IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

TUESDAY, THE 27TH DAY OF JUNE 2023 / 6TH ASHADHA, 1945

FAO NO. 17 OF 2023

AGAINST THE ORDER DATED 23.12.2022 IN R.P.I.A.NO.20 OF 2022 AND I.A.NO.1 OF 2022 IN O.S.NO.44 OF 2015 OF SUB COURT, CHAVAKKAD

APPELLANT/PETITIONER/1ST DEFENDANT:

ABDUL KHADER, AGED 57 YEARS, S/O. KANNATHUVEETTIL HASSAN HAJI, VYLATHOOR VILLAGE,DESOM, CHAVAKKAD TALUK, THRISSUR DISTRICT., PIN - 679563

BY ADVS.K.B.ARUNKUMAR
POOJA K.S.

RESPONDENTS/RESPONDENTS/PLAINTIFFS:

1 **RAPHEAL T GEORGE, AGED 72 YEARS S/O. THEKKEKKARA JOSEPH GEORGE, ERANELLUR VILLAGE, KECHERI DESOM, THALAPILLY TALUK, THRISSUR DISTRICT, PIN - 680501**

2 **RENIL SHAJU, AGED 47 YEARS, W/O. ARAKKAL SHAJU JOSEPH, PAVARATTY VILLAGE,DESOM, PAVARATTY (P.O), CHAVAKKAD TALUK, THRISSUR DISTRICT., PIN - 680507**

BY ADVS.DEEPU THANKAN
UMMUL FIDA(K/954/2013)
LAKSHMI SREEDHAR(K/946/2016)
LEKSHMI P. NAIR(K/001011/2017)
NAMITHA K.M.(K/001556/2021)

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 27.06.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Anil K. Narendran, J.

The appellant is the 1st defendant in O.S.No.44 of 2015, which was one filed by respondents 1 and 2 herein, against the appellant for realisation of a sum of Rs.20,00,000/-, together with interest and cost. In that suit, the defendants were set *ex parte* and an *ex parte* decree was also passed on 05.01.2017. Seeking an order to set aside that *ex parte* decree, the appellant-1st defendant filed R.P.I.A.No.20 of 2022, invoking the provisions under Order IX, Rule 13 of the Code of Civil Procedure, 1908, along with I.A.No.1 of 2022, which is an application filed under Section 5 of the Limitation Act, 1963, seeking an order to condone the delay of 2110 days in filing the former application. Those applications ended in dismissal by the common order dated 23.12.2022 for the reasons stated therein. The said order is under challenge in this appeal filed invoking the provisions under Order XLIII, Rule 1(d) of the Code of Civil Procedure.

2. On 29.03.2023, when this appeal came up for admission, this Court admitted the matter on file. The respondents entered appearance through counsel.

3. Heard the learned counsel for the appellant-1st defendant and also the learned counsel for the respondents-

plaintiffs.

4. The reasoning of the court below in the impugned order dated 23.12.2022, for dismissing the applications, reads thus;

> "6. The 2nd defendant is the wife of the 1st defendant. The 2nd defendant appeared in the suit and contested the suit for some time and thereafter she did not appear and was set ex-parte and the suit was decreed. From the records, it is seen that the 2nd defendant has received summons for the 1st defendant also. So, it cannot be said that the 1st defendant was not aware of the suit. Admittedly, in 2021 the 1st defendant came to India. Thereafter, also he did not care to file any application to set aside ex-parte decree. The above petition is without any merit and there is no reason to condone the delay of 2110 days. Hence the petitions are dismissed."

5. The Limitation Act, 1963 was enacted by the Parliament to consolidate and amend the law for the limitation of suits and other proceedings and for purposes connected therewith. Section 5 of the Act deals with extension of prescribed period in certain cases. As per Section 5, any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such

period. As per Explanation to Section 5, the fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this Section.

6. It is well settled that the Law of Limitation is founded on public policy to ensure that the parties to a litigation do not resort to dilatory tactics and seek legal remedy without delay. In an application filed under Section 5 of the Limitation Act, the court has to condone the delay if sufficient cause is shown. Adopting a liberal approach in condoning the delay is one of the guiding principles, but such liberal approach cannot be equated with a licence to approach the court-at-will disregarding the time limit fixed by the relevant statute. The acts of negligence or inaction on the part of a litigant do not constitute sufficient cause for condonation of delay. Therefore, in the matter of condonation of delay, sufficient cause is required to be shown, thereby explaining the sequence of events and the circumstances that led to the delay.

7. In **Collector, Land Acquisition v. Katiji [(1987) 2 SCC 107]**, in the context of Section 5 of the limitation Act, 1963, the Apex Court held that, the expression 'sufficient cause'

employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner, which subserves the ends of justice, that being the life-purpose for the existence of the institution of Courts.

8. In **Esha Bhattacharjee v. Raghunathpur Nafar Academy [(2013) 12 SCC 649]** the Apex Court while summerising the principles applicable while dealing with an application for condonation of delay held that, the concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play. The Apex Court held further that, there is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

9. Though the expression 'sufficient cause' employed in Section 5 of the Limitation Act, 1963 is adequately elastic to enable the courts to apply the law in a meaningful manner, which subserves the ends of justice, as held by the Apex Court in **Katiji [(1987) 2 SCC 107]**, the concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be

allowed a totally unfettered free play, as held by the Apex Court in **Esha Bhattacharjee [(2013) 12 SCC 649]**. Inordinate delay, which attracts doctrine of prejudice, warrants strict approach, whereas, a delay of short duration or few days, which may not attract doctrine of prejudice, calls for a liberal delineation. An application for condonation of delay should be drafted with careful concern and no court shall deal with such an application in a routine manner.

10. Order IX, Rule 13 of the Code provides for setting aside decree *ex parte* against defendant. As per sub-rule (1) of Rule 13, in any case in which a decree is passed *ex parte* against a defendant, he may apply to the court which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. As per the first proviso to sub-rule (1), where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also. As per the second proviso to

sub-rule (1), no court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. As per the Explanation, where there has been an appeal against a decree passed *ex parte* under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that *ex parte* decree.

11. In **G.P. Srivastava v. R.K. Raizada [(2000) 3 SCC 54]** in the context of an application filed under Order IX, Rule 13 of the Code, for setting aside an *ex parte* decree, the Apex Court held that, the word 'was prevented by any sufficient cause from appearing' occurring in Order IX, Rule 13 of the Code must be liberally construed to enable the court to do complete justice between the parties, particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order IX, Rule 13 of the Code has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and

circumstances of each case.

12. In **G.P. Srivastava**, the Apex Court held further that, 'sufficient cause' for non-appearance refers to the date on which the absence was made a ground for proceeding *ex parte* and cannot be stretched to rely upon other circumstances anterior in time. If 'sufficient cause' is made out for non-appearance of the defendant on the date fixed for hearing when *ex parte* proceedings initiated against him, he cannot be penalised for his previous negligence which had been overlooked and thereby condoned earlier. In a case where defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the *lis* decided on merits.

13. In **Peeves Enterprises v. Muhammed Ashraf [2015 (3) KHC 981]**, relying on the law laid down by the Apex Court in **G.P. Srivastava**, a Division Bench of this Court held that, on an application filed under Order IX, Rule 13 of the Code of Civil Procedure, the court has to find out whether the erring party has made out sufficient cause for setting aside the *ex parte* decree. When no negligence or inaction is imputable to the erring

party and the absence was not mala fide or intentional, the discretion has to be exercised in his favour, especially when the application is within the statutory time limit. In appropriate cases, the plaintiff can be compensated by adequate costs for the loss of time and the inconvenience caused to him. But any such condition shall not be too onerous.

14. In **In Re:Cognizance for Extension of Limitation [(2022) 3 SCC 117]** a Three-Judge Bench of the Apex Court held that in computing the period of limitation for any suit, appeal, application or proceedings, the period from 15.03.2020 till 28.02.2022 shall stand excluded. Relying on the said decision, the learned counsel for the appellants would submit that, if the aforesaid period is excluded, the actual delay comes to 130 days, as against 473 days sought to be condoned by filing I.A.No.1 of 2021 in O.S.No.149 of 2014.

15. R.P.I.A.No.2 of 2022 is an application filed by the appellant-1st defendant seeking an order to set aside the *ex parte* decree dated 05.01.2017, which was one filed under Order IX Rule 13 of the Code of Civil Procedure, along with I.A.No.1 of 2022 seeking condonation of the delay of 2110 days in filing R.P.I.A.No.2 of 2022. According to the appellant, he migrated to Malaysia in the year 2017 and from there he went to Indonesia.

He came back only in December, 2021. Immediately after returning from Indonesia, he was undergoing treatment at MIMS Hospital. Since it was Covid period and the appellant was not keeping well, he could not follow up the court proceedings immediately after his return from Indonesia. The court below by a cryptic order dated 23.12.2022 dismissed those applications, stating that the petition is without any merit and there is no reason to condone the delay.

16. In **Breen v. Amalgamated Engineering Union [1971 (1) All. E.R. 1148]** Lord Denning, M.R. Observed that, the giving of reasons is one of the fundamentals of good administration. In **Alexander Machinery (Dudley) Ltd. v. Crabtree [1974 ICR 120]** it was observed that, failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision - taker to the controversy in question and the decision or conclusion arrived at.

17. In **Commissioner of Police, Bombay v. Gordhandas Bhanji [AIR 1952 SC 16]** the Apex Court has held that, public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do.

Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself. Following the principle laid down in **Gordhandas Bhanji's case (supra)**, the Apex Court has reiterated in **Mohinder Singh Gill v. Chief Election Commissioner [(1978) 1 SCC 405]** that, when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, gets validated by additional grounds later brought out.

18. Following the principle laid down in the decisions referred to above, the Apex Court in **Chairman and Managing Director, United Commercial Bank v. P.C. Kakkar [(2003) 4 SCC 364]** held that, reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the 'inscrutable face of the sphinx', it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an

indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The 'inscrutable face of a sphinx' is ordinarily incongruous with a judicial or quasi - judicial performance.

19. Viewed in the light of the law laid down in the decisions referred to supra, conclusion is irresistible that, a cryptic order like the impugned order passed by the court below, whereby R.P.I.A.No.20 of 2022 and I.A.No.1 of 2022 in O.S.No.44 of 2015 stand dismissed, cannot be sustained in law. The said order would not indicate that the court below has given due consideration to the points in controversy.

20. In such circumstances, this appeal is allowed by setting aside the order dated 23.12.2022 of the Sub Court, Chavakkad in R.P.I.A.No.20 of 2022 and I.A.No.1 of 2022 in O.S.No.44 of 2015, for the aforesaid reason. R.P.I.A.No.20 of 2022 and I.A.No.1 of 2022 in O.S.No.44 of 2015 are restored to file and the Sub Court is directed to reconsider those applications and pass a reasoned order, after considering the rival contentions, as expeditiously as possible, at any rate, within a period of one month from the date of receipt of a certified copy of

this judgment.

Both parties are directed to appear before the Sub Court, Chavakkad, on **11.07.2023**.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

P.G. AJITHKUMAR, JUDGE

AV/1/7