

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

M.A. No. 38/2023

Reserved on: 14.11.2023

Pronounced on: 21.11.2024

Shabnam Soodan, Age 29 years
W/o Sarth Sudan R/o H.No.125, Sector-7,
Lane NO.5, Near Ellqauai Dehati Bank,
Nanak Nagar, Jammu

.... Appellant(s)

Through: Mr. C. S. Gupta Advocate

Vs.

Seema Gupta W/o Sanjay Gupta
R/o H.No.27, Sector-2A, Laxmi Enclave
Triukuta Nagar, Jammu

... Respondent(s)

Through: Mr. Varun Raina, Advocate

CORAM:

HON'BLE MS JUSTICE MOKSHA KHAJURIA KAZMI, JUDGE

JUDGMENT

1. This Civil First Appeal under Order XLIII(1)(d) of Civil Procedure Code is directed against the order passed by Court of Learned First Additional District Judge, Jammu, dated 03.11.2023, whereby the application filed by the appellant seeking condonation of delay, under Section 5 of Limitation Act, for filing the petition under Order IX Rule 13 CPC, for setting aside the ex-parte judgment and decree dated 18.03.2023, passed in a suit for ejectment, titled *Seema Gupta versus Shabana Soodan*, has been dismissed.

FACTUAL MATRIX.

2. The respondent along with her husband, namely Shri Sanjay Gupta are the owners of the Triple story house bearing no. 67 B/B, Gandhinagar, Jammu. It was given on rent to the appellant on monthly basis with effect from 05.09.2020 for a period of 11 months on monthly rent of ₹ 40,000/- , initially for a period of three months and ₹ 50,000 per month for the rent of the tenancy term vide Rent Deed /Agreement dated 14.09.2020, which was executed by the respondent with the permission of her husband.

3. The appellant had to pay rent regularly by or before 10th day of the following month, she also had to pay the electricity charges as well as the water charges to the respondent regularly. The appellant started violating the terms and conditions of the tenancy as contained in the rent agreement entered between the

parties, as such, until the expiration of the term of tenancy, the appellant was in arrears of rent to the tune of ₹ 2,42,000/-. She also had failed to deposit the electricity as well as the water charges, which swelled to the tune of ₹ 54,000/-.

4. The son of the respondent, namely Sushant Gupta, who was working in merchant Navy, after the outbreak of COVID-19 pandemic, had stopped sailing and eventually lost his job. Since the tenancy in favour of the petitioner had come to an end with effect from 14.08.2021, and the conduct of the appellant was in violation of the rent agreement, the respondent served the legal notice upon the appellant on 22.09.2021, asking her to handover the vacant position of the suit premises to the respondent and also to pay the tenancy arrears of rent and other dues.

5. The appellant replied to the notice through her counsel and while disputing the amount of arrears as well as amount due towards the electricity charges, she agreed to vacate the suit premises and sought time for the same. Despite assurance given by the appellant, she failed to vacate the premises of the respondent and to clear the outstanding dues, as a result of which the respondent presented a civil suit on 16-11-2021 before learned Principal District Judge, Jammu, and prayed as under:-

“Decree of ejectment of the defendant from the Triple Storey House of the Plaintiff bearing House number 67 B/B, Gandhi, Nagar, Jammu.

Decree for recovery of amount on account of arrears of rent from the petitioner to the tune of ₹ 2,42,000/- up to 30.09.2021, along with interest @ 18 % till it's realisation and amount on account of electricity charges up to 01.11.2021 to the tune of ₹ 75,065/- along with the future amount towards electricity charges along with interest @ 18% till its realisation and amount on account of compensation for the illegal use of the suit premises to the tune of ₹ 2,00,000/- per month with effect from 01.10.2021 along with interest @ 18 % till it's realisation.”

6. On presentation of the suit, appellant was summoned and on 21.11.2022, Mr Rajeev Sharma, Advocate, appeared on behalf of the appellant and filed written statement along with an application seeking condonation of delay of 12 days in filing the written statement. The written statement was taken on record on payment of the cost of ₹ 5000/-. Thereafter he chose not to appear and finally

appellant was proceeded ex-parte on 01.02.2023. The suit was decreed in favour of the respondent on 18.03.2023 as under:-

“9. Suit as such is decreed in favour of the plaintiff and against the defendant and decree of ejectment of the defendant from the Triple Story House of the plaintiff bearing House Number 67 B/B, Gandhi Nagar, Jammu is passed with further decree of recovery of amount on account of areas of rent from the defendant to the tune of ₹2, 42, 000/- (Rupees Two lacs Forty Two Thousand only) up to 30.09.2021, along with interest @ 9% till it's realisation and amount on account of electricity charges up to 01.11.2021 to the tune of ₹75,065/-along with the future amount towards electricity charges along with interest @ 7% till it's realisation and amount on account of compensation for the illegal use of the suit premises to the tune of ₹ 2, 00, 000/-per month w.e.f. 01. 10. 2021 along with interest @ 9% till its realisation is also passed in favour of the plaintiff and against the defendant. The decree shall be binding upon the parties.

No cost.

Office is directed to draw a decree sheet accordingly. Suit file after due compilation be consigned to records under rule.”

7. The appellant filed an application under Order IX Rule 13 of the CPC for setting aside the ex-parte judgment and decree dated 18.03.2023 passed in the suit for ejectment in case titled as *Seema Gupta versus Shabanam Soodan*, along with an application for condonation of delay under Section 5 of J&K Limitation Act. The said application was instituted on 18.07.2023. Appellant had also filed an application for staying operation of judgment and decree dated 18.03.2023. The learned First Additional District Judge, Jammu, in terms of order dated 03.11.2023 disposed of all the applications by passing a composite order as under:-

“16. Thus, in view of the forgoing reasons, I am of the view that the case does not qualify for condonation of delay as the assertions of the applicant lack bona fide. Resultantly, the cause given for condonation of delay is not convincing and so the application for condonation of delay is dismissed, consequently, application for setting aside ex-parte judgment and decree dated 18.03.2023 sought to be filed and application for staying the operation of

judgement and decree are also dismissed. The stay granted against the operation of the judgment and decree dated 18.03.2023 passed in file number 26/COS titled Seema Gupta versus Shabana Sudan vide order dated 20.07.2023 is also vacated. All the application after due compilation be consigned to records.”

8. The appellant has filed the instant appeal on the ground that the advocate who was representing her did not appear before the court after 15th September 2022 and Learned First Additional District Judge, Jammu proceeded ex-parte against the appellant. The appellant has further stated that she was not in contact with her counsel as her father-in-law who was living with her and was being looked after by her, was hospitalized for dementia as well as for mental issues. He remained in the hospital and ultimately died on 05.03.2023. After the death of father-in-law of the appellant it took some time for her to take care of the house and resettle. It is stated that the appellant was under an impression that the suit was being contested by her counsel and as and when her presence will be required, she would be called by him. It is stated that on coming to know about the passing of the ex-parte judgment and decree against appellant on 18.03.2023, she immediately contacted her counsel, but he had no knowledge regarding the ex-parte proceedings being initiated against appellant. As such she engaged another counsel, who presented the petition under Order IX Rule, 13 CPC for setting aside the ex-parte proceedings as well as an application seeking condonation of delay in filing the petition.

Arguments advanced by the learned counsel for the Appellant:-

9. It is stated by the learned counsel for the appellant Mr C S Gupta, Advocate that the appellant could not appear before the court after filing of the written statement as her father-in-law was suffering from mental disease. He was being looked after by the appellant. She was proceeded ex-parte on 01.02.2023 and ex-parte decree was passed on 18.03.2023, whereas the father-in-law of the appellant died on 05.03.2023 and before that he was hospitalized and remained under constant treatment of doctors. It is further stated that it was due to this reason that appellant could not contact her counsel, as such the learned First Additional District Judge, Jammu, was not legally correct to hold that appellant failed to show sufficient cause for non-appearance on the day she was proceeded ex-parte and also when an ex-parte decree was passed against her. It is also stated that it was only due to the negligence of the counsel in not attending the case that

the appellant was proceeded ex-parte. It is further stated that after initiation of ex-parte proceedings against the appellant, an application was moved by the respondent under Order VI Rule 17 of CPC, seeking amendment of the plaint, which was allowed in ex-parte, without issuing fresh notice to the appellant for her appearance which is not in consonance with law.

10. Learned counsel for the appellant has relied upon judgments of the Apex Court delivered in cases titled **Union of India & Anr. v. Jahangir Byramji Jeejeebhoy (D) through his LR; 2024 LiveLaw (SC) 288;** and **Pathapati Subba Reddy (Died) by L.Rs & Ors. v. The Special Deputy Collector (LA) AIR 2024 SC 1884.**

Arguments advanced by learned counsel for the respondent:-

11. Learned counsel for the respondent, Mr. Varun Raina, has stated that the appellant herein has challenged the order impugned dated 03-11-2023, on two grounds, first that her father-in-law, she was taking care of, was hospitalized and died on 05-03-2023. In his appeal he has stated in paragraph no. 9, that he has annexed medical prescriptions, discharge slip of the hospital and the death certificate of the father-in-law of the appellant, whereas the appellant has placed on record only the death certificate of her father-in-law dated 05-03-2023. These documents were not even referred in the applications seeking condonation of delay and in an application under Order IX Rule 13, before the learned First Additional District Judge, Jammu.

Secondly, appellant has shifted the blame on her counsel who being negligent failed to follow up the case of the appellant and didn't inform her about passing of the ex-parte Judgment against her. That the appellant has narrated an imaginary and fabricated story to escape the burden of proof and to draw some sympathy of the court, thereby pointing finger at the previous conducting counsel only to overcome long delayed period from the date of impounded order till filing of the application under order IX Rule 13. He has further stated that suit was presented on 16.11.2021, the power of attorney was filed by Mr Rajiv Sharma, advocate on 30.04.2022 and since there was a delay of 12 days in filing the written statement, as such, learned First Additional District Judge, Jammu, allowed the appellant to file written statement on 21.11.2022, subject to the cost of ₹ 5000. The counsel representing appellant failed to deposit the said amount despite various assurances then appellant engaged another counsel namely Mr

Satyam Arora, who deposited the costs on behalf of the appellant on 11.01.2023 where after, no one appeared for the appellant, resultantly, she was set ex-parte on 01.02.2023. The appellant has failed to disclose any sufficient reason from the date of engagement of a new counsel i.e., 11.01.2023 and cost was deposited, till the date of passing of ex-parte decree and judgment 18.03.2023 and from 18.03.2023 till 18-07-2023, when she filed an application under Order IX Rule 13 CPC along with an application seeking condonation of delay after period of 90 days.

12. Learned Counsel for the respondent has relied upon the judgment passed in case titled as **Shankar Lal Patwari versus Sri Jagannath Mahaprabhu and others** of High Court of Orissa, Cuttack decided on 29.09.2023, where it was held as under:-

“It is very easy to change lawyer and to put blame on the earlier lawyer for his/her negligence, but the court cannot turn a blind eye to the surrounding circumstances, eventualities, and most importantly, the conducts of the party before it marches on to believe the allegations levelled by the party against his advocate as a gospel truth. Moreover, the concerned lawyer has not been made as a party in this case and thus, it is not fair on our part to pass any order against the conduct of the lawyer without hearing him.”

Analysis:-

13. The Supreme Court in case titled **Union of India & Anr. v. Jahangir Byramji Jeejeebhoy (D) through his LR; 2024 LiveLaw (SC) 288** has laid down certain principles for guidance as to how the applications seeking condonation need to be dealt with. Paragraphs 29, 31 and 32 being relevant are taken note of hereunder:-

“29. In *Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation*, (2010) 5 SCC 459, this Court rejected the application for condonation of delay of 4 years in filing an application to set aside an ex-parte decree on the ground that the explanation offered for condonation of delay is found to be not satisfied.

31. In the case of *Lanka Venkateswarlu (D) by LRs v. State of Andhra Pradesh & others*, (2011) 4 SCC 363, this Court made the following observations:

“20. In N. Balakrishnan, [(1998) 7 SCC 123] this Court again reiterated the principle that: (SCC p. 127, para 11)

“11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that [the] parties do not resort to dilatory tactics, but seek their remedy promptly.”

21 to 27.....

28. We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as “liberal approach”, “justice oriented approach”, “substantial justice” cannot be employed to jettison the substantial law of limitation. Especially, in cases where the court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms.

29. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under Section 5 of the Limitation Act, the courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers.”

32. In the case of Pundlik Jalam Patil (D) by LRs. v. Executive Engineer, Jalgaon Medium Project & others, (2008) 17 SCC 448, this Court held as follows:

“19. In Ajit Singh Thakur Singh v. State of Gujarat [(1981) 1 SCC 495 : 1981 SCC (Cri) 184] this Court observed: (SCC p. 497, para 6)

“6. ... it is true that a party is entitled to wait until the last day of limitation for filing an appeal. But when it allows limitation to expire and pleads sufficient cause for not filing the appeal earlier, the sufficient cause must establish that because of some event or circumstance arising before limitation expired it was not possible to file the appeal within time. No event or circumstance arising after the expiry of limitation can constitute sufficient cause.”

(emphasis
supplied)

This judgment squarely applies to the facts in hand.

x x x x

21. Shri Mohta, learned Senior Counsel relying on the decision of this Court in *N. Balakrishnan v. M. Krishnamurthy* [(1998) 7 SCC 123] submitted that length of delay is no matter and acceptability of explanation is the only criterion. It was submitted that if the explanation offered does not smack of mala fides or it is not put forth as a part of dilatory tactics, the court must show utmost consideration to the suitor. The very said decision upon which reliance has been placed holds that the law of limitation fixes a lifespan for every legal remedy for the redress of the legal injury suffered. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. The decision does not lay down that a lethargic litigant can leisurely choose his own time in preferring appeal or application as the case may be. On the other hand, in the said judgment it is said that court should not forget the opposite party altogether. It was observed: (SCC p. 128, para 11)

“11. ... It is enshrined in the maxim interest reipublicae ut sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.”

22. In *Ramlal v. Rewa Coalfields Ltd.* [AIR 1962 SC 361] this Court held that: (AIR pp. 363-65)

“In construing Section 5 of the Limitation Act, it is relevant to bear in mind two important considerations. The first consideration is that the expiration of period of limitation prescribed for making an appeal gives rise to right in favour of the decree-holder to treat the decree as binding between the parties and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause of excusing delay is shown discretion is given to the court to condone the delay and admit the appeal. It is further necessary to emphasise that even if the

sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage the diligence of the party or its bona fides may fall for consideration.”

(emphasis
supplied)

23. On the facts and in the circumstances, we are of the opinion that the respondent beneficiary was not diligent in availing the remedy of appeal. The averments made in the application seeking condonation of delay in filing appeals do not show any acceptable cause much less sufficient cause to exercise courts’ discretion in its favour.”

14. Though this court is mindful of the fact that a liberal, pragmatic, justice oriented, non-pedantic approach has to be adopted to deal with an application for condonation of delay but the appellant herein has failed to show any sufficient cause, on the basis of the pleadings as contained in the appeal and in the application for condonation of delay before the court of First Additional District Judge, Jammu, that may convince this court to condone the delay occasioned from the date of engagement of new counsel i.e. 11.01.2023 till the date of impugned judgment and decree i.e. 18.03.2023 and from 18.03.2023 till the date of filing of the application i.e. 18.07.2023.

15. The appellant has suppressed the material facts before this court and has tried to mislead this court. She has stated at paragraph no. 8 of the appeal that after 15th September 2022, her advocate did not appear before the court with the result she was proceeded ex-parte, whereas the record clearly reflects that she had engaged a new counsel who appeared before the court on 11.01.2023, deposited the cost of ₹5000/- before the court of First Additional District Judge, Jammu. Moreover she has stressed upon the fact that she remained in the hospital in order to look after her father-in-law who expired on 05.03.2023, she has stated that she has annexed the medical prescription, discharge slip of the hospital, but the same has not been placed on record, which amounts to sheer abuse of process of law by the appellant. The appellant initiated steps for filing an application under Order IX Rule 13 and application for condonation of delay, after the notice was issued

upon her in the execution petition filed by the respondent on 11.07.2023, which indicates that she was following the proceedings filed by the respondent.

16. It would be profitable to refer to few paragraphs of yet another judgment of the Supreme Court dealing with the issue delivered in case titled **Pathapati Subba Reddy (Died) by L.Rs & Ors. v. The Special Deputy Collector (LA) AIR 2024 SC 1884**. Paragraphs 7, 9, 10, 11,& 12 are taken note of hereunder:

“7. The law of limitation is founded on public policy. It is enshrined in the legal maxim “interest reipublicae ut sit finis litium” i.e. it is for the general welfare that a period of limitation be put to litigation. The object is to put an end to every legal remedy and to have a fixed period of life for every litigation as it is futile to keep any litigation or dispute pending indefinitely. Even public policy requires that there should be an end to the litigation otherwise it would be a dichotomy if the litigation is made immortal vis-a-vis the litigating parties i.e. human beings, who are mortals.

9. Section 3 of the Limitation Act in no uncertain terms lays down that no suit, appeal or application instituted, preferred or made after the period prescribed shall be entertained rather dismissed even though limitation has not been set up as a defence subject to the exceptions contained in Sections 4 to 24 (inclusive) of the Limitation Act.

10. Section 3(1) of the Limitation Act, for the sake of convenience, is reproduced hereinbelow:

“3. Bar of limitation.- (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.”

11. Though Section 3 of the Act mentions about suit, appeal and application but since in this case we are concerned with appeal, we would hereinafter be mentioning about the appeal only in context with the limitation, it being barred by time, if at all, and if the delay in its filing is liable to be condoned.

12. In view of the above provision, the appeal which is preferred after the expiry of the limitation is liable to be dismissed. The use of the word ‘shall’ in the aforesaid provision connotes that the dismissal is mandatory subject to the exceptions. Section 3 of the Act is peremptory and had to be given effect to even though no objection regarding limitation is taken by the other side or referred to in the pleadings. In other words, it casts an obligation upon the court to dismiss an appeal which is presented beyond limitation. This is the general law of limitation. The exceptions are carved out under Sections 4 to 24 (inclusive) of the Limitation Act but we are concerned only with the exception contained in Section 5 which empowers the courts to admit an appeal even if it is preferred after the prescribed period provided the proposed appellant gives ‘sufficient cause’ for not preferring the appeal within the period prescribed. In other words, the courts are conferred with discretionary powers to admit an appeal even after the expiry of the prescribed period provided the proposed appellant

is able to establish ‘sufficient cause’ for not filing it within time. The said power to condone the delay or to admit the appeal preferred after the expiry of time is discretionary in nature and may not be exercised even if sufficient cause is shown based upon host of other factors such as negligence, failure to exercise due diligence etc.”

17. From the above stated legal position the court is convinced that the appellant has not been able to put forth any explanation much less a sufficient explanation to explain the delay caused in filing the application under Order IX Rule 13 CPC along with application for condonation of delay from the date the new counsel was engaged till the passing of impugned judgment and decree and from that date till the actual date of filing of the application. It is a settled principle of law that explanation for the delay should be clearly understood in contradistinction to inordinate unexplained delay. The conduct of the party, *bona fide* reasons for condonation of delay and whether such delay could easily be avoided by taking normal care and caution are the other relevant factors those need to be taken into consideration in granting the application for condonation of delay. As a constitutional authority, this court has a duty to protect the rights of the citizens, but simultaneously it has to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the court would be under legal obligation to scrutinize whether the *lis* at a belated stage should be entertained or not.

18. Learned counsel for the respondent has stated that since status quo was granted by the court on 20.11.2023, the appellant as on date is in arrears to the tune of ₹18,00,000/- (eighteen lacs). She is enjoying the property of the respondent without paying a single penny to the respondent.

19. In view of the above, the court has reached the conclusion that there has been negligence, deliberate inaction and lack of *bona fides* on the part of the appellant. Appellant has tried to resort to dilatory tactics without any rationale and logic, as such, the appeal deserves to be dismissed.

20. This appeal being devoid of any merit is dismissed.

(MOKSHA KHAJURIA KAZMI)
JUDGE

Jammu
21.11.2024
Amjad

Whether the judgment is reportable: Yes