

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

BEFORE:

The Hon'ble Justice Soumen Sen

and

The Hon'ble Justice Siddhartha Roy Chowdhury

FA 22 OF 2022

With

I.A. No. CAN 1 of 2013 (Old CAN 4857 of 2013)

CAN 2 of 2022

CAN 3 of 2022

Orbit Projects Pvt. Ltd.

Versus

M/s. Alankar Financial Services Pvt. Ltd. & Anr.

For the Appellant

: Mr. Debnath Ghosh, Adv.,
Mr. Pushan Kar, Adv.
Mr. Aritro Mukherjee, Adv.,
Mr. Sagnik Majumder, Adv.,
Mr. S. Ghosh, Adv.
Mr. Ananya Das, Adv.

For the Respondent

: Mr. Ratnanko Banerjee, Sr. Adv.,
Mr. Sumon Dutta, Adv.,
Mr. Siddhartha Banerjee, Adv.,
Mr. Dwaipayan Basu Mallick, Adv.,
Mr. Arka Prava Sen, Adv.,
Mrs. Soni Ojha, Adv.
Mr. S.B. Chatterjee, Adv.
Mr. Kanisk Kejriwal, Adv.

Hearing concluded on

: 16th December, 2022

Judgment on

: 21st December, 2022

Soumen Sen, J.: The application for dismissal of the appeal for non-payment of deficit court fees along with the application for extension of time

to put in deficit court fees are taken up together and disposed of by this common order.

The appeal is arising out of an order passed in connection with an application filed under Order VII Rule 11 of the Code of Civil Procedure for dismissal of the suit. The suit was for specific performance of an agreement dated December 15, 2006 as varied by an oral agreement dated November 21, 2007. The suit was dismissed by the learned Trial Court on 12th September, 2013 accepting the submission of the petitioner/applicant/respondent no.1 that the plaint does not disclose any cause of action.

The appeal was initially filed as FMAT treating it as an appeal from order and on such understanding the appellant put in Rs.100 towards court fee. The department accepted the said court fees and registered the appeal as FMAT 580 of 2013.

The appeal along with the stay petition being CAN 1 of 2013 (old CAN 4587 of 2013) were listed before a coordinate Bench on 10th December, 2014 for admission. Upon hearing the parties, the following order was passed:

“Since the appeal is directed against an order rejecting the plaint under Order 7 Rule 11 of the Code of Civil Procedure, the appeal is against a decree and therefore, the appeal has to be preferred against the decree.

Leave is granted to the appellant to make necessary corrections by giving appropriate court fees and then move the matter upon notice to the other side.

For the time being, let the matter go out of list.” (emphasis supplied)

It can be fairly discerned from the aforesaid order that the appeal was kept in abeyance for want of deficit court fees and other corrections namely change in the classifications of the case that is, from FMAT to FA. The appeal now is required to be classified as First Appeal (FA) instead of First Miscellaneous Appeal. The revised report of the Stamp Reporter dated December 18, 2014 would show that in terms of the aforesaid order the appeal was classified as FAT with number 597 of 2014 on 18th December, 2014. However, no step was taken by the appellant towards payment of deficit court fees until 25th April, 2022, after the appellant was served with an application by the respondents/applicants for dismissal of the appeal on the ground of deficit court fees.

The power to make up deficiency of court fees is stated in Section 149 of Code of Civil Procedure (in short CPC). The said section reads as follows:

“S.149. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance”.

The said provision empowers the court, in its discretion, at any stage to allow payment of court fees and it is only upon such payment being made the document would have the same force and effect as if such fee had been paid in the first instance meaning thereby that it shall relate back to the date

of presentation of the document, which in the instant case, is the Memorandum of Appeal (MOA). Ordinarily when a MOA is presented the department would scrutinize it and flawless MOA is placed before the appropriate bench with the report of the stamp reporter. In the instant case the stamp reporter on misconception of law wrongly classified the appeal and accepted the MOA with court fees of Rs.100/- only. Thereafter such defects being noticed at the stage of admission of the appeal and hearing of the stay petition the Hon'ble Division Bench passed the aforesaid direction.

Admittedly for almost 8 years the appellant did not take any steps for putting in the deficit court fees.

On 30th August, 2022 we directed the Registrar Administration (L & OM) to file a report disclosing the reason for not placing the matter before the Lawzima Court between 8th December, 2014 and 21st May, 2022. The report filed by the Registrar Administration (L & OM) dated 1st December, 2022 shows complete negligence and inaction on the part of the department in dealing with the matter. The report states that the revised report of the stamp Reporter was erroneous. The department admitted to have made a mistake "inadvertently" relying upon the revised report of stamp Reporter dated 18th December, 2014. The matter was sent to the FA section on 9th February, 2022 for registration. We are not at all satisfied with the explanation offered by the Department for not placing the matter before the Lawgima Court.

This act of negligence on the part of the Department cannot, however, benefit the appellant.

The appellant had tried to take advantage of absence of any time period in the aforesaid order directing payment of deficit court fees and the latches on the part of the department concerned in not following the procedure prescribed under Chapter 5 rule 18 of the Appellate Side Rules of this court which inter alia, deals with the procedure required to be followed in such cases.

For the sake of brevity the said Rule is reproduced below:

“18. (1) If there is a reasonable doubt as to the amount of court - fee leviable on any memorandum of appeal which an advocate or a party desires to present, he shall apply to the Registrar, as Taxing Officer, for his decision as to the court - fee payable, and the Registrar shall pass an order accordingly and fix a period within which the requisite court - fee must be paid.

If the requisite fee is not paid within the period fixed, the case shall be laid before the Division Bench for orders.

(2) If the Stamp Reporter, on a memorandum being presented to him, finds that it has been insufficiently stamped, he shall make a note thereon as regards the deficiency and shall return it, with as little delay as possible, to the advocate or the party presenting it. If the advocate or the party refiles it having supplied the deficit court - fees, within the prescribed period of limitation, the Stamp Reporter shall record a note to that effect on the memorandum which shall then be admitted.

(3) The advocate or the party to whom a memorandum is returned under clause (2) may apply to the Registrar for time to put in the requisite court - fee. On such application being made the Registrar, if

he is satisfied that the insufficiency of the court - fee was due to a mistake on the part of the applicant as to the court - fee payable, may fix a period within which the additional court - fee must be paid. In other cases or when the requisite fee is not paid within the period fixed, the Registrar shall lay the matter before the Division Bench for orders.

(4) If a memorandum which has been returned under clause (2) and for filing which no time under clause (3) has been fixed is refiled, sufficiently stamped, after the period of limitation has expired, it shall be presented direct to the Registrar and the latter may pass an order for the admission thereof or lay it before the Division Bench for orders according as, in his opinion, a case as to mistake as referred to in clause (3) has been made out or not.

(5) An application made under clause (3) or a memorandum of appeal refiled under clause (4) must be accompanied by an affidavit explaining the insufficiency, unless the insufficiency is due to a mistake which is apparent on the face of the papers filed.”

The department seems to have completely lost sight of the matter and did not put up the matter before the Lawzima Court or the Division Bench for non-payment of court fees for final order.

On 19th July 2022 the appellant filed an application for condonation of delay in making payment of the deficit court fees. In the said application it is stated that in the order dated 10th December, 2014 the appellant was permitted to make necessary corrections by depositing appropriate Court fees and only thereafter to move the matter upon notice to the other side. No time limit has been indicated in the said order regarding deposit of the court fees and it is only after the appellant cured the defect the appellant was given the liberty to move the appeal.

Mr. Debnath Ghosh, the learned advocate representing the appellant, has submitted that since no time limit was fixed by the coordinate bench and the order dated 10th December, 2014 does not provide that the appeal would be dismissed for non-payment of court fees within any specific period and also having regard to the fact that due to oversight and inadvertent error the court fee was not purchased in time hence opportunity may be given to the appellant to rectify the defect and the court may accept the deficit court fees deposited on 25th April 2022. The application has also disclosed that one Abha Alley was initially appointed by the appellant to conduct the appeal, however, there has been subsequent changes and the present advocate on record is Sagnik Mazumder. The dealing law officer Shri Ajoy Kumar Fogla of the appellant also left the service in the year 2020 during the corona pandemic and all these factors taken together had caused the delay. It is also stated that usually matters involving such defects appear in Lawazima List for the purpose of removing defects including payment of required court fees but the said matter never appeared in the Lawazima List for which the matter escaped the attention of the Learned Advocate entrusted with the matter.

It is submitted that the delay is unintentional as the Advocate has filed the appeal within the period of limitation with court fees that was found to be insufficient by the stamp reporter as would appear from the endorsement made by him on the reverse of the first page of the

Memorandum of appeal. The order impugned is ex facie bad and in the event the appeal is dismissed for delayed deposit of court fees the appellant shall suffer irreparable loss.

Mr. Ratnanko Banerjee, learned Senior Counsel ably assisted by Mr. Sumon Dutta, Advocate and Mr. Siddhartha Banerjee, Advocate has submitted that the appellant was not at all interested to proceed with the appeal and has deliberately kept the appeal defective without any intention or desire to proceed with the appeal. It is submitted that the order extending time to put in court fees is a discretion of the court and if it appears that such delay was deliberate the court shall not exercise such discretion in favour of such unscrupulous litigant. Moreover by reason of such long delay valuable right has accrued in favour of the applicant. The appellant did not put in the deficit court fees within the period of limitation and in view of such culpable negligence the deficit court fees may not be accepted. Our attention is drawn to the application filed by Arun Sankholia, one of the directors of the respondent/applicant No.1 on January 2, 2021 seeking information in connection with FMAT 580 of 2021. It is submitted that Deputy Registrar (Administration) and Public Information Officer, Hon'ble High Court, Appellate Side, Calcutta in his reply to several questions which, inter alia, include whether appellant has removed the defects and put in the deficit court fees have stated that defects have been removed but due to non furnishing of the copy of the plaint by the advocate of the appellant the

information with regard to exact amount of deficit court could not be disclosed as of now.

For the sake of convenience question nos. (a), (c), (d), (e) and (f) along with Reply furnished by the department on 9th February, 2021 are reproduced below:

“Q. (a). Has any step taken by the appellant, therein, to rectify the said error in filing? If yes, please provide the detail for the same.

Ans. Yes, the appellant has taken step.

(c) What was the amount of court fee initially paid by the appellant, therein, at the time of filing of above stated appeal?

Ans. Rs.100

(d) What was the exact court fee required for filing of an appeal preferred against a decree?

(e) What was the exact amount of deficit court fee at the time of initial filing of the above stated appeal by the Appellant therein?

(f) What is the additional amount paid as deficit court fee by the appellant, therein and what was the date for making such payment?

Ans. This is to inform that Ld. Advocate on record for the appellant was requested to supply the copy of the plaint to the concerned department, but till date no such copy of plaint has been received by the department and as such no information in this regard could be disclosed as of now.”

Mr. Banerjee submits that the appellant after being aware of the application filed by the respondent on 29th March, 2022 for dismissal of the appeal for non-payment of deficit court fees has filed an application on 19th July, 2022 praying for acceptance of the deficit court fees by condoning the delay. It is submitted that the extension of time beyond the period of

limitation cannot in any event extend beyond 30 days in totality in view of time limit specified in Section 148 CPC and even in exercising such jurisdiction the court would require to take into consideration the conduct of the parties.

Mr. Banerjee submits that by reason of unexplained laches, negligence and failure on the part of the appellant to put in requisite court fees for over a period of almost eight years the appeal could not effectively proceed. Pendency of the appeal has caused and is still causing undue hardship and irretrievable sufferings to the applicants as they are unable to utilize their valuable immovable property to their benefits. Mr. Banerjee in support of his submission has relied upon a decision of the Hon'ble Supreme Court in ***Buta Singh (Dead) by LRS vs. Union of India*** reported in **(1995) 5 SCC 284**.

Mr. Suman Dutta, the learned Counsel in supplementing the argument of Mr. Banerjee has referred to Section 4 of The West Bengal Court Fees Act, 1970 and submits that unless the court fees are paid within the period of limitation the appeal cannot be registered and taken on record. It is submitted that the remittance of the court fees through e-payment was without the leave of the court and on the date the said amount was deposited the appeal was admittedly time barred. The memorandum of appeal could not have been taken on record until the said defect is allowed to be removed with the permission of the court. It is submitted that even acceptance of

court fees may not save the appeal as the applicant appellant still would have to satisfy the court for the long delay of almost eight years in not pursuing the appeal and removing the defects for which there may be a requirement to file a separate application under Section 5 of the Limitation Act. Mr. Dutta in this regard has relied upon the decision of the Madras High Court in ***P.M. Gopalasamy v. C. Senpagam*** reported in **2007(5) CTC 283** paragraph 7 and ***S.V. Arjunaraja v. P. Vasantha*** reported in **2005 (5) CTC 401** paragraphs 12, 13 and 19.

Mr. Dutta submits that the jurisdiction under Section 149 CPC to allow payment of deficit court fees is discretionary in nature and such discretion has to be exercised on reasonably accepted grounds. In this regard Mr. Dutta had relied upon the decision of the Hon'ble Supreme Court in ***A. Nawab John & Ors. v. V.N. Subramaniam*** reported in **2012(7) SCC 738** paragraphs 44, 45 and 46.

In response to the submission that even if there is an acceptance of deficit court fees beyond the period of limitation it would not save the appeal from being held as time barred and it would not automatically relate back to the date of presentation of memorandum of appeal.

Mr. Debnath Ghosh learned Advocate for the appellant applicant has relied upon the decision of the Hon'ble Supreme Court in ***Mannan Lal v. Chhotaka Bibi, (Dead) by Lrs. B. Sharda Shankar and Ors.*** reported in

AIR 1971 SC 1374; 1970 (1) SCC 769; 1971 (1) SCR 253 paragraphs 19 to 21.

Before we advert to the decisions and legal provisions relating to deficit court fees we may refer to our order dated 4th November, 2022 and the supplementary affidavit filed by the appellant pursuant to the aforesaid order.

The relevant portion of the order dated 4th November, 2022 reads:

“The Section Officer, First Appellate Section has filed a report wherefrom it appears that the names of Mr. Mr. Aniruddha Sinha, and Ms. Abha Alley, Advocates appeared in the vakalatnama. However, no vakalatnama executed by Mr. Aniruddha Sinha is lying with the department. Mr. Sagnik Majumder has entered appearance on behalf of the appellant after obtaining no objection from the erstwhile advocate, Ms. Abha Alley, under Filing No. A-6712 dated 18th April, 2022. However, it appears that communication address to Ms. Abha Alley was received by her as late as in 2021. In view of the aforesaid, the statement made on behalf of the applicant that Abha Alley gave change in favour of one Aniruddha Sinha does not appear to be correct. It is submitted by Mr. Debnath Ghosh, Advocate that Aniruddha Ghosh and Abha Alley left the office and the communication accepted on behalf of the Abha Alley was a mistake. This oral submission completely contradicts the statement made in paragraphs 11 and 13 of the petition. We give an opportunity to the appellant to file an affidavit to explain the apparent contradiction appearing in paragraphs 11 and 13 of the petition read with the report filed by the Section Officer.”

In the supplementary affidavit the appellant has offered the following explanation:

“4. I state that the said Ms. Abha Alley and Mr. Aniruddha Sinha were practicing together and had been operating from 7C, Kiran Shankar Roy Road, Kolkata – 70001. The said Ms. Abha Alley, had stopped operating from the said office from March 2014. Subsequently, Mr. Aniruddha Sinha also stopped operating from the said premises on and from 23.11.2019. From March 2020 and lockdowns were imposed and offices were not functioning normally.

5. Since the present appeal pertains to the year 2013 and no formal change had been obtained from Ms. Abha Alley after she left. The erstwhile law officer of the appellant Sri Ajay Kumar Fogla also left the service of the appellant in the year 2020. After receiving CAN No.2 of 2022 from the respondent, the appellant engaged the current Advocate on Record Sri Sagnik Majumdar, Advocate and requested him to file vakalatnama. On such request of the appellant, the present Advocate-on-Record has obtained change from the said Ms. Abha Alley on 18.04.2022. I state that the present Advocate on Record had not joined the profession at the time the said appeal was filed, and had no personal knowledge of the instant proceedings until his engagement.

6. After perusing the vakalatnama and the papers and documents filed in the said appeal it came to light that the initial vakalatnama has been signed by one Ms. Abha Alley though the same bears the name of both Ms. Abha Alley and Mr. Aniruddha Sinha. The appellant caused searches in their office records and came across the order dated 10.12.2014 where the name of Mr Aniruddha Sinha, Advocate appears. Under such circumstances, the appellant was under the impression that Mr. Aniruddha Sinha, Advocate was acting as the Learned Advocate on Record.

7. I state that the appellant has stated in the said application and the affidavit in opposition affirmed on 18.07.2022 that, Ms. Abha Alley was the initial Advocate-on-Record and thereafter change had been obtained in favour of Mr. Aniruddha Sinha, Advocate due to an

oversight and/or a mistaken impression. Such averments have been made by the appellant without any intention of obtaining any advantage from this Hon'ble Court, or to steal a march on the respondents. The appellant has already deposited full Court Fees of Rs.50,000/- in relation to the present appeal, and prays before this Hon'ble Court, that the matter be heard out on merits. The appellant tenders unconditional apology for the statements made in paragraphs 11 and 13 of the application.

8. It is significant to state herein that Utpal Majumdar Advocates LLP are operating from Hastings Chambers, 7C, Kiran Shankar Ray Road, Kolkata – 700001 since 1st April, 2021.

9. Since, both Ms. Abha Alley and Mr. Aniruddha Sinha in the past had operated from the same address where from Utpal Majumdar Advocates LLP now operates, communications addressed to Ms. Abha Alley, were inadvertently received by the receiving clerk, with the endorsement "For Abha Alley". The said endorsement has been made by the receiving cleak by mistake as the said Ms. Abha Alley, Advocate had stopped working way back in 2014. It is also pertinent to mention that the concerned receiving clerk i.e. Mrs Tenusree Jaiswal knew that Ms. Abha Alley, Advocate used to operate from 7c Kiran Shankar Roy Road." (emphasis supplied)

The appellant admits to have made incorrect statements with regard to change of advocate and made a belated attempt to salvage the situation by embellishment of facts with an unconditional apology for the "inadvertent mistakes" made in the petition. The said supplementary affidavit is a desperate attempt to curate and ornate the otherwise unacceptable explanation for the delay.

In our view Section 149 does not give an absolute unfettered right to the plaintiff to pay deficit court fee as and when it suits its convenience. Section 149 is an enabling provision. It only enables the appellant to seek an indulgence of court to permit payment of court fee at a point of time later than the presentation of the MOA. The jurisdiction to allow payment of deficit court fee is conditional upon the discretion of the court that the appellant has offered a 'legally acceptable explanation' for not paying the court fee within the period of limitation.

In **Nawab John** (*supra*) the plaint was presented on 20th August, 1998 before the Trial Court. It was returned by the court with various objections including the objection as to deficiency in the court fee. The plaintiffs represented the plaint after allowing delay on 3rd May, 2002 with enhanced court fee along with application to condone the delay in approaching the court after return of the plaint. The plaint was again returned on the ground of deficit court fee. The plaint was further presented on 22nd January, 2004 with the deficit court fee along with an application to condone the delay in approaching the court. The trial court condoned the delay in payment of the deficit court fee and registered the suit on 5th October, 2004. This order of the trial court was challenged in Revision before the High Court. The High Court set aside the orders of the Trial Court and directed the suit to be struck off from the file. Against this order Special Leave Petition was preferred. The Hon'ble Supreme Court dismissed the

appeal. In deciding the issue the Apex Court observed that the authority of the court to allow the deficit court fees in exercising of its power under Section 149 CPC at any stage of the suit and any amount of lapse of time does not fetter the authority of the court to direct the payment of such deficit court fees. However, the jurisdiction under Section 149 CPC is discretionary nature and it is well settled that the judicial discretion is required to be exercised in accordance with the settled principles of law. It must not be exercised in a manner to confer an unfair advantage to one of the parties to the litigation. In the context of presentation of plaint with deficit court fees and thereafter attempt to make good the deficit court fee beyond the period of limitation, the Apex Court observed that the court is required to scrutinize the explanation offered for the delayed payment of the deficit court fee carefully because exercise of such discretion would certainly have some bearing on the rights and obligations of the defendants.

In the instant case even if we accept that on the basis of the report of the stamp reporter the appellant could be on a bona fide belief that sufficient court fees have been paid, however, in view of the order dated 10th December, 2014 it was clear that MOA was presented with insufficient court fees. Since the deficit court fees have not been put in within the period of limitation the appellant is required to explain the inordinate delay in putting the deficit court fees. In fact, the department could not have accepted the

deficit court fees beyond the period of limitation and for that reason this time the stamp reporter in his revised report dated May 21, 2022 has stated:

“Revised Report

Deficit Court fees to a tune of Rs.50,000/- has been filed on 27.04.2022 which is beyond the period of limitation. Appeal is in form subject to acceptance of the Hon’ble Court and the appeal may perhaps be treated as sufficiently stamped.”

The fact remains that the matter was never placed before the Hon’ble Division Bench ignoring that reasonable time had lapsed since the order dated 10th December, 2014 was passed for putting in the deficit court fees without specifying the time within which such deposit were to be made. This is a clear lapse on the part of the department concerned. However, it is clear from record that no attempt was made by the appellant either to deposit the court fees until 25th April, 2022 beyond the period of limitation.

The initial mistake was of the stamp reporter in filing an incorrect report dated May 8, 2013 stating that the appeal is sufficiently stamped. It was only on December 18, 2014 the appeal was correctly classified in terms of the order dated December 10, 2014, however, the deficit court fees was not put in on that date.

The appeal cannot be treated to be filed within the period of limitation if it is filed with deficit court fees and not cured within the period of limitation unless the court permits.

Mr. Dutta has referred to Section 4 of the West Bengal Court Fees Act, 1970 Section 4(2) starts with a non obstante clause. It specifically

states that a Court may receive a plaint or memorandum of appeal in respect of which an insufficient court fee has been paid subject to the condition that the plaint or memorandum appeal shall be rejected unless the plaintiff or appellant, as the case may be, pays to the court within the time to be fixed by the court such reasonable sum on account of court-fees as the court may direct.

What would be the effect of condoning the delay in making deposit of the deficit court fees have been elaborately discussed in **Mannan Lal** (*Supra*) in paragraphs 19 to 21 which read:

“19. In another Full Bench, Hari Har Prasad Singh v. Beni Chand AIR 1951 All 79 of the same year dealing with a case of a memorandum of appeal which was found defective for want of proper court-fee and not admitted in view of Section 4 of the Court Fees Act but returned or rejected on that ground it was held that the memorandum could not be treated as an appeal. It was there observed :

If Section 4 of the Act (i.e. Court Fees Act) had stood by itself, an unstamped or insufficiently stamped memorandum of appeal, chargeable with fees, could not have been received by the High Court for any purpose.... There is nothing in Section 149 of the Code which overrides the provisions of Section 4, Court-fees Act, it merely postpones the operation of that section for the time being. If the whole or part of the requisite court-fee is not paid within the time allowed by the Court, Section 149 of the Code ceases to have effect, and the Court is precluded from filing or recording an unstamped or insufficiently stamped memorandum of appeal in court.

According to Stroud, a legal proceeding is "pending" as soon as commenced, and until it is concluded i.e. so long as the court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein.

20. When the deficiency in the payment of court-fees is made good and the document or memorandum of appeal is to be given the force and effect which it would have had if there had been no deficiency, the appeal must be treated as pending on 12th November, 1962. In Nagendra Nath v. Suresh which turned on the interpretation of Article 182(2) of the Limitation Act of 1908 as regards the validity of an appeal presented in an irregular form the Board observed that although there was no definition of 'appeal' in the Civil Procedure Code any application by a party to an appellate court asking it to set aside or revise a decision of a Subordinate Judge, is an appeal within the ordinary acceptance of the term, and that it was no less an appeal because it was irregular and incompetent.

21. The words used in that judgment are no doubt of wide import, But however that may be in the case before us there can be no difficulty in holding that an appeal was presented in terms of Order 41, Rule 1 of the Code inasmuch as all that this provision of law requires for an appeal to be preferred is the presentation in the form of a memorandum as therein prescribed. If the court fees paid thereon be insufficient it does not cease to be a memorandum of appeal although the court may reject it. If the deficiency in the fees is made good in terms of an order of the court, it must be held that though the curing of the defect takes place on the date of the making good of the deficiency, the defect must be treated as remedied from the date of its original institution."

In view thereof the submission made by Mr. Dutta that period of limitation would not be saved even if we allow the prayer for condonation of delay in depositing the deficit court fees is not acceptable.

However, the court is required to apply the same set of standards, guidelines and principles as would govern any application for condonation of delay since in both the cases the court would be exercising a discretionary jurisdiction.

Both Mr. Banerjee and Mr. Dutta have referred to Section 148 and Section 149 of the Code of Civil Procedure to argue that 30 days period prescribed in Section 148 as amended by the Code of Civil Procedure (Amendment) Act, 1999 Section 13 with effect from 1st July, 2002 shall commence from 10th December, 2014 when the coordinate Bench granted leave to the appellant to make necessary corrections by giving appropriate court fees and then move the matter upon notice to the other side.

If we import the principles as are applicable in deciding an application under Section 5 of the Limitation Act to Section 149 of the CPC the discretion can be provided where there is a sufficient cause for not complying with the direction of the Court. The concept of sufficient cause and reasonableness are implicit and are to be applied in exercising a discretion under Section 149 of the Code of Civil Procedure. The court would normally take a liberal approach to advance substantial justice when the delay is not on account of any dilatory tactics, want of bona

fides, deliberate inaction or negligence on the part of the appellant. The law of limitation is a substantive law and has definite consequences on the right of obligation of a party to arise and once a valuable right has accrued in favour of one party as a result of failure of the other party to explain the delay by showing sufficient cause for delay and its own conduct it would be unreasonable to take away that right on the mere asking of the applicant particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both party equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in pursuing its rights and remedies, it would be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly. [See. ***Balwant Singh v. Jagdish Singh & Ors.***, reported in **2010(8) SCC 685** followed in ***Brahampal & Ors. v. National Insurance Company*** reported in **2021 (6) SCC 512.**]

After noticing that a liberal and justice oriented approach needs to be taken in ***Sridevi Datla v. Union of India & Ors.***, reported at **2021(5) SCC 321** it was stated that the court, equally should be sensitive to the fact that “the successful litigant has acquired certain rights on the basis of the judgment under challenge and not a lot of time is consumed at various stages of litigation apart from the cost.” It was further held that the term sufficient cause is relative, fact dependent, and has many hues, largely

deriving colour from the facts of each case, and the behaviour of the litigant who seeks condonation of delay (in approaching the court). However, what can broadly be said to be universally accepted is that in principle, the applicant must display bona fides, should not have been negligent, and the delay occasioned should not be such that condoning it would seriously prejudice the other party. (*Per S. Ravindra Bhat, J.*)

Courts are required to weigh the scale of balance of justice in respect of both the parties and the said principle cannot be given a go-by under the guise of liberal approach.

A discretionary power has to be exercised with caution and due care and circumspection. The court is required to exercise discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in this regard in a catena of decisions of the Hon'ble Supreme Court.

When deficit court fees is not deposited within the statutory period the leave of the court is required to be obtained upon making a prayer for condonation of delay. If we take December, 18, 2014 as the starting point of limitation upon proper classification of the appeal, the appeal became time barred by the end of March 2015 and no endeavour was made to approach the court for condonation of delay. The payment of deficit court fees beyond the period of limitation would not automatically result in resurrection of the appeal unless the court extends the time to put in the deficit court fees.

Ordinarily under the rules the matter ought to have been placed before the Hon'ble Division Bench within a reasonable time. The department concerned in the instant matter had acted with utter negligence in not following the rules prescribed in this regard.

Appellant equally is found to be negligent in not curing the defect. Though no outer limit was fixed for compliance with order of the Court but conduct of appellant indicates lack of diligence.

Inaction on the part of office added further lethargy to the appellant in putting in Deficit Court Fees, till the petition of the respondent seeking dismissal of the appeal disturbed the slumber of the appellant.

There cannot be any doubt that unless there is any mistake the court may not allow the deposit of deficit court fees merely to suit the convenience of the appellant.

Mr. Banerjee has relied upon **Buta Singh** (supra) wherein the appellant was awaiting a verdict enhancing the compensation and for that consciously avoided the payment of Deficit Court Fees.

In **Buta Singh** (supra), the law on this point has been summarized in paragraph 9, which is reproduced hereinbelow:

“9. Having given anxious consideration to the respective contentions, question arises whether the claimants would be allowed to pay the deficit court fee. It is true that Section 149 CPC gives power to the Court to give time to the appellant to make up deficiency of court fee when the whole or any part of the fee prescribed under the Court Fee Act to pay court fee on the Memorandum of Appeal (MOA) but had not

been paid while presenting the same; but the power of the court is one of discretion and not as of right. Generally, before the appeal is admitted under Order 41 Rule 9, the court would exercise the discretion on showing sufficient cause for not making the required fee on the MOA. The discretion conferred on the court by Section 149 is a judicial discretion. The court is not bound to exercise the discretion unless the applicant shows sufficient cause for the failure to pay deficit court fee or he was under bona fide mistake in payment thereof. Mere poverty or ignorance or inability to the court fee at the time of presenting the appeal is not always a good ground for indulgence under Section 149. Bona fide mistake on the part of the appellant or applicant in making the deficit court fee may be a ground to exercise discretion in favour of the appellant. It is the duty of the Registry before admitting the appeal to point out to the appellant or his counsel that deficit court fee is payable on the MOA and some reasonable time may be given for payment of the court fee. The MOA would be returned to do the needful. If the deficit court fee is not made up and presented within the time enlarged under Section 148 CPC, there would be no appeal in the eye of law unless the delay is condoned. If the party deliberately to suit his convenience paid insufficient court fee, the mistake is not a bona fide but one of choice made by the party in making the deficit court fee. In that situation, even after pointing out the need to make the court fee and given time, if the court fee is not paid and MOA is represented within the enlarged time, it would be open to the court either to reject the MOA or refuse to condone the delay for not showing sufficient cause thereon. Therefore, the court is required to exercise its judicial discretion keeping the facts and circumstances in each case and not automatically for mere asking that the indulgence be shown to the party to make good the deficit court fee. In the latter event, it is not the exercise of the judicial discretion but showing undue indulgence.” (emphasis supplied)

In the instant case it can be perceived that the attempt was to keep the matter pending on the board without any real intention to move the appeal. There is culpable negligence and inaction on the part of the appellant to move with the matter and remove the defects. The appellant is not an indigent, rustic, illiterate and ignorant person where the court can take a liberal view.

A prayer for allowing the appellant to put in the deficit court fee beyond the period of limitation must be supported by reasons which prevented the appellants for not paying the court fee along with the appeal. The explanations offered initially and in the supplementary affidavit for not being able to put in the deficit court fees disclosed when considered cumulatively it would show that there was total lack of bona fides in its approach and there have been prevarication in the pleading. Gross negligence on the part of the Counsel or litigant is a factor required to be taken into consideration along with lack of bona fides imputable to a party seeking explanation of time to put in deficit court fees beyond period of limitation.

Sometimes delay of short duration of few days are condoned as opposed to where the delay is inordinate. In the later situation the doctrine of prejudice is attracted and it calls for strict approach as opposed to a liberal view. The explanation offered in our view is concocted and unbelievable. Although the application filed is strictly speaking not supported by a prayer

for condonation of delay but the said application in effect is an application for condonation of delay in putting the deficit court fees.

The filing of the application for the condonation of delay without disclosing satisfactory reasons would result in its dismissal as the court should not in such circumstances show any indulgence. Allowing any such prayer on unsubstantiated fanciful grounds and lack of candour would cost more harm and injustice to the applicant and would result in a miscarriage of justice.

It is well settled that law assists those who are vigilant and not those who sleep over their rights.

Mr. Ghosh has tried to take advantage of the order dated 10th December, 2014 by arguing that since no time limited is fixed the court should give an opportunity to make good balance court fee and in the event, such amount is not deposited only then the appeal should be dismissed.

We are unable to accept the said submission since there is a clear indication in the order dated 10th December, 2014 that the appellant should deposit appropriate court fees after reclassification and sufficient time had lapsed since then within which no attempt was made to put in the deficit court fees.

The provisions of Section 148 and 149 are intended to apply to cases of bona fide mistakes and not where a party consciously and intentionally avoided putting in deficit court fees in an attempt to avoid the law of limitation. These are the prerequisites for exercising such discretion.

A party cannot take advantage of enlargement of time under Section 148 of the Code of Civil Procedure after eight years. Although under Section 148 the court can enlarge the time fixed from time to time not extending thirty days in total even though the period originally fixed or granted might have expired, there has to be a reasonable, sufficient and acceptable explanation for such delay or inability to act within the time stipulated.

In the instant case, even if we assume that the initial deposit of insufficient court fee is due to bona fide mistake but there cannot be any excuse for not paying in the deficit court fees within the period of limitation or within a reasonable time once the reclassification was carried out by the learned Advocate for the appellant on 18th December, 2014. Initial explanation for not depositing the court fee was tainted with falsehood which however, attempted to be retrieved in the supplementary affidavit after the report filed by the Registrar clearly contradicts the averments made in the petition.

The appellant would be benefited by such lapses if we regularize the payment of the deficit court fees now. The lapses are fatal and in absence of any satisfactory explanation we cannot condone the delay.

On such consideration, we do not find any reason to condone the delay in depositing the court fees.

We direct the Registrar General and Registrar Administration (L & OM) to ensure that all matters where deficit court fees have not been deposited within two weeks from the date of the report of the stamp reporter in absence of any order from the court accepting or extending such time the matter shall be dealt with strictly in accordance with Chapter 5 Rule 18 of the Appellate Side Rules and any lapses in this regard shall be treated as dereliction of duty of the person concerned and to be dealt with strictly. The Registrar Administration (L& OM) must call for a report from the stamp reporter on a weekly basis and shall ensure that such matters are dealt with in terms of the aforesaid rules. The Registrar LOM must ensure strict compliance of the aforesaid direction.

This order shall be communicated immediately to the Registrar General and Registrar Administration (L & OM) for compliance.

In view thereof the application for condonation of delay to put in deficit court fees being CAN 3 of 2021 stands dismissed with cost of Rs.5 lacs to be paid to the State Legal Services Authority. The said amount shall be earmarked towards honorarium of the mediators. This order shall be

immediately communicated to the Member Secretary SLSA and Member Secretary Mediation Centre, High Court Calcutta for information.

In view the aforesaid CAN 2 of 2022 praying for dismissal of the appeal succeeds.

The court fees deposited shall be refunded to the appellant within four weeks.

FA 22 of 2022 stands dismissed.

I agree

(Soumen Sen, J.)

(Siddhartha Roy Chowdhury, J.)