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%02.04.2008

Present: Mr.Rajiv Tyagi for the appellant.

+CM No.4996/2008 in RSA No.82/2008

Allowed subject to just exceptions.

CM No.4995/2008

1. The present Second Appeal lays a challenge to an order dated 3.1.2006. Vide said order learned Appellate Judge has dismissed appellant's application under Section 5 of the Limitation Act.

2. The instant appeal which lays a challenge to the order dated 30.1.2006 has been filed on 20.2.2008. Thus there is a delay of over 2 years in lodging the instant appeal.

3. Before dealing with the merits of the controversy it would be relevant to note that no Second Appeal lies against an order dismissing an application under Section 5 of the Limitation Act not condoning the delay in filing the First Appeal. The reason thereof is that an order disposing of an application under Section 5 of the Limitation Act is an independent order and if delay in filing the appeal is not condoned the consequential order of dismissal of the appeal as not

maintainable is not a substantive order.

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been compared and the digital data is as per
the physical file and no page is missing.

4. I accordingly treat the instant appeal as a petition under Article 227 of the Constitution of India.

5. Even in relation to proceedings under Article 227 of the Constitution of India delay and laches hit a petitioner who approaches a court belatedly.

6. With the backdrop aforesaid relevant facts may now be noted.

7. The appellant was the plaintiff. Appellant's suit was dismissed on 22.12.2002. The First Appeal against the judgment and decree dated 23.12.2002 was filed somewhere around 10.11.2005. Since period of limitation to file the First Appeal was 30 days (appeal being from the Court of a Civil Judge to a Senior Civil Judge) an application was filed under Section 5 of the Limitation Act praying that delay in filing the appeal be condoned.

8. Facts stated as sufficient cause requiring delay to be condoned were that Mr.Yogender Aggarwal, the counsel engaged for filing the suit informed the appellant somewhere in January 2003 that appellant's suit stood dismissed on 23.12.2002. That the appellant entrusted the brief to another advocate, Mr.S.K.Kaushik, for filing a First Appeal somewhere in the last week of January 2003. That Mr.S.K.Kaushik informed

the appellant that the appeal was filed. That in October 2005 the appellant visited Patiala House Courts in relation to some other matter and learnt that Mr.S.K.Kaushik, Advocate had expired in the year 2005. Further inquiry revealed that even the chamber had been sold out to some other lawyer. That under the circumstances one Mr.Ashesh Lal, Advocate was entrusted the task of finding out the position of the appeal. That Mr.Ashesh Lal, Advocate informed the appellant somewhere towards the end of October 2005 that no appeal was filed against the judgment and decree dated 23.12.2002. It was accordingly stated that thereafter the appeal was drafted and was filed around 10.11.2005.

9. Noting the inordinate delay in filing the appeal the learned Appellate Judge has held that the story put forward was not convincing. Delay has not been condoned.

10. As noted above, against the order dated 30.1.2006 present appeal has been filed on 20.2.2008, meaning thereby, challenge to the order dated 30.1.2006 is after over 2 years.

11. It is pleaded in CM No.4995/2008 that Mr.Ashesh Lal, the counsel engaged to lodge the First Appeal also betrayed the trust of the appellant. It is stated that the counsel did not inform about the dismissal of the appeal and

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whenever appellant queried the counsel he was given evasive reply. Realizing that no satisfactory explanation was being given by the counsel a new counsel was engaged who found that the appeal was dismissed way back on 30.1.2006.

12. Once bitten twice shy, goes the saying. I fail to understand as to why the appellant did not pay greater attention to his appeal if his previous counsel had betrayed the trust. Suffice would it be to note that no document has been placed on record to show that the appellant ever wrote a letter to the counsel seeking a written response from the counsel about the fate of his appeal. If appellant is to be believed that Mr.S.K.Kaushik, Advocate had cheated him by not filing an appeal I see gross negligence in the conduct of the appellant in not keeping a track of what happened when he engaged Mr.Ashesh Lal, Advocate to file the appeal. It would not be out of place to note that the First Appeal was filed after nearly 3 years and even the instant appeal has been filed after over 2 years of the order passed by the learned Appellate Judge.

13. Negligence which borders on gross negligence becomes culpable and is not worthy of being condoned.

14. There is gross delay and laches in filing the instant appeal (treated as a petition under Article 227 of the

Constitution of India).

15. It may additionally be noted that concern of this Court under the circumstances, while considering the impugned order is to see whether the learned Appellate Judge misdirected the inquiry or proceedings to consider the issue before him on non-legal parameters. This Court would be exceeding its jurisdiction if it enters into the merits of the controversy.

16. Looked at from any angle no case is made out to exercise discretion in favour of the appellant and entertain a belated challenge to the impugned order.

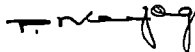
16. The CM is dismissed.

RSA No.82/2008

Dismissed.

April 02, 2008

L.K. Dainola


PRADEEP NANDRAJOG, J.