

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

+ **RFA No. 493/2018**

% **3rd July, 2018**

DIWAN SHARMA Appellant

Through: Mr. Animesh Kumar and
Mr. Aman Jha, Advocates.

versus

GURUDUTT K P S N & ORS. Respondents

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. Appl. No. 25715/2018 (for exemption)

Exemption allowed, subject to just exceptions.

C.M. stands disposed of.

RFA No. 493/2018, C.M. Appl. No. 25714/2018 (for condonation of delay of 935 days in filing the appeal) and C.M. Appl. No. 25713/2018 (for stay)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no. 2 in the suit impugning the judgment of the trial court dated 31.7.2015 by

which the trial court has dismissed the leave to defend application filed by the appellant/defendant no. 2 under Order XXXVII Rule 3(5) CPC and has decreed the suit for recovery of Rs.3,25,000/- along with interest at 9% per annum. The suit was filed on the basis of dishonoured cheques.

2. At the outset, it is noted that this appeal is filed with a huge delay of 935 days. The delay is not of a few weeks or few months but the delay is of around more than thirty months. The first aspect therefore to be looked into is whether this Court can condone the delay of 935 days in filing of the appeal on the basis of the averments made in the application seeking condonation of delay being C.M. Appl. No. 25714/2018.

3. The ground which is urged in the application seeking condonation of delay is that the Advocate of the appellant/defendant no. 2 did not inform the appellant/defendant no. 2 about the impugned judgment. Besides the fact that this averment made is very difficult to believe as the appellant/defendant no. 2 is not an illiterate person but is a Managing Director of a company which is engaged in construction business, it is also however relevant to note that the

appellant/defendant no. 2 himself in the application seeking condonation of delay avers that since the year 2016 he has been appearing in the executing court and pursuing his objections to the attachment. Therefore, once the appellant/defendant no. 2 has been pursuing his objections to the attachment in execution proceedings of the subject judgment, appellant/defendant no. 2 is well aware of the passing of the impugned judgment dated 31.7.2015, and therefore, there is no reason why the huge delay of 935 days should be condoned, and more so in the facts of the present case where the suit under order XXXVII CPC filed on the basis of dishonoured cheques for dues towards the salary of the respondent no.1/plaintiff/employee, and which has been decreed.

4. In my opinion, therefore this appeal is liable to be and is accordingly dismissed on account of there not being sufficient cause for condonation of delay. No doubt courts look at the aspect of condonation of delay liberally, however looking at an issue liberally does not mean that the limitation period has to be thrown to the winds, and which is more so because vested rights accrue in favour of the opposite side on account of expiry of the period of limitation. CM No. 25714/2018 is dismissed.

5. Independent of the issue of limitation, since learned counsel for the appellant/defendant no. 2 has argued on merits, I have also examined the merits of the matter and have found that the trial court has rightly dismissed the leave to defend application as being completely moonshine. Supreme Court in the recent judgment in the case of ***IDBI Trusteeship Services Ltd. Vs. Hubtown Ltd., (2017) 1 SCC 568*** has laid down the principles for grant of leave to defend and these principles are as under:-

"17. Accordingly, the principles stated in paragraph 8 of *Mechelec's* case will now stand superseded, given the amendment of Order XXXVII Rule 3, and the binding decision of four judges in *Milkhiram's* case, as follows:

17.1. If the defendant satisfies the Court that he has a substantial defence, that is, a defence that is likely to succeed, the Plaintiff is not entitled to leave to sign judgment, and the Defendant is entitled to unconditional leave to defend the suit.

17.2 If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the Plaintiff is not entitled to sign judgment, and the Defendant is *ordinarily* entitled to unconditional leave to defend.

17.3 Even if the Defendant raises triable issues, if a doubt is left with the trial judge about the Defendant's good faith, or the genuineness of the triable issues, the trial judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4 If the Defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a

defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5 If the Defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the Plaintiff is entitled to judgment forthwith.

17.6 If any part of the amount claimed by the Plaintiff is admitted by the Defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the Defendant in court."

6. Therefore, once the defence is clearly frivolous and vexatious or in fact is an abuse of process of law because no triable issue is raised then Courts would not grant leave to defend.

7. In the present case it is seen that admittedly the cheques bear the signatures of the appellant/defendant no. 2. Not only the cheques bear the signatures of the appellant/defendant no. 2, the case put forth by the appellant/defendant no. 2 of the cheques having been stolen from the office of his company is clearly a completely frivolous defence, inasmuch as not only there is no office address given in the leave to defend application from where the cheques were allegedly stolen. Also, stealing of cheques is a serious thing and the trial court rightly notes that appellant/defendant no. 2 took no follow up action of the cheques having been stolen allegedly by the respondent

no.1/plaintiff i.e. the appellant/defendant no. 2 did not file any FIR or file any criminal case of stealing of the cheques. In fact, I would like to add that even assuming no FIR was required to be filed, appellant/defendant no. 2 could well have at least issued a legal notice or a letter complaining to the respondent no.1/plaintiff of stealing of the cheques, and which admittedly has not been done. It is completely unbelievable and a frivolous defence that the respondent no.1/plaintiff was not an employee but was in relation of one of the directors and on that basis he used to come to the office (address not given), and consequently the respondent no.1/plaintiff stole the subject cheques.

8. I may note that no other ground on merits is urged before this Court except the fact that this Court in one other RFA No. 619/2017, has issued notice against the self-same impugned judgment on an appeal filed by the wife of the appellant/defendant no. 2, however, it is noted that the ground taken in the said RFA No. 619/2017 of there not being the liability of the wife of the appellant/defendant no. 2 on account of simply the wife being a share holder or director in the company, is not a ground which is urged before this Court in this appeal.

9. In view of the above discussion neither there are any grounds for condonation of delay nor is there any merit in the matter, inasmuch as, this Court finds that the appellant/defendant no. 2 is deliberately not paying the dues of an employee and who had worked for the appellant/defendant no. 2.

10. Dismissed.

JULY 03, 2018/ *AK*

VALMIKI J. MEHTA, J