26. A perusal of the judgment passed by the Supreme Court would evince that the appellant therein had engaged a counsel and had signed the papers and the Vakalatnama for doing the needful. Advocate's fee and expenses were also paid to the lawyer. But the lawyer did nothing.

27. It is trite that default by a party is different than a default by an agent. A lawyer prosecutes a suit as the agent of a party. Once a party does what it

is required to do and the lawyer lets the party down by belying the trust imposed by the litigant, that would be a sufficient cause to condone a default. The reason being that default by an agent which causes prejudice to the principles has to be condoned more liberally.

28. The second decision cited is reported as 2016 (159) DRJ 712 (DB) Tendril Financial Services Pvt. Ltd. & Ors. V. Namedi Leasing & Finance Ltd. & Ors. The judgment of the Division Bench would evince that a sufficient cause was shown in the facts of the case. The sufficient cause being the plaintiff not leading evidence on account of an application filed to transpose a defendant as a plaintiff, which if allowed, would have had a bearing on the nature of the affirmative evidence to be led by the plaintiff.

29. In the instant case regrettably we find no cause whatsoever, much less a sufficient cause, pleaded to condone the default which we find is a continuing default committed on August 14, 2015. We are conscious of the fact that previous defaults have not to be considered while considering the sufficiency of the cause, if any, was pleaded concerning the default which took place on August 14, 2015.

30. Two facts had to be pleaded by the appellant having a bearing on the sufficiency of the cause for default on August 14, 2015. The first fact had to relate to previous two costs imposed not being paid. The second had to be why the witness was not present. Not a word has been uttered in the Chamber Appeal.

31. Therefore, there is neither any merit in the two appeals. We have not decided the applications first wherein delay in filing the two appeals is prayed to be condoned because said facet of delay has to be considered with reference to the previous conduct of the appellant and the default committed

which has proved to be serious.

32. We therefore dismiss both the appeals and the applications seeking delay to be condoned by preferring to decide the appeals on merits, but without any costs.

(PRADEEP NANDRAJOG)
JUDGE

(YOGESH KHANNA)
JUDGE

JANUARY 13, 2017
VLD