

\$~47

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% *Date of Judgment: 1st August, 2018*

+ RFA(OS) 56/2018

JAY KUMAR

..... Appellant

Through: Mr D.K. Devesh and Mr Hitesh Vats,
Advs

versus

SANDEEP VIRMANI & ANR

..... Respondents

Through: Nemo

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J. (ORAL)

CM Nos. 30565-66/2018 (exemptions)

Exemptions are allowed subject to just exceptions.

Applications stand disposed of.

CM No. 30582/2018 (delay in filing)

1. Present appeal has been filed under Section 96 of the Code of Civil Procedure, 1908 read with Section 10 of the Delhi High Court Act. Challenge is to the ex-parte decree and judgment dated 28.04.2014. Along with the appeal, the appellant has filed an application under Section 5 of the Limitation Act, 1963 seeking condonation of 1512 days delay. Learned

counsel for the appellant has strongly urged before this Court that the delay is not attributable to the appellant but to the fact that the counsel who was representing the appellant and who had assured the appellant that he would take care of the litigation and intimate the appellant as and when his appearance will be required and believing the words of his counsel, the appellant did not appear in the matter.

2. It is further submitted that the counsel Sh. S.C. Baweja expired during the pendency of the suit which was not communicated to the appellant and hence the appellant was not aware of the passing of the ex-parte decree on 28.04.2014 till he received summons in the execution petition in the month of November, 2015.

3. It is further averred in the application seeking condonation of delay that immediately after service of summons, the appellant appointed another counsel who filed his Vakalatnama on behalf of the appellant in the execution petition. Thereafter, he moved an application under Order IX Rule 13 CPC, wrongly mentioned as appeal in para B of the application.

4. It is further averred that on 26.11.2015, the appellant was informed that warrants of attachment of his immovable property had been issued. Accordingly, the appellant issued three cheques amounting to Rs. 42,20,000/- with the condition that the respondent would withdraw the execution petition and thereafter the parties would enter into a fresh agreement to settle. It is also submitted that the appellant had advised his subsequently appointed counsel to take all appropriate steps to safeguard his interest but no steps were taken and only at this stage the present appeal has been filed, as advised.

5. We have heard the learned counsel for the appellant and also examined the application filed under Section 5 of the Limitation Act. Although law is well settled that it is not the number of days which should be the basis of rejecting an application seeking condonation of delay but it is the reasoning and satisfaction of the Court that the applicant has not acted in a casual, negligent and the delay was on account on bona-fide reasons. The present application, in our view, is vague and lacks material numbers. Although the order of the learned Single Judge shows that the appellant herein was proceeded ex-parte on 24.10.2013, there is no explanation as to why the appellant did not approach his counsel during his life time to inquire about the progress, of not one but two cases which were being handled by him as disclosed in the present application. We also find that there is no date as to when the counsel expired. There is no date as to when another counsel was appointed except that he was appointed in the year 2015. The application also does not satisfactorily explain the delay between 26.11.2015, when warrants of attachment were served upon the appellant, and the filing of the present appeal in the month of July 2018. We may note that the applicant discloses that three cheques were issued by the appellant upon receipt of warrants of attachment for the total sum of Rs. 42,20,000/- in the case titled as ***Sandeep Virmani & Anr vs Jay Kumar*** but on being asked as to whether the aforesaid cheques were encashed or not, the answer is in the negative. Although counsel explains that the cheques were not encashed for the reason that the respondent was not willing to settle the matter and on the pretext that the respondent would approach them. We find this explanation to be unacceptable for the reason that the appellant is the debtor

and the respondent was a holder of decree, to expect that the respondent would approach the appellant is not an explanation worth considering.

6. The 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.”*** Repored in (2014) 2 SCC (LS). Paragraph 15 is produced herein below wherein it has been observed as under:-

“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."

7. The submission made by the counsel for the appellant that he was assured by the counsel appointed that he would look after his interest is also not convincing. It is not believable that after engaging a counsel the

appellant did not think it proper or appropriate to inquire about the fate or progress of his cases. The appellant cannot be permitted to shift the entire burden on his counsel who we are told is no more. The delay in this case is inordinate and unexplained. The Supreme Court in the case of ***Salil Dutta v. T.M. and M.C. Private Ltd.*** Reported as **JT 1993 (4) SC 528**, wherein, while distinguishing the decision in ***Rafiq and Anr. V. Munshilal and Anr.*** Reported as **AIR 1981 SC 1400**, it was observed as below:

“The advocate is the agent of the party. His act and statements made within the limits of authority given to him, are the acts and statements of the principal, i.e., the party who engaged him. It is true that in certain situations, the Court may, in the interest of justice, set aside a dismissal order or an ex-parte decree notwithstanding the Negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant, but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. The observations made in Rafiq must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition.”

8. In the case of **Brijesh Kumar & Ors. V. 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.”

9. We find no cogent, reasonable and sufficient ground to condone the delay, resultantly, the application is dismissed.

RFA(OS) 56/2018 and CM No. 30564/2018 (stay)

10. In view of the order passed in CM No. 30582/2018, the appeal and CM No. 30564/2018 are dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

AUGUST 01, 2018
SU