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IN THE HIGH COURT OF DELHI AT NEW DELHI

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FAO (COMM) 200/2023

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*Date of decision: 13.03.2024***UNION BANK OF INDIA**

..... Appellant

Through: Mr Sanjeev Sagar, Standing counsel
for UOI with Ms Nazia Parveen and
Mr Shubham Kashyap, Advocates.

versus

M/S B N GARMENTS

..... Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE AMIT BANSAL****[Physical Hearing/Hybrid Hearing (as per request)]****AMIT BANSAL, J. (ORAL)**

1. The present appeal has been filed impugning the order dated 24th August, 2023 passed in MISC DJ ADJ 449/23 in Suit No. CS(COMM) No.303/21 passed by the learned Additional District Judge (Commercial Court) – 01, South West, Dwarka Courts, Delhi, whereby the application filed on behalf of the appellant/plaintiff under Section 5 of the Limitation Act, 1963 (Limitation Act) seeking condonation of delay has been dismissed. Consequently, the application filed on behalf of the appellant under Order IX Rule 9 of the Code of Civil Procedure, 1908 (CPC) has also been dismissed.

2. Notice in the present appeal was issued on 27th September, 2023.

3. As per the report of the Registry, the respondent has been duly served. An advocate appeared on behalf of the respondent on the last date of hearing



i.e. 11th March, however, none has appeared on behalf of the respondent today.

4. Taking into account the limited issue involved in this appeal, we proceed to decide the appeal.

5. Counsel for the appellant submits that the appellant had been diligently pursuing its suit and had already filed the affidavit in evidence of the sole witness to be examined on its behalf.

6. The record reveals that the matter was referred for mediation and the mediation proceedings continued over a period of time. Ultimately, the disputes between the parties could not be settled in mediation. Thereafter, *vide* order dated 16th March, 2023, the Commercial Court directed the appellant to file list of witnesses along with affidavit of evidence. However, the Commercial Court failed to take note of the fact that the affidavit of evidence of the sole witness had already been filed by the appellant.

7. *Via* order dated 12th April, 2023, the suit of the appellant was dismissed for non-prosecution taking into account that the appellant had failed to file the list of witnesses and the witness of the appellant, whose evidence by way of affidavit had been filed, was not present in the court.

8. Subsequently, the appellant moved an application under Order IX Rule 9 of the CPC for recall of the order dated 12th April, 2023 along with an application under Section 5 of the Limitation Act seeking condonation of delay. Both the applications have been dismissed *via* the impugned order.

9. We have heard the counsel for the appellant.

10. While there is no doubt that the appellant has been somewhat negligent in pursuing the suit before the Commercial Court, in our view, the



dismissal of the suit on account of non-appearance by the witness of the appellant on one particular date, would result in an outcome which is far more disproportionate to the default committed by the appellant.

11. On the aspect of delay, in both the applications filed on behalf of the appellant i.e. under Section 5 of the Limitation Act and under Order IX Rule 9 of the CPC, reasons have been given for the delay in filing the applications which, *inter alia*, include:-

- (i) amalgamation of the appellant bank with another bank,
- (ii) change in counsel appearing on behalf of the appellant.

12. In our considered view, the Commercial Court should have melded pragmatism with liberality and thus granted at least one more opportunity to the appellant. The respondent could have been compensated for the delay caused by the appellant by the imposition of costs.

13. Accordingly, the impugned order passed by the Commercial Court is set aside and the suit filed by the appellant is restored, subject to the appellant paying costs of Rs.20,000/- to the respondent.

14. The suit shall be listed before the concerned Commercial Court on 29th April, 2024, on which date the costs shall be paid.

15. The present appeal is, accordingly, disposed of in aforesaid terms.

**AMIT BANSAL
(JUDGE)**

**RAJIV SHAKDHER
(JUDGE)**

MARCH 13, 2024/rt