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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ C.R.P. No.129/2017, CM No.20606/2017 (for condonation of 101 days delay in filing) and CM No.20607/2017 (for condonation of 65 days delay in re-filing).

K P GUPTA

..... Petitioner

Through: Mr. Ashish Chauhan and Mr.
Kushagra Bansal, Advs.

versus

RAJESH MITTAL

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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31.07.2017

CM No.20605/2017 (for exemption).

1. Allowed, subject to just exceptions.
2. The application stands disposed of.

C.R.P. No.129/2017, CM No.20606/2017 (for condonation of 101 days delay in filing) and CM No.20607/2017 (for condonation of 65 days delay in re-filing).

3. This Revision Petition under Section 115 of the Code of Civil Procedure, 1908 (CPC) impugns the order (dated 9th August, 2016 in RCA No.49/16 of the Court of Additional District Judge-1, North East District, Karkardooma Courts, Delhi) of dismissal of an appeal preferred by the petitioner against the order dated 30th March, 2016 of the Court of the Senior Civil Judge, of dismissal of an application of the petitioner / defendant under Order IX Rule 13 of the Code of Civil Procedure, 1908 (CPC).

4. This petition was filed first on 8th March, 2017 and thereafter repeatedly re-filed on 20th March, 2017, 30th March, 2017, 11th March, 2017, 22nd May, 2017 and 24th May, 2017 and came up before this Court first on

26th May, 2017 when none appeared on behalf of the petitioner and the matter was posted for today.

5. This petition is accompanied with applications for condonation of 101 days delay in filing and 65 days delay in re-filing thereof.

6. The learned Senior Civil Judge dismissed the application filed by the petitioner / defendant under Order IX Rule 13 of the CPC observing / holding (i) that from the averments in the application itself the petitioner / defendant No.1 came to know of the *ex parte* decree against him on 27th August, 2012 but filed the application under Order IX Rule 13 of the CPC only on 21st September, 2012; (ii) that it was not the case of the petitioner / defendant No.1 that he was not duly served; rather as per Court record, the petitioner / defendant No.1 as well as defendant no.2 being the son of the petitioner / defendant No.1 were duly served and had also filed a written statement and after which issues had been framed in the suit on 2nd May, 2011 in the presence of the petitioner / defendant No.1; (iii) that it was only thereafter that the petitioner / defendant No.1 failed to appear on 24th September, 2011, 14th December, 2011, 21st February, 2012 and was finally proceeded against *ex parte* on 21st February, 2012 and *ex parte* decree passed on 18th April, 2012; (iv) per Article 123 of the Schedule to the Limitation Act, 1963, limitation for filing an application under Order IX Rule 13 of the CPC was 30 days from the date of decree and not from the date when the petitioner / defendant No.1 had knowledge of decree; (v) the application under Order IX Rule 13 of the CPC was barred by time and was not accompanied with any application for condonation of delay; (vi) that there was no explanation why the defendant no.2 in the suit, who is the son of the petitioner / defendant No.1, did not appear before the Court on 24th

September, 2011, 14th December, 2011 and 21st February, 2012; and, (vii) that there was absolutely no reason stated for the delay of 25 days in filing the application.

7. The learned Additional District Judge in appeal preferred by the petitioner / defendant No.1 has observed / held (i) that the suit was hotly contested by the petitioner / defendant No.1 and his son; (ii) the petitioner / defendant No.1 and his son were found to be moving multifarious applications in the suit and were cautioned and directed to allow the case to proceed further on merits; (iii) that the application under Order IX Rule 13 of the CPC filed on 21st September, 2012 also was dismissed for non-prosecution on 14th January, 2015, though was subsequently restored subject to costs; (iv) that the appeal was also time barred and without any application for condonation of delay; (v) the Trial Court record showed that the petitioner / defendant No.1 had engaged three Advocates to represent him; names of the said Advocates were given; however all the said Advocates stopped appearing for the petitioner / defendant No.1; (vi) that the reason of non-appearance in the Court given by the petitioner / defendant No.1 was mainly attributed to medical problem of the petitioner / defendant No.1 and working outstation of the defendant no.2; and, (vii) the medical records produced by the petitioner / defendant No.1 were not such which prevented the petitioner / defendant No.1 from attending to his day to day affairs.

8. I may mention, that the suit, for setting aside of *ex parte* decree wherein the application under Order IX Rule 13 of the CPC was filed, was filed by the respondent / plaintiff against the petitioner / defendant No.1 and the son of the petitioner / defendant No.1 based on landlord – tenant

relationship and for ejectment of the petitioner / defendant No.1 and his son from the tenancy premises after determination of their tenancy and for recovery of *mesne* profits.

9. I have thus enquired from the counsel for the petitioner / defendant No.1 as to what is the defence of the petitioner / defendant No.1 to the suit.

10. The counsel for the petitioner / defendant No.1 states that the defence is, of the lease having been extended for a period of two years.

11. On enquiry, whether the said lease is by a registered document, the answer is in the negative.

12. If that be so, then without a registered document, there can, in law, be no Lease for two years, to constitute defence to the order of eviction. In the absence of a registered lease deed, the petitioner / defendant no.1, in law, was a tenant from month to month, whose tenancy could be determined by 15 days notice.

13. The counsel for the petitioner / defendant No.1 states that the petitioner / defendant No.1 has of his own vacated the premises and delivered possession thereof to the respondent/plaintiff and has also paid rents and now only the decree for *mesne* profits remains. On enquiry, as to what was the rate of rent and at what rate have the *mesne* profits have been awarded, the counsel for the petitioner / defendant No.1 states that the *mesne* profits have been awarded at the rate of Rs.15,000/- per month but he is not aware of the rate of rent.

14. A perusal of the judgment / *ex parte* decree shows the rent to be Rs.9,700/- per month fixed on 1st May, 2004 and the premises in the tenancy of the petitioner / defendant No.1 to be Flat No.B-101, Saraswati Apartments, 97 I.P. Estate, Patparganj, New Delhi – 110 092.

15. The *mesne* profits at less than double the rent and for which elaborate cogent reasons have been given in the *ex parte* judgment and decree, are also not so questionable so as to require this Court to, in exercise of powers under Article 227 of the Constitution of India and against a concurrent finding of fact and law of the two Courts below, interfere with the order.

16. The counsel for the petitioner /defendant No.1 has contended that the question of law which arises in the present case is, whether there was any need for the petitioner / defendant No.1 to file a separate application for condonation of delay when the facts were set-out in the application under Order IX Rule 13 of the CPC itself. Reference in this regard is made to ***Bhagmal Vs. Kunwar Lal*** (2010) 12 SCC 159 where it has been observed that where the question of delay is completely interlinked with the merits of the matter, a hyper technical view of dismissal of application under Order IX Rule 13 of the CPC for the reason of non-filing of application for condonation of delay was not proper.

17. However, in the present case, the conduct of the petitioner / defendant no.1 is replete with defaults and delays, with the petitioner / defendant no.1 delaying each and every stage of the proceedings. There is also a finding, of there being no cause for non-appearance of the petitioner / defendant on 26th May, 2017.

18. There is thus no merit in the petition.

Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

JULY 31, 2017

‘pp’..