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[2016] 198 Comp Cas 536 (Mad)

[IN THE MADRAS HIGH COURT]

CREDIT SUISSE AG

v.

SPICEJET LTD.

(C. A. Nos. 887 and 888 of 2015 and C. P. No. 363 of 2015)

SPICEJET LTD.

v.

OFFICIAL LIQUIDATOR AND ANOTHER

(C. A. Nos. 1119 and 1120 of 2015)

S. MANIKUMAR J.

January 27, 2016.

WINDING UP—PETITION FOR WINDING UP—APPOINTMENT OF LIQUIDATOR—ADMISSION OF PETITION AND APPOINTMENT OF OFFICIAL LIQUIDATOR AS PROVISIONAL LIQUIDATOR ON FAILURE OF COMPANY'S COUNSEL TO APPEAR BEFORE COURT—COMPANY MAKING OUT SUFFICIENT CASE FOR CONDONATION OF ABSENCE OF ITS COUNSEL IN DEFENDING APPLICATIONS IN PETITION—APPOINTMENT OF OFFICIAL LIQUIDATOR RESCINDED BUT WITH INJUNCTION TO COMPANY NOT TO ALIENATE ITS PROPERTY TILL DISPOSAL OF PENDING APPLICATION—COMPANIES ACT, 1956.

In a petition seeking winding up of the respondent-company the petitioner sought interim orders of appointment of the official liquidator and injunction restraining the company from alienating its property. Since the company did not put in appearance before it, the court passed an ex parte order admitting the petition and appointing the official liquidator as the liquidator of the company. The company filed an application seeking to set aside the ex parte order contending that on receipt of the notice, it had entrusted the matter to counsel but the vakalat sent to them could not be returned in time and hence, it could not be filed before the hearing date, and that when the matter was listed, the junior counsel attached to the office of counsel on record to whom the matter was entrusted could not reach the court in time resulting in the ex parte orders :

Held, *that the company had made out a sufficient case for condonation of the absence of its counsel, in defending applications in the petition, in which, directions had been issued to the official liquidator, to take charge of the assets*

of the company in liquidation. The order appointing the official liquidator as the provisional liquidator, was to be rescinded.

BANK OF BARODA *v.* SANSAR CHAND KAPUR [1994] AIR 1994 Delhi 359, COLLECTOR, LAND ACQUISITION *v.* MST. KATIJI [1987] 62 Comp Cas 370 (SC), KRISHNAMOORTHY (G.) *v.* ARULMIGHU SRI PATALEESWARAR DEVASTHANAM [2010] 1 MWC 837 (Civil), RAFIQ *v.* MUNSHILAL [1981] AIR 1981 SC 1400, SAGAYAM ENGINEERING WORKS *v.* SRIVATSA TUBE CORPORATION [1989] AIR 1989 Mad 237 *and* SHANMUGA SADACHARA SERVAI *v.* THIRUGNANAM SERVAI S. MUTHIAH [1993] 3 LW 649 *applied.*

[The court passed an interim order restraining the company and its officials from in any manner alienating, encumbering, dealing with the fixed assets of the company pending disposal of the application seeking such an injunction till disposal of the petition.]

Cases referred to :

Bank of Baroda *v.* Sansar Chand Kapur [1994] AIR 1994 Delhi 359 (para 37)

Collector, Land Acquisition *v.* Mst. Katiji [1987] 62 Comp Cas 370 (SC) ; [1987] 167 ITR 471 (SC) ; [1987] 66 STC 228 (SC) (para 37)

Deshbandhu Gupta and Co. *v.* K. B. Malik and Co. [1972] RLR 18 (para 37)

Krishnamoorthy (G.) *v.* Arulmighu Sri Pataleeswarar Devasthanam [2010] 1 MWC 837 (Civil) (para 37)

Rafiq *v.* Munshilal [1981] AIR 1981 SC 1400 (para 37)

Sagayam Engineering Works *v.* Srivatsa Tube Corporation [1989] AIR 1989 Mad 237 (para 37)

Shakuntala Devi Jain *v.* Kuntal Kumari [1969] AIR 1969 SC 575 (para 37)

Shamdasani (P. D.) *v.* Central Bank of India [1938] AIR 1938 Bom 199 (para 37)

Shanmuga Sadachara Servai *v.* Thirugnanam Servai S. Muthiah [1993] 3 LW 649 (para 37)

Company Applications Nos. 1119 and 1120 of 2015 in Company Applications Nos. 887 and 888 of 2015 in Company Petition No. 363 of 2015.

Ramakrishnan Veeraraghavan, Senior Counsel for *Ashok Menon* for the applicant in C. A. Nos. 1119 and 1120 of 2015 and for the respondent in C. A. Nos. 887 and 888 of 2015.

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P. Atchutha Ramaiah, official liquidator, for the first respondent in C. A. Nos. 1119 and 1120 of 2015.

R. Parthasarathy for *Satish Parasaran* for the second respondent in C. A. Nos. 1119 and 1120 of 2015 and for the applicant in C. A. Nos. 887 and 888 of 2015.

JUDGMENT

1 S. MANIKUMAR J.—Material on record discloses that M/s. Credit Suisse AG, Switzerland, has filed C. P. No. 363 of 2015, under sections 433(e) and (f), 434(1)(a) and 439(1)(b) of the Companies Act, 1956, for winding up of the company, viz., M/s. Spicejet Ltd., Chennai, under the provisions of the Companies Act, 1956, and also for an appointment of the Official Liquidator, High Court, Madras, as the liquidator of the company, with all powers under section 448 of the Companies Act, 1956, to take charge of the assets, properties, stock in trade and books of account of the company.

2 Along with Company Petition No. 363 of 2015, M/s. Credit Suisse AG, Switzerland, has filed Company Application No. 887 of 2015, for an injunction, restraining M/s. Spicejet Ltd., Chennai, its directors, officers, servants, agents or anyone acting through or under them from in any manner alienating, encumbering, dealing with, disposing or creating any third party rights, interests or charge in or over the assets of the company, sought to be wound up, pending disposal of the company petition.

3 In Company Application No. 888 of 2015, M/s. Credit Suisse AG, Switzerland, has sought for appointment of the Official Liquidator, High Court, Madras, as the provisional liquidator of the company, with all powers, to take charge of the assets, properties, stock in trade and books of account of the company, pending disposal of the company petition.

4 Material on record discloses that on August 17, 2015, this court has ordered notice in Company Applications Nos. 887 and 888 of 2015 in Company Application No. 363 of 2015, through court, and privately, returnable in two weeks. Taking note of the affidavit of service, before the learned Master, Applications Nos. 887 and 888 of 2015, have been listed before the court.

5 M/s. Outdoor Advertisement Professionals P. Ltd., has also filed Company Petition No. 328 of 2015, for winding up of M/s. Spicejet Ltd., Chennai.

6 In Company Petition No. 328 of 2015, Company Application No. 828 of 2015 has been filed for appointment of the Official Liquidator, High Court, Madras, as the provisional liquidator of M/s. Spicejet Ltd., Chennai, with all the necessary powers, under the provisions of the Companies Act, 1956.

In Company Application No. 829 of 2015, M/s. Outdoor Advertisement Professionals P. Ltd., has sought for an interim injunction, restraining M/s. Spicejet Ltd., Chennai, from entering into any transactions, arrangements with its subsidiaries or related companies or transferring any monies to any third party without leaving of this court or the provisional liquidator. 7

In Company Application No. 830 of 2015 in Company Petition No. 328 of 2015, M/s. Outdoor Advertisement Professionals P. Ltd., has sought for an interim injunction, restraining the above company, its promoters, directors, officers, agents, employees and servant and/or any person claiming through or under them from in any manner selling alienating/disposing off/encumbering the respondent-company's fixed assets, properties, business and/or from creating any third party rights in respect of the same. 8

In Company Applications Nos. 828 to 830 of 2015 in Company Petition No. 328 of 2015, notices have been ordered on July 31, 2015, through court, and privately, and thereafter, after filing an affidavit of service, before the learned Master, the matter has been listed before the court. On September 3, 2015, when Company Application No. 830 of 2015, came up for hearing, there was no representation for M/s. Spicejet Ltd., Chennai and hence, this court has ordered an interim injunction. 9

Material on record discloses that Company Applications Nos. 887 and 888 of 2015 in C. P. No. 363 of 2015, have been listed before this court on September 15, 2015. On that date, the following order has been passed, "At the request of learned counsel for the applicant, adjourned by one week". Subsequently, the abovesaid matter has been listed on September 23, 2015. Thereafter, on October 14, 2015, when Company Applications Nos. 887 and 888 of 2015 in C. P. No. 363 of 2015, came up for hearing, there was no representation, on behalf of M/s. Spicejet Ltd., Chennai, the company sought to be wound up, and hence, this court, on October 14, 2015, while admitting C. P. No. 363 of 2015, appointed the Official Liquidator, High Court, as provisional liquidator, to take charge of the assets of the respondent-company. 10

Similarly, when Company Applications Nos. 828 to 830 of 2015 in C. P. No. 328 of 2015, came up for hearing on October 14, 2015, there was no representation, on behalf of M/s. Spicejet Ltd., Chennai, company sought to be wound up and hence, this court, on October 14, 2015, while admitting C. P. No. 328 of 2015, appointed the Official Liquidator, High Court, as provisional liquidator, to take charge of the assets of the respondent-company. 11

Thereafter, M/s. Spicejet Ltd., Chennai, has filed Company Applications Nos. 1117 and 1118 of 2015 in C. P. No. 328 of 2015, for setting aside the ex 12

parte order dated October 14, 2015 and also for an order of stay of further proceedings in C. P. No. 328 of 2015 respectively.

13 Similarly, Company Applications Nos. 1119 and 1120 of 2015, have been filed by M/s. Spicejet Ltd., Chennai, for setting aside the ex parte order passed in Company Applications Nos. 887 and 888 of 2015 in C. P. No. 363 of 2015, dated October 14, 2015 and also for an interim stay of further proceedings in C. P. No. 363 of 2015.

14 On November 3, 2015, when the abovesaid applications in C. P. Nos. 328 and 363 of 2015 respectively were listed, this court has granted interim stay of all further proceedings in C. P. Nos. 328 and 363 of 2015. Thereafter, the matters were directed to be listed on November 17, 2015. On that day, at request, interim stay was extended and the matter was directed to be listed on November 23, 2015. On the said date, both the parties, viz., M/s. Outdoor Advertisement Professionals P. Ltd., and M/s. Spicejet Ltd., Chennai, have entered into a compromise and filed a memorandum of compromise, dated November 23, 2015 in C. P. No. 328 of 2015. Recording the above, both Company Applications Nos. 1117 and 1118 of 2015, were allowed. The ex parte order, dated October 14, 2015, in so far as Company Applications Nos. 1117 and 1118 of 2015, has been set aside. Thereafter, registry was directed to post both Company Petition No. 363 of 2015, along with pending applications, on December 16, 2015.

15 Based on the averments made in Company Application No. 1119 of 2015 in C. P. No. 363 of 2015, Mr. Rama Krishnan Veeraraghavan, learned counsel appearing for M/s. Spicejet Ltd., Chennai, submitted that on August 17, 2015, when C. A. Nos. 887 and 888 of 2015, came up for hearing, this court had issued notice, through court and privately, in the abovesaid applications, returnable in two weeks. According to him, on August 17, 2015, this court did not issue any notice in the company petition, filed for winding up.

16 Learned counsel for the applicant further submitted that on receipt of notices in the interim applications, the matter was entrusted to a learned counsel, to appear and defend the case. But unfortunately, the vakalat sent by learned counsel, was not returned to him, immediately. C. P. No. 363 of 2015, along with Applications Nos. 887 and 888 of 2015 respectively, were listed before this court on October 14, 2015, as Item No. 11. Since vakalat was not filed, counsel engaged by the applicant, M/s. Spicejet Ltd., instructed one of his juniors, to appear and represent before the court. Unfortunately, the junior counsel was bit late, in reaching the court and in the mean while, matter was called and this court passed an ex parte order, in all the applications, listed on that day.

Learned counsel appearing for the applicant in Company Applications Nos. 1119 and 1120 of 2015 in C. P. No. 363 of 2015, further submitted that one Mr. Syed Thaga, Junior Advocate, attached to the office of learned counsel on record, for M/s. Spicejet Ltd., Chennai, has also filed a supporting affidavit, dated December 16, 2015, supporting the version of Mr. Gavin Jefferies, Station Manager, M/s. Spicejet Ltd., Chennai, the deponent of the affidavit, dated November 2, 2015, filed in support of the Judge's Summons to Applications Nos. 1119 and 1120 of 2015 in C. P. No. 363 of 2015. 17

Added further, Mr. Ramakrishnan Veeraraghavan, learned counsel appearing for the applicant further submitted that for the above said bona fide reasons, M/s. Spicejet Ltd., Chennai, the applicant in Applications Nos. 1119 and 1120 of 2015, could not appear, before this court, on the date of hearing, through a counsel and non-appearance should not take away the rights of the company, to defend the company petition, in which, notice was ordered only on October 14, 2015, simultaneously when the court, set M/s. Spicejet Ltd., Chennai, ex parte. According to him, the reasons assigned are bona fide. It is also his submission that M/s. Spicejet Ltd., the company, sought to be wound up has a good case to oppose the prayer sought for, in C. P. No. 363 of 2015. For the reasons, stated supra, he prayed to set aside the ex parte order made in Company Applications Nos. 887 and 888 of 2015 and Company Petition No. 363 of 2015, dated October 14, 2015. 18

M/s. Credit Suisse AG, Switzerland, has filed a counter affidavit to both the applications in C. A. Nos. 1119 and 1120 of 2015 in C. P. No. 363 of 2015. Averments are almost common. Based on the above, Mr. R. Parthasarathy, learned counsel appearing for the respondent submitted that pursuant to the order of this court dated August 17, 2015, issuing notice, through court and privately, returnable in two weeks, M/s. Spicejet Ltd., Chennai, the company, sought to be wound up, was served on August 21, 2015. Matter was listed before the learned Master on September 4, 2015. Thereafter, recording that M/s. Spicejet Ltd., Chennai, as served, matter was directed to be posted before this court. 19

According to learned counsel appearing for M/s. Credit Suisse AG, Switzerland, respondent in Applications Nos. 1119 and 1120 of 2015 in C. P. No. 363 of 2015, on September 15, 2015 and September 23, 2015, when the matter was listed before this court, the name of M/s. Spicejet Ltd., Chennai, was shown in the cause list, but despite service of notice, in Applications Nos. 887 and 888 of 2015 in C. P. No. 363 of 2015, the applicant did not appear in person or through counsel. 20

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21 Learned counsel appearing for the respondent further submitted that knowing fully well that Company Petition No. 363 of 2015, has been filed, for winding up of M/s. Spicejet Ltd. Chennai, under the provisions of the Companies Act, M/s. Spicejet Ltd., Chennai, through its counsel, has caused a notice, dated September 24, 2015, calling upon M/s. Credit Suisse AG, Switzerland, to furnish the entire papers, pertaining to Applications Nos. 887 and 888 of 2015 in C. P. No. 363 of 2015, which were also sent on September 28, 2015. In this context, he produced the copy of a letter dated September 24, 2015, for perusal.

22 According to learned counsel appearing for the respondent, in the letter dated September 24, 2015, M/s. Spicejet Ltd., Chennai, has categorically mentioned C. P. No. 363 of 2015 and therefore, it is not open to them to contend that they are not aware of the filing of C. P. No. 363 of 2015. He also submitted that when all the applications were listed on October 14, 2015, the letter dated September 24, 2015, of M/s. Spicejet Ltd., Chennai, was placed before this court, and after going through the same and taking note of the deliberate absence of the company, sought to be wound up, this court has passed an order, appointing the Official Liquidator, High Court, Madras, as provisional liquidator, to take charge of the assets of the applicant-company. Thereafter, Gazette publication has been effected and proceedings have been taken for advertisement in newspapers.

23 Having regard to the above, learned counsel appearing for M/s. Credit Suisse AG, Switzerland, submitted that there is absolutely no bona fide in the conduct of the company, sought to be wound up and submitted that they have chosen to abstain from the court on September 15, 2015, September 23, 2015 and October 14, 2015, despite knowledge of the filing of company petition, with two prayers, viz., (i) order for winding up of the respondent under the provisions of the Companies Act, 1956 ; and (ii) appoint the Official Liquidator, High Court, Madras, as the liquidator of the company, with all powers, under section 448 of the Companies Act, 1956, to take charge of the assets, properties, stock in trade and books of account of the company.

24 Learned counsel for M/s. Credit Suisse AG, Switzerland, further submitted that the averments made in the supporting affidavit to the Judge's Summons, to Applications Nos. 1119 and 1120 of 2015, do not reflect a plausible cause of action, for setting aside the ex parte order dated October 14, 2015. According to him, the conduct of the company, sought to be wound up, in not appearing in the court, on the above said dates, lacks bona fide and does not deserve condonation.

Learned counsel for the respondent further submitted that in normal 25
circumstances, whenever an application is filed, to set aside the ex parte order, the party, who suffered the same, would also file a counter affidavit, to the main petition. Pointing out that M/s. Spicejet Ltd., Chennai, the company, to be wound up, has not filed any counter affidavit to Applications Nos. 887 and 888 of 2015 in C. P. No. 363 of 2015, along with Applications Nos. 1119 and 1120 of 2015, it is also the submission of learned counsel for the respondent that there is lack of bona fide and the intention of the applicant, is only to protract the proceedings.

Without prejudice to the objections, learned counsel for the respondent 26
in Applications Nos. 1119 and 1120 of 2015, submitted that in the event of this court, granting the relief, sought for, in Applications Nos. 1119 and 1120 of 2015, the court may consider that the applicant, M/s. Spicejet Ltd., Chennai, should be put on terms and prayed to grant an interim injunction granted in Applications No. 887 and 888 of 2015 in C. P. No. 363 of 2015, restraining M/s. Spicejet Ltd., Chennai, its directors, officers, servants, agents or anyone acting through or under them from in any manner alienating, encumbering, dealing with, disposing or creating any third party rights, interests or charge in or over the assets of the company, sought to be wound up, pending disposal of the company petition.

By way of reply, Mr. Rama Krishnan Veeraraghavan, learned senior 27
counsel appearing for M/s. Spicejet Ltd., Chennai, submitted that the counter affidavit is already ready, but since arbitration proceedings were in progress in a foreign country and some changes were required to be made, counter affidavit could not be filed immediately, along with Applications Nos. 1119 and 1120 of 2015. He further submitted that the counter affidavit could be filed, within two weeks.

On the contention that there should be an order of interim injunction, 28
restraining M/s. Spicejet Ltd., Chennai, its directors, officers, servants, agents or anyone acting through or under them from in any manner alienating, encumbering, dealing with, disposing or creating any third party rights, interests or charge in or over the assets of the company, sought to be wound up, till Applications Nos. 887 and 888 of 2015, learned counsel for the applicant M/s. Spicejet Ltd., Chennai, submitted that he has no objection, but the interim orders of injunction, be restricted to the disposal of Application No. 887 of 2015, on merits and not till the disposal of the company petition.

Heard learned counsel for the parties and perused the materials available on record.

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29 On August 17, 2015, in Company Applications Nos. 887 and 888 of 2015 in C. P. No. 363 of 2015, this court ordered notice, through court and privately, returnable in two weeks. On September 4, 2015, on the filing proof affidavit of service, the learned Master has recorded that service as completed and directed the registry to post the matter, before the court on September 15, 2015.

30 It is the case of M/s. Spicejet Ltd., Chennai, that on receipt of the notice, in the above said applications, they have entrusted the matter to a learned counsel, to prosecute. Vakalat sent to them, could not be returned in time and hence, they could not file the same, before the hearing date. It is also the contention of M/s. Spicejet Ltd., Chennai that on October 14, 2015, when the matter was listed, the junior counsel, attached to the office of learned counsel on record, to whom, the matter was entrusted, could not reach the court in time and hence, this court was pleased to set M/s. Spicejet Ltd., Chennai, as ex parte.

31 Mr. U. Syed Thaga, advocate, attached to the office of learned counsel on record, appearing for M/s. Spicejet Ltd., Chennai, has filed a supporting affidavit dated December 16, 2015, stating that the averments made in the affidavit of Mr. Govind Jefferies, deponent of the supporting affidavit filed in Applications Nos. 1119 and 1120 of 2015, are true to his knowledge.

32 The fact remains that M/s. Spicejet Ltd., Chennai, has not filed any vakalat, despite knowledge. Absence, according to M/s. Spicejet Ltd., is due to the above said bona fide reasons. Whereas, M/s. Credit Suisse AG, Switzerland, has filed counter affidavits to the abovesaid applications contenting, inter alia, that the reasons lacks bona fide.

33 Admittedly, on August 17, 2015, no notice was issued in C. P. No. 363 of 2015. But C. A. No. 888 of 2015 has been filed, for appointment of the Official Liquidator, High Court, Madras, as the provisional liquidator of the company, with all powers, to take charge of the assets, properties, stock in trade and books of account of the company, pending disposal of the company petition. The other application in C. A. No. 887 of 2015, has been filed for an injunction, restraining M/s. Spicejet Ltd., Chennai, its directors, officers, servants, agents or anyone acting through or under them from in any manner alienating, encumbering, dealing with, disposing or creating any third party rights, interests or charge in or over the assets of the company, sought to be wound up, pending disposal of the company petition.

34 Having received the notices in the above said applications and when M/s. Spicejet Ltd., Chennai, has sent a notice dated September 24, 2015, to learned counsel for M/s. Credit Suisse AG, Switzerland, it cannot be contended by M/s. Spicejet Ltd., Chennai, was not aware of filing of the

company petition. Perusal of the letter dated September 28, 2015, of the respondent, shows that typed set of documents filed in C. P. No. 363 of 2015, have been enclosed, along with the said letter. Despite of the above, M/s. Spicejet Ltd., Chennai, has not chosen to appear before this court, either in person or through counsel on October 14, 2015.

Reading of the order made in Company Applications Nos. 887 and 888 35
of 2015, shows that this court had perused the letter dated September 24, 2015 and observed that despite knowledge of C. P. No. 363 of 2015, there was no appearance on behalf of M/s. Spicejet Ltd., Chennai, either in person or through counsel. Thus after hearing the submission of learned counsel for the petitioner in C. P. No. 363 of 2015 and after perusing the petition averments, prima facie satisfying that the petitioner in C. P. No. 363 of 2015, has made out a case for admission, this court has issued directions.

Vakalat ought to have been filed. Admittedly, it was not filed before or 36
on the hearing date. But it is the contention of M/s. Spicejet Ltd., Chennai, that on October 14, 2015, when a junior counsel, attached to the office of learned counsel on record, was instructed to appear before this court and when the matter was called for, he did not do so. It is also the contention of M/s. Spicejet Ltd., Chennai that they have a valid case to oppose the company petition and that they would be put to great loss and hardship, if the ex parte order dated October 14, 2015, is not set aside. Averments of the deponent is supported by an affidavit of Mr. Syed Thaga, advocate.

Taking note of the above said submissions, this court, deems it fit to 37
consider few decisions, as to whether, a client should be made to suffer, for the fault of his counsel :

(i) In *Rafiq* v. *Munshilal*, AIR 1981 SC 1400, the Supreme Court held that (page 1401) :

> "3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire

as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A. K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. May be . . . he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A. K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanor of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs. 200 should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A. K. Sanghi."

(ii) In *Sagayam Engineering Works* v. *Srivatsa Tube Corporation*, AIR 1989 Mad 237, while setting aside the order, refusing to condone the delay of 730 days in filing the petition to set aside the ex parte decree, this court, at paragraphs 7 and 8, held as follows (page 238) :

"7. Learned counsel for the petitioner, Mr. Lakshmi Narain, drew my attention to the following decisions for the proposition that the courts should be liberal in the matter of condoning the delay and

further the party should not be penalised for the fault of his advocate and in any event an opportunity should be given to the petitioner to defend the suit."

(iii) In *Rafiq* v. *Munshilal*, AIR 1981 SC 1400 while considering a similar plea, the Supreme Court, at paragraph 7, held as follows (page 1401) :

"3. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watch-dog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A. K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. May be we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not . . . disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A. K. Sanghi invited us to do, the only one would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate admission, or misdemeanor of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted."

(iv) At this juncture, it is also worthwhile to consider the decision of the Supreme Court in *Collector, Land Acquisition* v. *Mst. Katiji* [1987] 62 Comp Cas 370 (SC) ; [1987] 167 ITR 471 (SC) ; [1987] 66 STC 228 (SC) ; AIR 1987 SC 1353 ; (100 LW 676), in the matter of entertaining an application for condonation of delay, under section 5 of the Limitation Act (page 371 of 62 Comp Cas) :

"1. Ordinarily, a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and the cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. 'Every day's delay must be explained' does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay ? The doctrine must be applied in a rational, commonsense and pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. It must be grasped that the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

(v) In *Shanmuga Sadachara Servai* v. *Thirugnanam Servai S. Muthiah* [1993] 3 LW 649, there was a delay in filing the appeal. The court below dismissed the petition filed under section 5 of the Limitation Act, for condonation of delay. When the said order was tested in a civil revision petition, following decisions of the Supreme Court in *Shakuntala Devi Jain* v. *Kuntal Kumari*, AIR 1969 SC 575 and *Collector, Land Acquisition* v. *Mst. Katiji* [1987] 62 Comp Cas 370 (SC) ; [1987] 167 ITR 471 (SC) ; [1987] 66 STC 228 (SC) ; AIR 1987 SC 1353 ; 100 LW 676, a learned single judge of this court, at paragraph 6, held as follows :

"6. It is settled law that the discretion vested in the court in the matter of dealing with the application filed under section 5 of the Limitation Act is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood. The words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant."

(vi) In *Bank of Baroda* v. *Sansar Chand Kapur*, AIR 1994 Delhi 359, the lawyer engaged by the appellant, did not appear, on the date it was posted. Suit was dismissed. An application filed for restoring was also dismissed. Being aggrieved an appeal was filed before the High Court. The question framed by the High Court was whether, the absence of lawyer, on the ground that he had some professional work, elsewhere, constitutes "sufficient cause". Dealing with the above in paragraph No. 3 and after considering decisions in *Deshbandhu Gupta and Co.* v. *K. B. Malik and Co.* [1972] RLR 18, *P. D. Shamdasani* v. *Central Bank of India*, AIR 1938 Bom 199 and *Collector, Land Acquisition* v. *Mst. Katiji* [1987] 62 Comp Cas 370 (SC) ; [1987] 167 ITR 471 (SC) ; [1987] 66 STC 228 (SC) ; AIR 1987 SC 1353 ; 100 LW 676, the Delhi High Court, held as follows (page 361) :

> "9. 'Sufficient cause' has to be given a meaning to embrace all relevant circumstances having bearing on the point in issue and since a judge has to adjudicate on the particular facts of each case, it may become very risky in such cases to act on precedents. It is, however, not every absence of a lawyer which may provide a sufficient cause. The question would be whether he honestly intended to be in court and did his best to get there in time and once the court feels satisfied that he did try to get there and that he would have even got there in time but for the intervention of some inevitable cause for which he could in no way be responsible, there would be the 'sufficient cause' inviting an order of restoration."

(vii) In *G. Krishnamoorthy* v. *Arulmighu Sri Pataleeswarar Devasthanam* [2010] 1 MWC 837 (Civil), a suit was decreed ex parte, for non-prosecution and non-filing the written statement. Execution proceedings were also launched. An application to condone the delay in setting aside the ex parte decree, was filed under section 5 of the Limitation Act, on the ground that the advocate did not inform him properly and that there was also no communication from the lawyer. Accepting the reasons stated and following *Rafiq* v. *Munshilal*, AIR 1981 SC 1400, a learned single judge of this court has condoned the delay, on payment of costs.

On the facts and circumstances of the present case and applying the judgments, stated supra, this court is of the view that M/s. Spicejet Ltd., Chennai, has made out a sufficient case for condonation of the absence of learned counsel, in defending Applications Nos. 887 and 888 of 2015 in Company Petition No. 363 of 2015, in which, directions have been issued to the official liquidator, to take charge of the assets of the company in liquidation.

39 Though there is no specific order in Application No. 887 of 2015 in C. P. No. 363 of 2015, granting interim injunction, restraining M/s. Spicejet Ltd., Chennai, its directors, officers, servants, agents or anyone acting through or under them from in any manner alienating, encumbering, dealing with, disposing or creating any third party rights, interests or charge in or over the assets of the company, sought to be wound up, pending disposal of the company petition, it is the submission of learned counsel appearing for M/s. Credit Suisse AG, Switzerland that if the court is inclined to allow the Company Applications Nos. 1119 and 1120 of 2015 in Company Petition No. 363 of 2015, filed to set aside the ex parte order, dated October 14, 2015 and for stay of further proceedings in C. P. No. 363 of 2015, M/s. Spicejet Ltd., Chennai, should be put on terms.

40 Concedingly, Mr. Ramakrishnan Veeraraghavan, learned senior counsel appearing for M/s. Spicejet Ltd., Chennai, submitted that he has no objection, for such an order, being passed, pending disposal of Company Applications Nos. 887 and 888 of 2015 in Company Petition No. 363 of 2015, to be decided, on merits.

41 In the light of the above discussion and decisions, Application No. 1119 of 2015, filed to set aside the ex parte order dated October 14, 2015, in Applications Nos. 887 and 888 of 2015 in C. P. No. 363 of 2015, is ordered. The order in Application No. 888 of 2015, dated October 14, 2015, appointing the Official Liquidator, High Court, Madras, as the provisional liquidator, is rescinded. Applications Nos. 887 and 888 of 2015, are restored to file.

42 Under similar circumstances, in Company Application No. 830 of 2015 in Company Petition No. 328 of 2015, this court has granted an interim injunction on September 3, 2015. Subsequently, further proceedings in C.P. No. 328 of 2015 have been stayed and later on, the ex parte order dated October 14, 2015, has been revoked.

43 Taking note of the submissions of learned counsel appearing for M/s. Credit Suisse AG, Switzerland and Mr. Rama Krishnan Veeraraghavan, learned counsel appearing for M/s. Spicejet Ltd., Chennai and to maintain balance of convenience, between the parties, there shall be an interim injunction, in Company Application No. 888 of 2015 in Company Petition No. 363 of 2015, restraining M/s. Spicejet Ltd., Chennai, its directors, officers, servants, agents or anyone acting through or under them from in any manner alienating, encumbering, dealing with the fixed assets of the company, sought to be wound up, pending disposal of the Company Application No. 887 of 2015, to be decided on merits. Counter to be filed in three weeks.

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Applications Nos. 1119 and 1120 of 2015, are ordered, accordingly. 44

The Official Liquidator, High Court, Madras, is directed to furnish the details of the expenditure, to M/s. Spicejet Ltd., Chennai, if any, incurred by him, after the order dated October 14, 2015, appointing him as the provisional liquidator of M/s. Spicejet Ltd., Chennai. M/s. Credit Sussie AG, Switzerland, is directed to furnish the details of the expenditure incurred to M/s. Spicejet Ltd., for effecting Gazette publication, etc., along with the bills. On receipt of the details, M/s. Spicejet Ltd., Chennai, is directed to pay the same, under acknowledgment within three weeks' time. Counter to Applications Nos. 887 and 888 of 2015 and Company Application No. 363 of 2015, to be filed within three weeks. 45