

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

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Reserved on: 13th July, 2021

Pronounced on: 10th August, 2021

+ **RFA 459/2015, CM APPL.31467/2020 (by the applicant under Section 151 CPC for impleadment of IndusInd Bank Ltd. as necessary party)**

M/S B GHOSE & COMPANY PVT LTDAppellant

Through: None

Versus

SATISH MATHUR & ANRRespondents

Through: Mr. Vidur Kamra, Advocate for
respondent No.1

+ **RFA 283/2020, CM APPLs.30147/2020 (by the appellant u/S 151 CPC for stay) & 30149/2020 (by the appellant u/S 5 of the Limitation Act for condonation of delay in filing the present appeal)**

ASHOK LEYLAND FINANCE LTDAppellant

Through: Mr. Avi Singh with Mr. Puneet
Bajaj, Advocates

Versus

SATISH MATHUR & ANR.Respondents

Through: Mr. Vidur Kamra, Advocate for
respondent No.1

CORAM:
HON'BLE MS. JUSTICE ASHA MENON

RFA 459/2015 & RFA 283/2020

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J U D G M E N T

[VIA VIDEO CONFERENCING]

ASHA MENON, J.

1. Since both the appeals have been filed against the same judgment and decree of the learned Trial Court dated 23rd February, 2015 passed in a suit filed by the respondent No.1/Satish Mathur against the two appellants, namely, M/s.Ashok Leyland Finance Ltd. (hereinafter referred to as “**Ashok Leyland**”) and M/s. B. Ghose & Company Pvt. Ltd. (hereinafter referred to as “**B. Ghose**”), who were defendants No.1 & 2 respectively before the learned Trial Court, the same are being disposed of together by this common judgment.

2. The case set up by the respondent No.1/plaintiff before the learned Trial Court for the recovery of Rs.14,00,000/- was that he was the sole proprietor of M/s. Dayal Container Carriers. He had hired out trailers and trollies to B.Ghose, since June 1999, for which it was required to pay him hire charges. The trailer horses had been financed by Ashok Leyland through various Hire Purchase Agreements (“**HPA**” for short) on various dates. According to the respondent No.1/plaintiff, he had been making payments regularly up to January 2002, but thereafter, as he left the employment of B.Ghose, the understanding was that B.Ghose would be making regular deposits of the instalments with Ashok Leyland. Apparently, except for one deposit in February 2002, that was not done, nor were the hire charges paid to the respondent No.1/plaintiff. He has

filed another suit being Civil Suit No.195/2009 for recovery of hire charges against B.Ghose.

3. The instant suit was, however, filed on the ground that Ashok Leyland had illegally taken possession of the trailer horses and trollies from the possession of B.Ghose without due authorization from respondent No.1/plaintiff and thereafter, had claimed to have returned the trollies to the B.Ghose. However, no trolley was returned to the respondent No.1/plaintiff. Moreover, when the respondent No.1/plaintiff paid a sum of Rs.1,50,000/- to Ashok Leyland on 1st June, 2002, after the seizure, and undertook to pay the remaining amount by 10th July 2002, he desired to inspect the vehicles with the trollies, but Ashok Leyland showed only two vehicles with trollies and that too, without tyres, batteries and other accessories. Therefore, he had filed the suit for the value of the four trollies, apart from the vehicles.

4. The written statements had been filed by both, B. Ghose and Ashok Leyland separately. An application was also filed by Ashok Leyland submitting that the suit was barred under Section 8 of the Arbitration and Conciliation Act, 1996 (“**A&C Act**”, for short). It was further stated that as the respondent No.1/plaintiff had defaulted in paying the installments regularly, the possession of the vehicles was taken in accordance with the HPAs. It was also the stand of Ashok Leyland that since the trollies had been recovered from B.Ghose, as such no permission of the respondent No.1/plaintiff was required for handing over the trollies back to B.Ghose. Thus, there was nothing recoverable from Ashok Leyland.

5. The stand taken by B.Ghose was that in view of the earlier suit filed for recovery against it, the second suit was barred by Order II Rule 2 of the Code of Civil Procedure, 1908 (“CPC”, for short). A plea that the suit was filed beyond the period of limitation was also taken. It was also claimed by B.Ghose that it was not a necessary party to the suit. While admitting that the respondent No.1/plaintiff had been its employee, looking after the Delhi Office, all other averments had been denied and disputed by it. It was, however, admitted that it had taken trailers/trollies on hire basis from the respondent No.1/plaintiff, but claimed that payments had been duly made and there was nothing payable by it to the respondent No.1/plaintiff. It was further admitted that one payment of Rs.74,750/- had been made to Ashok Leyland on the request of the respondent No.1/plaintiff, but there was no obligation on B.Ghose to make further payment of instalments to Ashok Leyland. Thus, it was prayed that the suit be dismissed.

6. On the basis of all these pleadings, the learned Trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled to the recovery of suit amount as claimed, if so, against which of the defendant? OPP*
- 2. Whether the plaintiff is entitled to the interest, if so, at what rate, for which period and against which of the defendant? OPP*
- 3. Whether the suit is barred under Order 2 rule 2 CPC? OPD2*
- 4. Whether the suit is not properly verified, if so,*

its effect? OPD 2

5. *Whether the suit is barred by limitation? OPD 2*
6. *Whether the suit has not been filed by a competent person, if so, effect of the same? OPD 2*
7. *Whether the suit is bad for mis-joinder of parties? OPD2*
8. *Whether there is no privity of contract between the plaintiff and the defendant No. 2? OPD 2*
9. *Relief.”*

7. The respondent No.1/plaintiff examined himself as PW-1 and B.Ghose examined Shri Mukesh Mathur as DW-1. However, Ashok Leyland did not lead any evidence. In fact, it was proceeded exparte vide orders dated 31st July, 2008. On the assessment of the evidence brought on record, the learned Trial Court answered the issues in favour of respondent No.1/plaintiff and against both the defendants i.e., Ashok Leyland and B.Ghose and on 23rd February, 2015, decreed the suit against both the defendants, for a sum of Rs.14,00,000/- along with pendente-lite and future interest @ 9% *per annum* from the date of filing of the suit, till realization of the decretal amount, with costs.

8. B.Ghose filed the appeal being RFA No.459/2015 on 14th July, 2015. The impugned judgment and decree were stayed by this court vide order dated 17th July, 2015, till the next date of hearing, and which continued till 14th March, 2016, when this court directed that subject to deposit of the entire decretal amount with up-to-date interest in this court

within four weeks from the date of the order, the execution against B.Ghose would be stayed. However, it was clarified that no stay of execution operated against Ashok Leyland as it had not chosen to file an appeal. It may be noted that B.Ghose has not complied with the orders for deposit and thus, the stay has automatically ceased qua B.Ghose.

9. It may be noted, also, that B. Ghose has not pursued its appeal. No submissions have been advanced on its behalf, either in the appeal filed by it or in RFA 283/2020 filed by Ashok Leyland. The only inference that can be drawn is that B.Ghose lost interest in the appeal with the automatic vacation of the stay of the execution against it, when it failed to deposit the decretal amount in terms of the directions of this court contained in the order dated 14th March, 2016.

10. RFA 283/2020 was filed by Ashok Leyland on 23rd November, 2020 along with applications for stay of the execution against Ashok Leyland as well as for condonation of delay in filing the appeal. Vide orders dated 4th December 2020, Ashok Leyland was directed to deposit the decretal amount within six weeks with the Registrar General of this court subject to which the impugned judgment qua Ashok Leyland would remain stayed. However, it was also directed that the amount would not be released to the respondent No.1/plaintiff without the leave of the court. The entire decretal amount has been deposited by Ashok Leyland by way of two demand drafts dated 10th February, 2021 and 16th February, 2021 for Rs.21,49,441/- and Rs.12,61,137/- i.e., for a total sum of Rs.34,10,578/-, after its request for substituting a Bank Guarantee instead of depositing the decretal amount, was declined vide orders dated 21st

January, 2021.

11. Mr.Avi Singh, learned counsel for Ashok Leyland submitted that the suit filed by respondent No.1/plaintiff was barred by time and an issue had also been framed in this regard. It was submitted that the finding of the learned Trial Court in respect of issue No.5 was legally untenable as the learned Trial Court erroneously concluded, on the basis of the notice dated 23rd February, 2005, that the suit which was filed on 30th May, 2005 was within prescribed time. The limitation commenced from the date when the seizure had first occurred i.e., in February 2002 and the suit was time barred and thus, the judgment, which allowed a time barred claim, was liable to be set aside.

12. It was further submitted that there was no cause of action to file the suit against Ashok Leyland. In the first place, if the dispute was premised on the HPAs, then the matter had to be arbitrated. However, the application under Section 8 of the A&C Act filed by Ashok Leyland had been dismissed as there was no arbitration agreement with B.Ghose. In any case, Ashok Leyland had returned the trollies to the persons from whom the seizure was made albeit erroneously. Since the respondent No.1/plaintiff was the employee of B.Ghose, the return of the trollies to B.Ghose was effectively a return to the respondent No.1/plaintiff through his employer. The liability, if any, of Ashok Leyland came to an end when the trollies were returned to the B.Ghose.

13. Learned counsel also submitted that respondent No.1/plaintiff had not proved his case inasmuch as he had failed to prove in whose possession the trollies were. When in the plaint all averments were to the effect that the trollies and trailers were being used on hire by B.Ghose

and that there was an oral agreement between the respondent No.1/plaintiff and the said B.Ghose in this regard on payment of hire charges, clearly the possession was with B.Ghose. The plaint also mentioned that the seized trollies had been returned by Ashok Leyland to B.Ghose. Yet, when the evidence was recorded, a completely different case was set up to the effect that the respondent No.1/plaintiff did not know in whose possession the trollies were. It is on the basis of this vague statement, which was beyond the pleadings, that the learned Trial Court wrongly concluded that the respondent No.1/plaintiff had been able to prove his case, and found him entitled to Rs.14,00,000/-. According to learned counsel, liability could not be fastened on such indeterminate statements.

14. Next, it was argued that Ashok Leyland had ceased to exist since 29th June, 2004. Annexure A-11 is the amalgamation/merger document reflecting the merger of Ashok Leyland Finance Ltd. with IndusInd Bank Ltd. The suit when filed on 30th May, 2005 had impleaded a non-existent entity. The successor-in-interest was not sued. Therefore, the suit could not have culminated in a decree against Ashok Leyland. Reliance has been placed on ***General Radio & Appliances Co. Ltd. v. M.A. Khader***, (1986) 2 SCC 656; ***Saraswati Industrial Syndicate Ltd. v. Commissioner of Income Tax*** 1990 (Supp) SCC 675; ***Nicholas Piramal India Ltd. v. S. Sundaranayagam*** [rendered on 23rd August, 2007 in Crl. M.C. No.5392/2005]; and, ***Spice Entertainment Ltd. v. Service Tax***, 2011 SCC OnLine Del 3210 to argue that the suit had to be filed against IndusInd Bank and not against Ashok Leyland.

15. The learned counsel further submitted that because of the improper impleadment of Ashok Leyland, when the Authorized Representative (“A.R.”, for short) of the company left the service, no one could follow it up, as a result of which, an ex parte judgment was passed against Ashok Leyland. On receipt of notice in RFA 459/2015, an application dated 21st December, 2015 was moved under Order IX Rule 13 CPC to set aside the ex parte decree. An application under Section 5 of the Limitation Act was also filed for condonation of delay in filing the application. The learned Trial Court vide order dated 31st August, 2020 dismissed the applications and thereafter, RFA 283/2020 was filed. Learned counsel further submitted that the time taken by Ashok Leyland in pursuing the application under Order IX Rule 13 CPC, if excluded, would tender the filing of the appeal [RFA 283/2020] within prescribed time. Nevertheless, an application under Section 5 of the Limitation Act read with Section 151 CPC for condonation of the delay in filing the appeal had also been filed.

16. Reliance has been placed on the judgments of the Supreme Court in *N. Balakrishnan v. M. Krishnamurthy*, (1998) 7 SCC 123; *Sankar Dastidar v. Banjula Dastidar*, (2006) 13 SCC 470; and, *Kamlesh Babu v. Lajpat Rai Sharma*, (2008) 12 SCC 577 to submit that the court has ample discretion to condone the delay in filing the appeal, especially when Ashok Leyland had, with promptitude, filed the application under Order IX Rule 13 CPC on coming to know of the ex parte judgment. Relying on the judgement in *Bhivchandra Shankar More v. Balu Gangaram More*, (2019) 6 SCC 387, it was further argued that even if the learned Trial Court had dismissed the application under Order IX

Rule 13 CPC, it did not preclude Ashok Leyland from challenging the original judgment and decree on merits.

17. Finally, it was argued by learned counsel that since the appeal filed by B.Ghose was within limitation, and Ashok Leyland was impleaded as respondent No.2 therein, therefore, the contentions raised on the merits of the case be considered as submissions made on behalf of Ashok Leyland in that appeal. It was also submitted that even though the decretal amount was not deposited by B.Ghose in RFA 459/2015, since that amount has been deposited by Ashok Leyland in RFA 283/2020, the same may be treated as compliance of orders in RFA 459/2015.

18. Mr. Vidur Kamra, learned counsel for the respondent No.1/plaintiff submitted that the present appeal was liable to be dismissed, as it was barred by limitation. It was pointed out that the learned Trial Court had dismissed the application under Order IX Rule 13 CPC on the ground of inordinate delay. Once the application under Order IX Rule 13 CPC was found to be barred by limitation, then the period sought to be excluded on the ground of pendency of such an application was untenable. Reliance was also placed on *Deepshree Singh v. Rishi Pratap Singh*, 2021 SCC OnLine Del 2348; *Suryachakra Power Corpn. Ltd. v. Electricity Deptt.*, (2016) 16 SCC 152 and *Pawan Goel v. KMG Milk Food Ltd.*, 2008 SCC Online P&H 263 and *S.N. Jayarama Aiyar v. S. Rajagopalan*, 1964 SCC OnLine Mad 52, and *Deena v. Bharat Singh*, (2002) 6 SCC 336. It was submitted that benefit of alternate remedy being pursued cannot be taken in case the alternate remedy was beyond limitation. Such delay could not be condoned. There was lack of *bona fides* in the moving of the application under Order IX Rule 13 CPC as there was no explanation

forthcoming for the delay in filing the said application from the date of the judgment. The plea that the A.R. had left the job, was found to be no ground at all.

19. Reliance has been placed on *Bhanu Kumar Jain v. Archana Kumar*, (2005) 1 SCC 787 to contend that both the remedies, i.e., the filing of the appeal under Section 96(2) CPC as also an application under Order IX Rule 13 CPC before the learned Trial Court, could be availed of together. Therefore too, nothing prevented Ashok Leyland to file the appeal without waiting for the disposal of the application under Order IX Rule 13 CPC. Ninety days having expired in April, 2015, the application under Order IX Rule 13 CPC had been filed after eight months. Relying on *Dharshan Lal Dhuper v. Motia Rani*, 2004 SCC OnLine Del 225, it was argued that limitation starts from the date of the judgment and not from the date of knowledge of the judgment. The appeal filed on 23rd November, 2020, after 2100 days of the date of the judgement, was hopelessly time barred and was necessarily to be dismissed on this ground.

20. Learned counsel further argued that Ashok Leyland had in fact participated in the suit and it was not a case of non-service. Ashok Leyland had first filed an application under Section 8 of the A&C Act and then filed the written statement in the suit. It was on 31st July, 2008, that Ashok Leyland was proceeded ex parte. In separate proceedings initiated under Section 9 of the A&C Act by Ashok Leyland, the respondent No.1/plaintiff had informed through the court the new A.R. that the suit was pending, but no action was taken by Ashok Leyland. In the application under Section 9 of the A&C Act also, Ashok Leyland had

appeared for the last time on 12th November, 2008. In these circumstances, there were no *bona fides* in the application under Order IX Rule 13 CPC, which was rightly dismissed.

21. With regard to the merger of Ashok Leyland with IndusInd Bank Ltd., learned counsel for the respondent No.1/plaintiff submitted that the factum of merger had never been brought to the notice of the court or the respondent No.1/plaintiff, till the filing of the appeal. Learned counsel pointed out to the fact that while claiming that the merger had occurred on 1st April, 2003, Ashok Leyland had not mentioned this fact when the application under Section 8 of A&C Act was filed on 29th March, 2006 or when the said application was dismissed on 6th September, 2006 or in their written statement filed on 29th January, 2007. This was also not mentioned in the application under Section 9 of the A&C Act filed on 18th November, 2007. Nothing was whispered in those proceedings till 12th November, 2008. Thus, if anything, there was material suppression by Ashok Leyland/IndusInd Bank, and they could not be permitted to benefit from their own wrongs. Relying on the judgements in ***Devendra Kumar v. State of Uttaranchal***, (2013) 9 SCC 363; ***MCD v. State of Delhi***, (2005) 4 SCC 605; and, ***Haryana Roadways v. Jai Bhagwan***, (2008) 4 SCC 127, the learned counsel for the respondent No.1/plaintiff contended that suppression of facts is to be taken seriously by courts and a party cannot take advantage of his own suppression and plead bar of any law to frustrate the lawful trial by a Competent Court.

22. On merits, learned counsel submitted that neither Ashok Leyland nor B.Ghose, in their written statement, had disclosed with whom the trollies were. Neither of them claimed that the trollies had been returned

to the respondent No.1/plaintiff. It was also not denied that the trollies in the possession of B. Ghose had been seized by Ashok Leyland and Ashok Leyland had claimed to have returned them to B.Ghose, but which fact is not affirmed by B. Ghose. In the circumstances, both the defendants to the suit, namely, Ashok Leyland and B. Ghose, were equally liable for the value of the trollies lost to the respondent No.1/plaintiff. It was submitted that even if the averments in the plaint were not happily worded and there was an allegation that Ashok Leyland had sold the trollies to B.Ghose, it did not materially affect the case, as the two defendants had to explain where the trollies had disappeared and whether they had been sold by one to the other or there was misappropriation or theft.

23. Relying on the judgements in *G. Palanisamy v. State Bank of India*, 2012 SCC OnLine Mad 1651 and *Sujay Kumar v. U.C.O. Bank* [rendered on 2nd December, 2019 in Civil Writ Jurisdiction Case No. 18557 of 2019], the learned counsel submitted that without due process of law, the trollies could not have been repossessed by Ashok Leyland. Furthermore, Reliance has been placed on *Bihar State Financial Corpn. v. Chhotanagpur Minerals*, (2009) 2 SCC 471 to contend that when the HPA was with respect to the trailers alone, Ashok Leyland had no authority to seize the trollies as well. Therefore, the action of seizure itself was illegal and the non-return of the trollies to their true owner by the Ashok Leyland established the liability to pay the cost of the trollies.

24. The learned counsel for the respondent No.1/plaintiff submitted that the suit was filed within limitation since payment had been made by the respondent No.1/plaintiff on 1st June, 2002 and the suit having been filed on 30th May, 2005, was within limitation from the last day of the

payment. Finally, it was submitted that since B.Ghose in RFA 459/2015 was not pursuing that appeal, the same had to be dismissed and Ashok Leyland cannot seek to piggyback ride on that appeal as its own appeal was hopelessly barred by time.

DISCUSSION

25. It would be appropriate to first address the argument advanced by learned counsel for Ashok Leyland that the suit had been filed against a non-existent entity. No doubt, as has been observed in the judgments relied upon by the learned counsel, namely, *Nicholas Piramal (supra)* and *General Radio & Appliances (supra)*, among others, the law stated succinctly is that when an amalgamation takes place, the original company ceases to exist. However, there is no automatic cessation of its liabilities. Rather, the new entity takes on the assets and liabilities unless the amalgamation excludes such taking over of assets and liabilities. In the certificate filed in RFA 283/2020 as Annexure A-11, the merger document makes no mention of such exclusion.

26. That the suit was filed subsequent to the amalgamation, is borne out from the record as the amalgamation seems to have been sanctioned and information sent to the Reserve Bank of India (RBI) vide Annexure A-11 in June, 2004, whereas the suit was filed on 30th May, 2005. But what is significant to note is that once Ashok Leyland had appeared before the court in pursuance of summons issued to it in the suit, it had the responsibility to make true disclosures so that the proper party could be impleaded and mentioned in the 'Memo of Parties'. Even as late as until 14th March, 2016, the correct facts relating to the merger were not

disclosed to this court when Ashok Leyland was served with notice of RFA 459/2015. As a result, Ashok Leyland was proceeded ex parte in that appeal. It was much later, in RFA 459/2015, that an application being C.M. Appln. 31467/2020 was filed by IndusInd Bank Limited under Order XLI Rule 20 CPC read with Order I Rule 10 CPC in RFA 459/2015 seeking impleadment as a necessary party in that appeal.

27. The present appeal has been filed in the name of Ashok Leyland through M/s. IndusInd Bank Limited. Thus, till 23rd November, 2020, leave alone the respondent No.1/plaintiff, the court itself was not informed of the true status of Ashok Leyland and IndusInd Bank Limited. There is no explanation forthcoming from Ashok Leyland as to why they did not make the disclosure of the merger on 29th March, 2006, when they had filed an application under Section 8 of the A&C Act claiming that the dispute between itself and the respondent No.1/plaintiff had to be referred to arbitration. Again, when the written statement was filed on 29th January, 2007, there was no mention of the merger. Even the application dated 18th January, 2007 under Section 9 of the A&C Act was in the name of Ashok Leyland. Even in the application under Order IX Rule 13 CPC filed by Ashok Leyland, there is no mention of the merger. A bald claim was made that M/s. Ashok Leyland Finance Limited had ceased to exist on 29th June, 2004 vide a Circular issued by the RBI. In the light of all these facts, there is no force in the submission made that the impugned judgment was not binding on the IndusInd Bank. Since material facts have been suppressed by Ashok Leyland or IndusInd Bank, they must suffer the consequences. The liability of Ashok Leyland under the

impugned judgment and decree would have to be discharged by IndusInd Bank.

28. The next important question that requires to be determined is whether the present appeal has been filed within the prescribed time. The impugned judgment and decree was passed on 23rd February, 2015. The present appeal [RFA 283/2020] has been filed on 23rd November, 2020. As was observed by the Supreme Court in ***Bhivchandra Shanker More (supra)***, the remedies under Order IX Rule 13 CPC and under Section 96(2) CPC were not mutually exclusive and nor were they to be taken necessarily simultaneously, as a consecutive recourse was permissible. However, the time taken in pursuing the remedy under Order IX Rule 13 CPC may form “sufficient cause” for condoning the delay in filing the appeal against the judgment and decree, but that would depend on the *bona fides* of the action taken. Even if a liberal construction is given to “sufficient cause”, so as to advance substantial justice, when there was negligence or resort to dilatory tactics or there was want of *bona fides*, condonation could not be granted.

29. The *bona fides* that Ashok Leyland claims is the mere fact of filing the application under Order IX Rule 13 CPC immediately on getting the notice in RFA 459/2015. However, *bona fides* is also to be seen in moving the application under Order IX Rule 13 CPC. The orders of the learned Trial Court dismissing the application under Order IX Rule 13 CPC reflects clearly, the lack of *bona fides* with Ashok Leyland. The Division Bench of this Court in ***Deepshree Singh (supra)*** [of which I was a Member] has held as hereunder:-

“15. This Court finds that the present appeal has been preferred after a delay of over two thousand three hundred and thirty one (2331) days. It is an admitted position that the appellant had been served and had knowledge of the filing of the suit, but she voluntarily chose not to enter appearance. Since the appellant failed to appear, she was proceeded ex-parte vide order dated 27th April, 2011. Consequently, the limitation for filing the present appeal shall commence from the date of the impugned judgement and order namely 18 November, 2013 and not from the date of alleged knowledge of the judgment and decree, as claimed by the appellant.

16. Further, the appellant is not entitled to benefit of Section 14 of the Limitation Act as even the prior proceeding initiated by the appellant, (namely, the application dated 06 February, 2014 under Section 151 CPC before the Court that had passed the decree) had not been filed within limitation and also the said prior proceeding had not failed due to defect of jurisdiction or other cause of like nature.....”

30. In the present case, Ashok Leyland had been duly served and had participated in the proceedings till 31st July, 2008, when it was proceeded ex parte. In the circumstances, the limitation has to be computed not from the date of knowledge on receipt of the notice in RFA 459/2015, but from the date of judgment i.e., 23rd February, 2015. In the application filed under Section 5 of the Limitation Act, along with the appeal, the only plea taken is that the delay was caused on account of the pendency of the application under Order IX Rule 13 CPC. The *bona fides* would,

therefore, have to be seen on the basis of the explanation offered for preferring an application under Order IX Rule 13 CPC. It is then clear that the explanation is founded only on the previous employee/A.R. leaving the employment of Ashok Leyland. The learned Trial Court rejected such an explanation to hold that the application under Order IX Rule 13 CPC was time barred. It is to be also noted that this order dismissing the application under Order IX Rule 13 CPC is dated 31st August, 2020, whereas the present appeal has been filed in November, 2020, with no explanation offered for the delay. Furthermore, as per the office report dated 4th November, 2015, the notice in RFA 459/2015 was served on Ashok Leyland/IndusInd Bank for 16th November, 2015, but the application under Order IX Rule 13 CPC was filed only on 21st December, 2015, again with no explanation for the delay.

31. The conduct of Ashok Leyland during the pendency of the suit and thereafter, reflects the casual attitude adopted by Ashok Leyland/IndusInd Bank and the complete absence of due care and attention. The entire purpose seems to be to somehow avoid the liability to the respondent No.1/plaintiff for the loss caused to him on account of the unlawful actions of Ashok Leyland in seizing the property of the respondent No.1/plaintiff, which admittedly was not hypothecated to it, and without any adherence to due process of law. The filing of the application under Order IX Rule 13 CPC seems to be one step in the long list of actions taken by Ashok Leyland to avoid liability. Thus, an application under Section 8 of the A&C Act was filed; thereafter, the written statement was filed; thereafter, the application under Section 9 was filed; then, Ashok Leyland absented from the trial and remained absent till supposedly

notice in the appeal filed by B.Ghose was served on it; thereafter, it took its own time in moving an application under Order IX Rule 13 CPC; and, took its time to file the present appeal.

32. In the light of the settled law in this regard, when lack of *bona fides* is writ large on the action of Ashok Leyland, there is no ground made out to condone the delay of 2100 days in the filing of the present appeal [RFA 238/2020]. When the application under Order IX Rule 13 CPC was itself not filed within the limitation period prescribed, the pendency of those proceedings and the dismissal thereof will not form “sufficient cause” to condone the delay in filing the appeal by Ashok Leyland.

33. In the view taken, the merits of the challenge to the impugned judgment and decree are not called for. However, it may be mentioned that the plea taken regarding the filing of the suit itself being beyond limitation, would, in the opinion of this Court, be not just a question of law and being a mixed question of fact and law, has been answered by the learned Trial Court in the impugned judgment, in the form of an answer to Issue No.5. Therefore, that plea cannot be separately considered by this Court in view of the fact that the appeal against the impugned judgment has been found to be barred by time.

34. Before concluding, it may be also recorded that the plea of the learned counsel for Ashok Leyland that since RFA 459/2015 was filed within time, the benefit of that may be given to Ashok Leyland, who has filed a separate appeal, is facetious. In any case, Ashok Leyland has not been transposed as a co-appellant in RFA 459/2015, which has sought the setting aside of the judgment only qua the appellant therein i.e., B.Ghose. Thus, the question of limitation has to be considered only in respect of

RFA 283/2020. As regards RFA 459/2015, the same is dismissed as having been not pressed by B.Ghose.

35. Both the appeals, are accordingly, dismissed along with the pending applications.

36. The interim stay stands vacated.

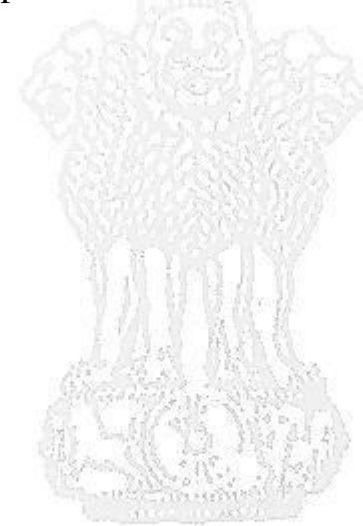
37. The respondent No.1/plaintiff is permitted to apply for release to him of the sum of Rs.34,10,578/- deposited by Ashok Leyland in the court.

38. The judgment be uploaded on the website forthwith.

**(ASHA MENON)
JUDGE**

AUGUST 10, 2021

pkb/ms/s



नित्यमेव जयते