$~2

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

\+ FAO(OS) (COMM) 239/2019 & C.M. Nos.6008/2013,41518/2019

M/S BANK KREISS AG ..... Appellant

Through: Mr. Sanjeev Anand, Mr. Shivam Sharma, Mr. Piyush Joshi, Ms. Anisha Bhattacharya & Ms. Lalia Philip, Advocates.

versus

ASHOK K.CHAUHAN & ORS. ..... Respondents

Through: Mr. Tanmaya Mehta, Mr. Raajan Chawla, Mr. S.B. Singh, Mr. Gautam Chauhan & Mr. Shyam Singh, Advocates.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE ASHA MENON

O R D E R

% **12.02.2020**

C.M. No.856/2003 (by the appellant under Section 5 of the Limitation Act for condonation of delay of 110 days in filing the accompanying appeal)

1. The appellant/plaintiff has filed the accompanying appeal being aggrieved by the judgment dated 06.03.2003, passed by the learned Single Judge, whereunder an application moved by it under Order VI Rule 17 CPC, for seeking amendment of the plaint, was rejected.

2. Accompanying the present appeal is C.M. No.856/2003, for seeking condonation of delay of 110 days in filing the appeal. The averments made in the application are to the effect that counsel for the appellant/Bank had applied for a certified copy of the impugned order dated 06.03.2003, on 12.03.2003; that counsel had received a certified

copy of the said order on 28.03.2003 and had posted the same to the appellant which is a bank based in Germany; that on receipt of a copy of the said order, the appellant/Bank decided to convene a Board meeting to decide the future course of action to be initiated; that in the said Board meeting, it was decided that an appeal may be preferred against the impugned order; that the decision of the appellant/Bank to file the appeal could be communicated to its counsel on 10.07.2003 as on account of the summer vacations of the High Court, the office of the counsel was closed and the same reopened only on 07.07.2003. It is further averred that on receiving necessary instructions from the appellant/Bank, the counsel had drafted the accompanying appeal and sent it to Germany for approval. Requisite approvals were granted by the appellant/Bank and the signed documents were sent back to counsel on 31.07.2003, whereafter, the present appeal came to be filed on 11.08.2003. With this explanation, the appellant/Bank seeks condonation of delay of 110 days in filing the accompanying appeal.

3. Reply in opposition to the present application was filed by the respondent Nos.1 & 4 on 23.10.2003 wherein, the prayer for condonation of delay has been opposed on several counts including the ground that the application is ambiguous as the appellant/Bank had failed to mention the date on which a copy of the impugned order was posted by the counsel to the Bank in Germany and the mode of intimation; that the appellant/Bank has not furnished the date when the Board meeting was convened to decide the future course of action as no Minutes of the Meeting have been placed on record; that the application is silent as to the date on which the appellant/Bank had

taken a decision to file the appeal; that the application does not state as to when a decision was taken to file the appeal and when it was communicated by the Bank to its counsel and when was the appeal finally drafted and sent to the bank in Germany for necessary approval. It has thus been averred in the reply that the application is bereft of material particulars and is liable to be dismissed.

4. We may note that on perusing the pleadings in the application, on 19.02.2004, the court had made the following observations:-

> *"**CM 856/2003 (condonation of delay) in FAO (OS) 317/2003***
>
> *Reply filed to this application. While this application was being considered, it was disclosed by respondent's counsel that appellant bank had undergone some change on 27th August, 2001 due to which maintainability of appellant's suit itself had come under cloud. He submitted that this issue, which was pending consideration of Learned Trial Judge, was sorted out, this application for condonation of delay alongwith the appeal could not proceed.*
>
> *We see substance in the plea and defer consideration of the matter to await the outcome of the proceedings before the learned Trial Judge. **Meanwhile appellant may file an additional affidavit to support his condonation application which be taken on record subject to the objections of respondents.**"*
>
> (emphasis added)

5. Despite the aforesaid opportunity granted to the appellant/Bank to file an additional affidavit in support of the condonation of delay application as long back as in the year 2004, no such affidavit has been filed till date. Even on 16.04.2013, the said position was noticed

by the predecessor Bench and the court was gracious enough to grant further time to the appellant/Bank to file the additional affidavit. Yet, the affidavit was not filed by the appellant/Bank. On 22.11.2018, noting the orders passed earlier, an opportunity was again granted to the appellant/Bank to file an additional affidavit to explain the delay. Finally on 15.02.2019, Mr. Anand, learned counsel for the appellant/Bank had stated that the Bank was not in a position to file an additional affidavit to explain the delay in terms of the earlier opportunities granted to it. The explanation offered for the same was that the Bank had got merged with Yapi Kredi Bank (Deutschland) AG and the documents were not available with the Bank for filing the said affidavit. The court had kept the aforesaid aspect open for consideration when the present application would be taken up for arguments.

6. Today, Mr. Anand, learned counsel for the appellant/Bank seeks to explain that the Minutes of the Board meeting of the Bank referred to in para 4 of the application, even if not on record, would be irrelevant when the affidavit filed in support of the present application has been filed by two authorized representatives of the appellant/Bank, one of whom happens to be a member of the Board of Directors of the Bank and the fact that he has sworn the affidavit should itself suffice for the court to accept the averments made in the application as true and correct. He states that the fact that no additional affidavit has been filed by the appellant/Bank and the Minutes of the Board meeting that had taken place taking a decision to file an appeal, have not been placed on record, would make no

difference.

7. Learned counsel for the appellant/Bank also seeks to cite the decision of the Supreme Court in the case of *Collector, Land Acquisition, Anantnag And Another vs. Mst. Katiji And Others,* reported as **(1987) 2 SCC 107** and *State of Haryana vs. Chandra Mani And Others,* reported as **(1996) 3 SCC 132** to urge that the court must not adopt a pedantic approach while examining an application for condonation of delay and nor is an applicant required to explain each and every days' delay in filing an appeal. As long as the appellant is able to demonstrate that there are no *mala fides* involved in causing the delay, that ought to be sufficient for the court to condone the delay and entertain the appeal.

8. *Per contra,* Mr. Tanmay Mehta, learned counsel for the respondents vehemently opposes the present application and states that the appellant/Bank has been granted several opportunities over the past decade and a half to file an additional affidavit in support of the averments made in the condonation of delay application but it has failed to do so. He submits that the statement made on behalf of the appellant/Bank as recorded in the order dated 15.02.2019, to the effect that the Bank had recently got merged with Yapi Kredi Bank (Deutschland) AG is contrary to the correct factual position inasmuch as the merger of the original plaintiff/Bank in the suit had taken place in October, 2001 and the accompanying appeal was filed by the appellant/Bank as the merged entity in August, 2003. It is therefore, urged that no such plea can be taken by the appellant/Bank to the effect that the records are not traceable, moreso, when the respondents

had put the appellant/Bank to notice by specifically taking a plea in their reply in opposition to the condonation of delay application that it was expected to substantiate the averments made in para 4 of the application. Pertinently, a reply to this application was filed by the respondents as long as back as on 23.10.2003.

9. We have heard the learned counsel for the parties, carefully perused the pleadings in the application and examined the previous order sheets. Quite clearly, the appellant/Bank has not been able to demonstrate either just or sufficient cause for the delay reckoned from 28.03.2003, the date on which a certified copy of the impugned order was received by its counsel, till 8th August, 2003 when the appeal was finally filed. Even if we exclude a reasonable period computed from 28.03.2003, the date on which the certified copy of the impugned order was received by the appellant's counsel and give some benefit to the appellant/Bank on an assumption that the counsel would have taken some time to forward the said order to the appellant/Bank based in Germany, it would hardly be of any assistance as the delay in the instant case is spanning over 110 days.

10. We are inclined to accept the submission made by learned counsel for the respondent that the application for condonation of delay is dead silent on the date on which a copy of the impugned order was received by the appellant/Bank, the date on which the appellant/Bank had taken a decision to convene a Board meeting to decide the future course of action to be taken in the matter and the date on which the Board meeting had actually taken place wherein a decision was taken to prefer an appeal against the impugned order.

As a large part of the explanation hinges on this aspect, non-filing of the minutes of the Board Meeting is fatal to the case of the appellant/Bank. Repeated opportunities to file an additional affidavit with the relevant documents have not been availed by the appellant/Bank for 16 long years. The explanation sought to be offered on behalf of the appellant/Bank that the relevant documents had gone missing due to the merger of the original plaintiff/Bank with the merged entity due to passage of time cannot cut any ice when the merger had taken place in the year 2001 and the appeal was filed in the year 2003.

11. It is also relevant to note that no material dates have been mentioned in the application to indicate the exact time lines within which the appellant/Bank had communicated the decision to its counsel to file the appeal. Instead, a bald averment has been made in para 5 of the application that due to the summer vacations breaking in the High Court, the office of the counsel for the Bank was closed during that period and when the court reopened on 07.07.2003, the Bank had sent a communication to its counsel on 10.07.2003, to file the appeal. It is noteworthy that not even a copy of the communication sent by the appellant/Bank, has been filed to substantiate the said submission.

12. In the aforesaid facts and circumstances of the case, we are afraid, it would not be of any avail for the appellant/Bank to refer to and rely on the decision of the Supreme Court in the case of Mst. Katiji And Others (supra), moreso, when the delay in the captioned case was only of four days and that too in a case where the State of

Jammu & Kashmir had filed an appeal challenging a decision for enhancing compensation in respect of land acquired for public purpose and the issue involved the principles of valuation of the land. Similarly, the decision in Chandra Mani And Others (supra) relates to an appeal preferred by the State of Haryana where the delay was of 109 days. After citing a line of decisions on the aspect of '*sufficient cause*' for condonation of delay, the only reason for condoning the delay that weighed with the Supreme Court was that the appellant therein happened to be State of Haryana. The Supreme Court noted that the decisions taken by officers/agencies are at a proverbially slow pace and the encumbered process of pushing the files from table to table, takes considerable time, causing delay, which is routine. Mindful of the procedural red-tape in the decision making process of the Government, the Supreme Court opined that some latitude ought to be given to the State.

13. In the instant case, the appellant is a private Bank and has all the facilities and manpower at its command including a team of officers who were expected to act with due diligence, efficiently and promptly in pursuing the legal remedies. Counsel for the appellant/Bank can hardly rely on the decisions in the captioned cases to explain the delay in the instant case. Even otherwise, the dispute between the parties to this lis is a commercial dispute. We are given to understand that the suit instituted by the appellant/Bank which is pending on the Original Side of this Court has been converted into a commercial suit where the criteria applied for condoning the delay is much more stringent, viz-a-viz an ordinary civil suit. Even if it is

case of the appellant/Bank that on the date of filing the appeal, the suit had not been converted into a commercial suit, but it remained an ordinary civil suit and therefore the yardstick to be applied ought to be more relaxed, we are of the opinion that the appellant/Bank has miserably failed to demonstrate either just or sufficient cause for this court to come to its aid by exercising its discretion in its favour.

14. For the aforesaid reasons, we decline to condone the delay of 110 days in filing the accompanying appeal. The application is dismissed accordingly, as meritless. As a consequence thereof, the accompanying appeal is also dismissed along with the pending applications.

HIMA KOHLI, J.

ASHA MENON, J.

FEBRUARY 12, 2020
'AA'/NA/ap