

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

+ **RFA No. 631/2017**

% **18th July, 2017**

SMT. DIMPLE BHALLA Appellant

Through: Mr. Umesh Suri, Adv.

versus

SH. GAURAV SINGH Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

**CM No. 24943/2017 (delay of 898 days in filing the appeal) and
RFA No. 631/2017**

1. By the application for condonation of delay appellant/defendant seeks condonation of delay of 898 days in filing of the appeal against the impugned *ex-parte* judgment dated 11.9.2014.

2. Condonation of delay is prayed on the sole ground that appellant/defendant was told by her Advocate that he will take care of the case and that appellant/defendant did not have to bother. It is stated that appellant/defendant came to know about the impugned

judgment and decree on 14.5.2015 when some officials from the Court came to her parental residence, and which was in the course of execution proceedings.

3. I have gone through the application seeking condonation of delay and heard the counsel for the appellant/defendant.

4. The application is completely vague and all that the application says is that appellant/defendant was assured by her Advocate that she need not be bothered for the case. I therefore put a specific query to the counsel for the appellant/defendant that for what period the appellant/defendant did not contact her Advocate and in reply it is stated that from 2012 to 14.5.2015 the appellant/defendant did not contact her Advocate. In my opinion this is neither believable nor acceptable. No doubt, a client may not have contacted her Advocate for some reasonably long period of time of many months, but, the period of time cannot stretch to around 3 years. This is all the more so because appellant/defendant is not an illiterate person and in fact appellant/defendant is pursuing another criminal case against the respondent/plaintiff.

5. I may note that the appellant/defendant had filed an application for setting aside the impugned *ex-parte* judgment and decree dated 11.9.2014 decreeing the suit of the respondent/plaintiff for Rs.3,96,000/- along with the interest at 6% per annum, but this application under Order IX Rule 13 CPC was dismissed by the order dated 2.2.2017 and which order has become final.

6. Though in my opinion therefore there is no ground for condonation of huge delay of 898 days, however I have also heard the counsel for the appellant/defendant on merits.

7. The facts of the case are that the respondent/plaintiff filed the subject suit pleading that the appellant/defendant had given a cheque of Rs.3,96,000/- towards return of a friendly loan granted by the respondent/plaintiff to the appellant/defendant, and which was dishonored, and hence the subject suit was filed.

8. Appellant/defendant appeared initially in the trial court and filed a written statement but thereafter did not appear and hence was proceeded *ex-parte* on 6.8.2013. Respondent/plaintiff thereafter proved his case by proving a cheque bearing no. 947550 dated 5.2.2011 as Ex.PW1/A, cheque returning memos dated 5.2.2011 and

5.3.2011 as Ex.PW1/B and Ex.PW1/C and also various other documents including the legal notice dated 18.3.2011 as Ex.PW1/F. By the impugned *ex-parte* judgment dated 11.9.2014 the trial court notes that issuance of the cheque in question is not disputed by the appellant/defendant as per her written statement and her defence was that the respondent/plaintiff had taken signed cheque book of the appellant/defendant on the basis of false promises and assurances. Once the appellant/defendant led no evidence her case was not proved. I may note that the appellant/defendant also pleaded that the respondent/plaintiff was living with the appellant/defendant and who had promised to marry the appellant/defendant.

9. Once the appellant/defendant is proceeded *ex-parte*, she leads no evidence, and respondent/plaintiff proves his case by leading evidence, then no fault can be found with the impugned judgment and decree decreeing the suit. The relevant paras of the judgment dated 11.9.2014 of the trial court holding that the respondent/plaintiff proved his case are paras 4 to 6. For the sake of clarification it is stated that paras 4 and 5 are serially repeated in the impugned judgment and

hence reference is made to these repeated paras, which paras read as under:-

“4. Ex.PW1/A is cheque no. 947550 dated 05.02.2011 payable in favour of the plaintiff for Rs.3,96,000/-drawn by defendant on HDFC Bank Ltd., 19, Kasturba Gandhi Marg, New Delhi-110001. Ex.PW-1/B and Ex.PW-1/C are the Cheque Returning Memo dated 5.2.2011 and 5.3.2011 respectively pertaining to the said cheque for the reason “funds insufficient”. Ex.PW-4/A is the copy of the statement of account of SB Account No.13322150002810 of the plaintiff issued by Oriental Bank of Commerce, Shivaji Enclave, Delhi which reflect that a cheque no. 36079 for Rs.1,15,000/- was debited to Ms. Dimple (defendant) on 3.11.2009 Ex.PW-5/A is the copy of the statement of account of SB Account No.037801510514 of the plaintiff issued by ICICI Bank Ltd., Vishal Enclave, Delhi which shows that a cheque no. 529584 for Rs.35,000/- was debited on 4th November, 2009 to Ms. Dimple Bhalla (defendant). Ex.PW-3/A is the copy of the statement of account of SB A/c of the plaintiff with Oriental Bank of Commerce, Shivaji Enclave, Delhi and it reflects that a cheque of Rs.3,96,000/- was deposited by the plaintiff on 7.3.2011 which was returned unpaid because of “funds insufficient” on the same day. Ex.PW-2/B is the copy of the statement of account of SB A/c of defendant with HDFC Bank Ltd. Which reflect that a cheque issued by her in the name of Gaurav Singh (Plaintiff) for Rs.3,96,000/- was dishonored on 07.03.2011. Ex.PW-1/F is the copy of legal notice dated 18.03.2011 which plaintiff got issued through his counsel Sh. Vijay Singhal, Advocate to the defendant. Ex.PW-1/G is the copy of reply dated 1.4.2011 sent by the defendant through her counsel to the defendant.

5. PW-1 Sh. Gaurav Singh (Plaintiff) has deposed all the facts in the affidavit Ex.PW-1/1 which he pleaded in the plaint. PW-2 Sh. Aman Tiwari, asstt. Manager, HDFC Bank Ltd. Stated that the cheque no. 947550 for Rs.3,96,000/- issued by the defendant in favour of the plaintiff was dishonored twice i.e on 07.02.2011 and 07.03.2011 due to insufficient funds. PW-3 Sh. Amit Chaudhary, Single Window Operator, Oriental Bank of Commerce also stated that cheque of Rs. 3,96,000/- issued by the defendant in favour of the plaintiff was dishonored due to insufficient funds twice on 7.2.2011 and 7.3.2011.

6. The issuance of the cheque in question is not disputed by the defendant and she has merely pleaded that the plaintiff has taken signed cheque books of the defendant on the basis of false promises and assurances. However, she got herself proceeded ex-parte after partly cross examining the plaintiff (Sh. Gaurav Singh) while appearing as PW-1. The evidence adduced by the plaintiff went un rebutted and unchallenged. The defendant has neither cross examined the plaintiff nor his witnesses. She has also not

turned up in the witness box to prove her defence. The defendant has issued to plaintiff a cheque of Rs.3,96,000/-, Ex.PW1/A which has dishonored for insufficient funds. Under section 18 and 139 of Negotiable Instrument Act, 1881, there is presumption that the cheque has been issued by the defendant for consideration. Therefore, the suit of the plaintiff is hereby decreed for recovery of Rs.3,96,000/- with proportions cost against the defendant. He would also be entitled to interest @ 6% per annum from the date of filing of suit till realization of the decretal amount. Decree Sheet be prepared accordingly. File be consigned to record room.”

10. In my opinion, no fault can therefore be found with the impugned judgment and decree decreeing the suit inasmuch as and as stated above the appellant/defendant was *ex-parte* and the respondent/plaintiff proved his case including the dishonor of the cheque for a sum of Rs.3,96,000/-.

11. Learned counsel for the appellant/defendant stated that he has moved an application in this Court under Order XLI Rule 27 CPC being CM No.24942/2017, and therefore, the appellant/defendant be allowed to lead evidence, however, this application is misconceived because the provision of Order XLI Rule 27 CPC is not to enable a defendant who is *ex-parte* in the suit, and who fails to lead evidence, in an appeal filed under Section 96 CPC seek leading of evidence under Order XLI Rule 27 CPC. This is all the more so in the present case where the application under Order IX Rule 13 CPC filed by the appellant/defendant has already been dismissed confirming the

appellant/defendant being rightly proceeded *ex-parte* and resulting in passing of the impugned *ex-parte* judgment and decree dated 11.9.2014. CM No.24942/2017 will accordingly stand dismissed.

12. In view of the above, neither there is any sufficient cause for huge delay of 898 days nor is there any merit in the appeal and therefore, the appeal is accordingly dismissed.

JULY 18, 2017/ib

VALMIKI J. MEHTA, J

