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

% *Date of Judgment: 16th August, 2018*

+ RFA(OS).10/2018

HEM CHAND SHARMA(DEAD) THR LR & ANR..... Appellants

Through: Mr. V.K. Gupta, Senior Advocate
with Mr. Sanjeev Mahajan, Ms.
Ruchira Gupta and Mr. Anurag
Sharma, Advocates

versus

M/s. INNOVATIVE TEXTILES LTD. & ANR Respondents

Through: Mr. Sachin Datta, Dr. Farrukh Khan,
Mr. Changhez Khan, Mr. Abhishek
Kumar and Mohd. Shadub, Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

CM.APPL 6981/2018(delay) and 6980/2018(stay) & RFA(OS).10/2018

1. This is an application filed under Section 5 of the Limitation Act filed by the appellant seeking condonation of 629 days delay in filing the present appeal against the order dated 27.05.2016.
2. Mr. Gupta, learned Senior Counsel for the appellant submits that the delay in filing the appeal was not deliberate nor on account of carelessness or inaction, but on account of *bona fide* reasons, i.e., illness of the father of appellant no.2, who was arrayed as the defendant no.2 in the main suit filed under the provisions of Order XXXVII of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'). Mr. Gupta submits that appellant no.1 is the wife of deceased Hem Chand Sharma. It is contended that Late Shri Hem Chand Sharma was the signatory to the Agreement to Sell which is the

basis of the suit filed by the respondent under Order XXXVII CPC. It is contended that the deceased Late Shri Hem Chand Sharma was looking after the litigation, who had engaged the counsel and was also pursuing the matter. It is also pointed out that the father of appellant no.2 Late Shri Hem Chand Sharma was diagnosed with Giant Cell Arthritis in the month of April, 2014 and was under treatment at the PGIMER Chandigarh. It was during this period that the appellant no.2 was also undergoing a huge financial setback relating to his business. The condition of the father of appellant no.2 became worse and he had to undergo various tests, including FNAC of liver along with endoscopy of oesophagus and as per the report, he was diagnosed with nodular uncreative growth in the lower oesophagus and was advised by the Doctor for a biopsy. It has also been averred that the condition of Shri Hem Chand Sharma became so severe that he was taken to Rajiv Gandhi Cancer Institute, Delhi where PET scan was advised and the result showed metabolically active oesophageal lesion with lymph nodal and solitary liver involvement. The entire family of the appellants no.1 and 2 was devastated on account of the critical condition of Shri Hem Chand Sharma who passed away on 13.03.2017. It is also the case of the appellant no.2 that since then, he has been coping with his father's loss and trying to handle the family business and other responsibilities. It has also been contended that the appellants were unaware of the execution which had been filed by the respondents and it is only when the appellant no.2 came across a publication in the Hindi daily Newspaper 'Amar Ujala', Chandigarh Edition at Panchkula on 22.08.2017 did he learn about the pendency of

the execution proceedings. Thereafter, appellant no.2 engaged a counsel at Delhi and started going through the files and documents of his Late father. He checked the status of the execution petition on the website of the Delhi High Court and engaged the counsel, who appeared on 08.11.2017. The appellant no.2 thereafter got in touch with the earlier counsel who had been engaged by his father. The suit file was inspected and it is only then that he learnt that the bank guarantee had not been furnished. It has also been averred that the appellant no.2 had very limited role during the litigation as Shri Hem Chand Sharma was looking after the litigation and appellant no.2 was only signing the replies, applications, and written statement which were prepared at the instructions of his father. It has also been pointed out that an application under Order XXXVII Rule 4 CPC was filed for setting aside the decree with an application seeking condonation of delay which application was dismissed and thereafter the present appeal was filed. For the above reasons, Mr. Gupta, learned Senior Counsel for the appellants submits that delay should be condoned and even otherwise he has a strong case on merits, the objections raised by him in the appeal go to the root of the suit filed under Order XXXVII CPC.

3. Mr. Datta, learned counsel for the respondents submits that sufficient grounds have not been stated for condonation of 629 days delay in filing the present appeal. He submits that the son of the deceased was arrayed as defendant no.2 in the suit, who was well-aware of the pendency of the suit, the execution petition and the orders which were passed from time to time. He points out that after the application for

leave to defend was decided, the appellants sold the property at Gurgaon which had been injunctioned. This fact was brought to the notice of the Court and by an order dated 24.08.2015, defendants (appellants herein) were directed to furnish a bank guarantee within a period of four weeks. He further points out that the bank guarantee was not furnished and thereafter, an application was filed seeking extension of time and an undertaking was given to furnish the bank guarantee within six months. The undertaking was also not honoured as no bank guarantee was furnished. It is further pointed out that ultimately, a decree was passed on 27.05.2016. It is thus, prayed that the application is not bona fide. Sufficient grounds are not made out and accordingly the application be dismissed.

4. We have heard the learned counsels for the parties and carefully examined the application seeking condonation of delay.
5. Reading of the application would show that the same is vague, lacks material particulars and, in fact, it is in the form of a story and does not disclose material particulars. In para 6 of the application, it is averred that Sh. Hem Chand Sharma was diagnosed with Giant Cell Arthritis in the month of April, 2014, which in our view, is not relevant as the relevant period was post 27.05.2016. Para 7 of the application, however, reveals that the property of the deceased which was mortgaged with State Bank of India was auctioned along with the building constructed and thus, Shri Hem Chand Sharma had to set up his business at a far flung place in Punjab at Derabassi, District Mohali and the appellant no.2 due to the ailing health of his father was looking after the said new set up which also reveals that the deceased

Hem Chand Sharma had also taken up another project in MES, Srinagar where he suffered a huge set back and failure due to floods in Kashmir in September, 2015, which took a toll on the deceased who was under acute diabetic condition and was suffering from other health issues. Thereafter, a medical diagnosis of the deceased has been detailed in para 8 from December, 2016 onwards. But, there is no whisper as to whether the deceased or the appellant no.2 who was defendant in the suit was aware of the passing of the decree or not. There is no whisper as to on which date when the appellant no.2 contacted the lawyer or the lawyer contacted the appellant no.2. There is no explanation as to whether the appellant no.2 or his mother appellant no.1 ever received summons from this Court. It has been submitted by Mr. Datta that the publication was carried out only when the decree holder was unable to serve the judgment debtors in the ordinary process. We find that throughout the pendency of the proceedings, the defendant in the suit being appellant no.2 herein and his deceased father were playing hide and seek post the passing of the order of injunction by which appellants(defendants in the suit) were directed to furnish a bank guarantee and despite giving undertaking to the Court, the bank guarantee was not furnished, which has led to the passing of the decree.

6. Further, reading of the application would show that it does not disclose any cause much less sufficient cause for the delay in filing the present appeal. The Supreme Court of India has repeatedly held that the expression “sufficient cause” in Section 5 of the Limitation Act should be given a liberal interpretation to advance substantial

justification. It has also been repeatedly held that length of delay is not to be considered provided the explanation is genuine and the delay was caused for sufficient reasons.

7. In the case of ***Brijesh Kumar & Ors. vs. State of Haryana & Ors.***, reported at ***AIR 2014 SC 1612***, the Apex Court has held as under:-

“11. The courts should not adopt an injustice-oriented approach in rejecting the application for condonation of delay. However the court while allowing such application has to draw a distinction between delay and inordinate delay for want of bona fides of an inaction or negligence would deprive a party of the protection of Section 5 of the Limitation Act, 1963. Sufficient cause is a condition precedent for exercise of discretion by the Court for condoning the delay. This Court has time and again held that when mandatory provision is not complied with and that delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay on sympathetic grounds alone.

12. It is also a well settled principle of law that if some person has taken a relief approaching the Court just or immediately after the cause of action had arisen, other persons cannot take benefit thereof approaching the court at a belated stage for the reason that they cannot be permitted to take the impetus of the order passed at the behest of some diligent person.”

8. The Hon’ble Supreme Court of India has culled out various factors which are to be considered while dealing with an application seeking condonation of delay, in the case of ***Esha Bhattacharjee vs Managing Committee of Raghunathpur Nafar Academy and Ors.*** reported at ***(2013) 12 SCC 649***. The relevant Paragraph 21 is reproduced herein below wherein it has been observed as under:-

“21. From the aforesaid authorities the principles that can broadly be culled out are:

i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

ii) The terms “sufficient cause” should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact- situation.

iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into

consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.”

9. Applying the aforementioned principles to the present case, we are of the considered view that the appellants have failed to show sufficient cause for the condonation of delay. Accordingly, we find no ground to condone the delay of 629 days in filing the present appeal.
10. The appeal and the applications CMs.APPL 6981/2018 and 6980/2018 are dismissed.

G.S.SISTANI, J.

SANGITA DHINGRA SEHGAL, J

AUGUST 16, 2018//pst