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

+ **FAO(OS) 366/2016**

VINOD KUMAR MAHOTRA & ANR Appellants
Through Mr. Vivek Singh, Advocate.

versus

HINDUSTRAN LEVER LIMITED & ORS Respondents
Through Mr. Raman Kapur, Sr. Advocate with
Mr. Aviral Tiwari, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

% **13.07.2017**

C.M. No. 46275/2016

There is delay of 59 days in re-filing of the present appeal.

For the reasons stated in the application, we condone the delay.

The application is accordingly disposed of.

FAO(OS) 366/2016

We have heard the counsel for the appellants and the contesting respondent i.e. respondent No.1.

2. The issues in the suit were framed on 28th January, 2013. By order dated 25th November, 2014, the appellants, namely, defendant Nos. 1 and 5 were given four weeks' time to file affidavit by way of evidence. This order also records that the evidence of plaintiff i.e. the first respondent before us stands closed.

3. However, it appears that one of the witnesses of the respondent No.1 was further cross-examined on 3rd March, 2015. This order dated 3rd March, 2015 had again granted four weeks' time to the appellants to file list of witnesses and file affidavit by way of evidence. Third opportunity was granted vide order dated 5th May, 2015. Fourth and fifth opportunities to the appellants to file affidavit by way of evidence were granted to the appellants vide orders dated 19th August, 2015 and 30th November, 2015. As affidavit by way of evidence was not filed, Joint Registrar vide order dated 4th February, 2016 imposed costs of Rs.15,000/-, and had granted the last opportunity. Affidavit by way of evidence was still not filed and in these circumstances, the Joint Registrar vide order dated 26th April, 2016 closed the right of the appellants to file affidavit by way of evidence and lead evidence. On the said date, the appellants had failed to pay costs and what was produced before him was a photocopy of the draft.

4. Appellants thereafter filed in-chamber appeal which was registered as OA No.141/2016 against the order dated 26th April, 2016 of the Joint Registrar closing evidence. This appeal was belated by 58 days and, therefore, an application seeking condonation of delay was filed. For the first time the appellants had enclosed affidavit by way of evidence with this application.

5. By the impugned order dated 27th July, 2016, the single Judge has dismissed the application seeking condonation of delay and also observed that there was no ground to interfere with the order dated 26th April, 2016 of the Joint Registrar. It is apparent from the above discussion that the appellants had taken more than one year to file affidavit by way of evidence. Liberal or bountiful approach in the aforesaid facts would be

counterproductive and is not in the interest of justice.

6. Counsel for the appellants has stated that one of the parties, namely, defendant No.2, had expired and the appellants were under bonafide impression that till legal heirs were substituted, affidavit by way of evidence need not be filed. It is difficult to accept the said contention, which appears to be a sham and lame excuse and a pretence to delay the proceedings. Affidavit by way of evidence was to be filed by the appellants and not by the deceased defendant No.2. The order dated 30th November, 2015 passed by the Joint Registrar had also recorded that in case the first respondent (the plaintiff) would not take steps for bringing on record the legal heirs of defendant No.2, consequences would follow. The appellants have not pleaded or even alleged abatement of suit. No such contention is raised.

7. Counsel for the appellants has stated that defendant Nos.3 and 4 have filed their affidavit by way of evidence and their cross-examination is in progress. It is also stated that the appellants are ready and willing to pay costs, which the Court may fix. Counsel for the respondent No.1 leaves it to the Court.

8. Keeping in view the prolonged delay and the also the fact that suit is pending since 2006, we feel that the costs of Rs.50,000/- is justified if the appellants are to be given an opportunity to lead evidence. The first respondent has filed the suit for recovery of more than Rs.4 crores, which is a substantial amount. Costs of Rs.50,000/- would be paid to the respondent No.1 within four weeks. In case costs are not paid within the said period, the appeal will be treated as dismissed and the impugned order will be treated as affirmed. The costs of Rs.50,000/- imposed by us includes the costs of Rs.15,000/- imposed by the Joint Registrar vide order dated 4th

February, 2016.

9. The appeal is accordingly disposed of.

SANJIV KHANNA, J.

NAVIN CHAWLA, J.

JULY 13, 2017
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