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

% *Date of Decision: 31.01.2024*

+ **RFA(COMM) 246/2023 and CM Nos.57587/2023 & 57588/2023**

M/S MACNEILL ENGINEERING LTD Appellant
Through: Mr. Saurabh Shandilya, Mr. N.
Mateen & Mr. Manoj Kumar, Advs.

versus

SMT. SHARMILA GOEL Respondent
Through: Mr. Aditya Malik, Mr. Anjani
Kumar & Mr. Tushar Yadav, Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE TARA VITASTA GANJU

VIBHU BAKHRU, J. (ORAL)

1. The appellant has filed the present appeal impugning a judgment and decree dated 01.04.2023 (hereafter '**the impugned judgment**') passed by the learned Commercial Court in a suit bearing No. CS(COMM.) No.94/2021 captioned *Sharmila Goel v. M/s Macneill Engineering Ltd. & Anr.* By the impugned judgment, the learned Commercial Court had decreed the suit for an amount of ₹33,63,044/- along with interest at the rate of 6% per annum from 30.10.2018 till realisation. There is an inordinate delay of 107 days in filing the present appeal. The appellant has filed an application (CM APPL. 57588/2023) under Section 5 of the Limitation Act, 1963 seeking condonation of delay in filing the present appeal.



2. The only explanation provided by the appellant for the inordinate delay in filing the appeal is that its authorised representative, who is the permanent resident of Saharanpur, Uttar Pradesh, was suffering from acute back pain and was advised bed rest. It is stated that after receiving a certified copy of the case file, the appellant's authorised representative handed over the same to the counsel for drafting an appeal in the month of August, 2023. The counsel had drafted the appeal and sent it to the authorised representative of the appellant sometime in the middle of September, 2023. The same was approved and thereafter, the appeal was filed before this Court.

3. The learned counsel appearing for the respondent has contested the said application. He contends that the authorised representative of the appellant is an advocate and therefore, was fully aware of the timelines for filing an appeal.

4. The delay in filing the present appeal far exceeds the period available for filing the said appeal. In ***Government of Maharashtra (Water Resources Department) Represented By Executive Engineer v. M/s Borse Brothers Engineers & Contractors Pvt. Ltd.: (2021) 6 SCC 460***, the Supreme Court had in the context of applications under Section 5 of the Limitation Act, 1963 for condonation of delay in commercial disputes observed as under:

“58. Given the object sought to be achieved under both the Arbitration Act and the Commercial Courts Act, that is, the speedy resolution of disputes, the expression “sufficient cause” is not elastic enough to cover long delays beyond the period



provided by the appeal provision itself. Besides, the expression “sufficient cause” is not itself a loose panacea for the ill pressing negligent and stale claims.

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63. Given the aforesaid and the object of speedy disposal sought to be achieved both under the Arbitration Act and the Commercial Courts Act, for appeals under section 37 of the Arbitration Act that are governed by Articles 116 and 117 of the Limitation Act or Section 13(1A) of the Commercial Courts Act, a delay beyond 90 days, 30 days or 60 days, respectively, is to be condoned by way of exception and not by way of rule....”

5. It is also relevant to note that in the present case, there is no attempt on the part of the appellant to explain the delay day wise. Further, no documents have been filed to establish that the appellant’s authorised representative was indisposed, which is the only explanation provided for the delay in filing the appeal. The appellant has provided no satisfactory explanation as to why alternate arrangements could not be made if its authorised representative was unwell.

6. We find no merit in the application and accordingly, reject the same. Consequently, the present appeal is liable to be rejected on the ground of delay.

7. In view of the above, it is not necessary to examine the merits of the appeal. However, the learned counsel for the appellant had also advanced arguments on merits. Since we had heard the same, we consider it apposite to examine these contentions as well.

8. The respondent is the owner of a property described as “Property bearing no.54 (Private No.3), Rama Road Industrial Area, Delhi-110015”



(hereafter '**the demised property**'). The demised property comprises of a basement and three floors.

9. It was the respondent's case that the demised property was let out to the appellants for a period of nine years, with effect from 01.09.2011 for industrial and commercial purposes on a monthly rent of ₹1,20,000/-. The parties had entered into a Lease Deed dated 23.08.2011.

10. The respondent claimed that the appellant was irregular in the payment of rent and consequently, on 13.07.2018, the respondent sent a legal notice to the appellant and its Regional Manager (who was arrayed as defendant no.2 in the suit) demanding arrears of rent amounting to ₹54,27,852/- for the period 01.09.2011 to 30.06.2018 along with interest at the rate of 15% per annum. The respondent claimed that in response to the said notice, the appellant issued two cheques for a sum of ₹4,50,000/- each, for discharging the arrears of rent. However, the said cheques were dishonoured on presentation. Thereafter, the appellant sent two demand drafts drawn on HDFC Bank for a sum of ₹4,50,000/- each. However, the appellant had not paid the balance amounts due. The respondent claimed that the appellant vacated the demised property on 16.10.2018 without clearing the arrears of rent and without handing over the TDS certificate.

11. The appellant issued another legal notice claiming ₹91,77,241/- after adjusting the rent paid, security deposit and also interest at the rate of 15% per annum on delayed payment.

12. The appellant filed a joint written statement along with its Regional



Manager (arrayed as defendant no.2 in the suit), *inter alia*, claiming that the respondent had handed over possession of only first floor of the demised property and had not provided possession of the remaining area. It claimed that the respondent had violated the term of the Lease Agreement dated 23.08.2011.

13. The learned Commercial Court found that there was no evidence on record, which would suggest that the appellant had raised any objection regarding handing over possession of only first floor and not of the remaining floors of the demised premises at any point of time prior to vacation. The appellant's witness (DW-1) had admitted that the appellant had vacated the demised premises and communicated the same by letter dated 16.08.2018. The learned Commercial Court noted that the said letter – which was admitted by DW-1 – mentioned that the appellant was vacating the demised property and not just the first floor of the demised property.

14. There was no dispute as to the rent payable for the demised property. There was also no dispute that the payment of rent was only through cheque, bank drafts or banking channels (RTGS). It is material to note that whereas, the respondent had placed statement of her bank accounts; the appellant did not do so.

15. It was contended on behalf of the appellant that the respondent's claim for arrears of rent beyond the period of three years was barred by limitation. The learned Commercial Court accepted the appellant's contention that the claim for arrears of rent beyond a period of three years



was barred by limitation and accordingly, the suit was required to be decreed for arrears for a period of three years, that is, from October, 2015 to October, 2018. The learned Commercial Court also accepted that the appellant had paid a sum of ₹58,25,000/- for the period till September 2015 and the same was in excess of the amount payable by it by a sum of ₹2,51,320/-. The rent payable for the three years, that is, from October, 2015 to October, 2018 was computed at ₹48,74,364/- and the learned Commercial Court reduced the amount of ₹9,00,000/- (which was admittedly received by the respondent); the security deposit of ₹3,60,000/-; and the excess payment of ₹2,51,320/- in respect of the period prior to October 2015, from the aforesaid amount. Accordingly, the learned Commercial Court passed a decree for an amount of ₹33,63,044/-.

16. Although, several grounds have been raised in the appeal. The learned counsel appearing for the appellant has confined the challenge to the impugned judgment to the singular ground that the appellant was not provided adequate opportunity to lead evidence in defence. The appellant's challenge rests on the fact that it had requested the learned Commercial Court for time to produce another defence witness after the evidence of DW-1 was closed, but the learned Commercial Court rejected the same.

17. We find no merit in the contention that the appellant was denied sufficient opportunity to lead evidence in defence of the suit.

18. The record indicates that summons in the suit were directed to be issued on 11.02.2021, 31.03.2021 and 06.08.2021. The summons was duly served to the appellant but none entered appearance on behalf of the



appellant when the suit was listed on 28.09.2021. On the said date, a last opportunity was granted to the defendants (including the appellant) to enter appearance and the suit was posted on 08.11.2021. However, even on the said date, none appeared for the defendants and the learned Commercial Court directed that the defendants be proceeded *ex parte*. The suit was put up for *ex parte* evidence on 14.12.2021. However, after the said order was passed, the counsel for the appellant appeared before the Court. He was apprised of the said order. He filed his *vakalatnama*, which was taken on record.

19. On the next date of hearing, that is, on 14.12.2021, the learned counsel for the defendants requested that the earlier order dated 08.11.2021 whereby, the court had proceeded against the defendants *ex parte* be recalled. The said request was acceded to and the order dated 08.11.2021 was recalled, subject to payment of costs of ₹3,000/-. The suit was, thereafter, listed on 22.12.2021 for filing of the written statement.

20. The appellant and its regional manager (the defendants in the suit) filed a joint written statement. However, the same was not accompanied by the statement of truth. Further, the affidavit accompanying the written statement was affirmed by the appellant's counsel as its authorized representative. The learned Commercial Court permitted the defendants (the appellant and its regional manager) to file a proper written statement as well as the statement of truth and, at the request of the defendants, re-notified the suit on 05.01.2022. However, on that date (that is, 05.01.2022) none appeared on behalf of the defendants and the suit was directed to be



listed on 03.03.2022.

21. On 03.03.2022, a request was made on behalf of the appellant and its regional manager (defendants) for passing over of the matter in the first round. However, none appeared when the suit was called again. Notwithstanding the above, the learned Commercial Court adjourned the matter to 28.03.2022 and gave a final opportunity to the appellant and its regional manager (defendants) to clarify the status of the counsel as he had filed the affidavit as the appellant's authorised representative. The suit was, thereafter, listed on 28.03.2022. On that date as well, none appeared for the defendants and accordingly, the defendants were proceeded *ex parte*. The suit was directed to be listed for plaintiff's evidence on 20.05.2022. However, after the order was passed, the learned counsel for the defendants had appeared and had filed its written statement.

22. On the next date of hearing, that is, 20.05.2022, the defendants once again filed an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 for setting aside the order dated 28.03.2022, whereby the defendants were proceeded *ex parte*. The learned Commercial Court allowed the said application, framed issues, and listed the matter for plaintiff's evidence on 12.07.2022. The Plaintiff's witness (PW-1) was present on the said date, but none was present on behalf of the defendants. PW-1 was examined. However, in the interest of justice, cross-examination of PW-1 was deferred and the court adjourned the proceedings to 04.08.2022. On that date, PW-1 was cross-examined and discharged and the plaintiff's evidence was closed. The suit was listed for the defendants'



evidence on 05.09.2022.

23. On 05.09.2022, the defendants' witness was not present and once again, a final opportunity was granted to the defendants to lead evidence and the matter was directed to be listed on 02.11.2022. The said date was changed at the joint request of the counsel for the parties to 04.11.2022. On the said date, that is, on 04.11.2022, the defence witness was not present. The learned Commercial Court once again granted an opportunity to the defendants to lead evidence and the matter was directed to be listed on 11.11.2022 for defence evidence, subject to the defendants paying costs of ₹2,000/-.

24. On the next date, that is, 11.11.2022, no defence witness was present. In the interest of justice, the learned Commercial Court granted one more opportunity to the defendants and listed the matter for defence evidence/arguments on 17.11.2022. The learned Commercial Court clarified that in case the witness is not present on the said date, the evidence would stand closed.

25. On the next date, that is on 17.11.2022, the defence witness (DW-1) was present. He was examined and cross-examined and discharged. At that stage, the defendants (including the appellant) sought one more opportunity to examine another witness. However, considering that sufficient opportunity had been granted to the defendants to produce the witness, the said request was not acceded to and the learned Commercial Court listed the suit for final arguments on 07.12.2022.



26. It is clear from the above that the appellant was lackadaisical in defending the suit. The appellant had been proceeded *ex parte* on more than two occasions. The matter was listed before the learned Commercial Court on three occasions for recording of defence evidence, but the defence witness was not present. It is on the fourth hearing that one witness (DW-1) was present and he was examined. Since, sufficient opportunity had already been granted to the appellant to lead evidence, the appellant's request to defer the proceedings was not warranted.

27. We find no infirmity with the decision of the learned Commercial Court to reject the appellant's request for deferring the matter further for recording of defence evidence.

28. In view of the above, the appeal is dismissed, both on limitation as well as on merits. All pending applications are also dismissed.

VIBHU BAKHRU, J

TARA VITASTA GANJU, J

JANUARY 31, 2024
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