

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

+ RSA NO. 237/2004

Date of Decision: July 16, 2010

AMRISH KUMAR CHOPRA & ORS. Appellants

Through: Dr. Aman Hingorani,
Advocate.

versus

MADHU MALIK & ORS. Respondents

Through: Mr.Arun Khosla for
Ms.Sujata Kashyap,
Advocate for Respondents
No. 1 and 2.
Mr.Arun Khosla and
Shreeanka Kakkar,
Advocates for the
applicants.

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CORAM:

HON'BLE MS. JUSTICE ARUNA SURESH

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| (1) | Whether reporters of local paper may be allowed to see the judgment? | |
| (2) | To be referred to the reporter or not? | Yes |
| (3) | Whether the judgment should be reported in the Digest ? | Yes |

J U D G M E N T

ARUNA SURESH, J.

CM No. 1401/2009 (u/O 6 rule 17 CPC r/w S. 151 CPC)

1. Appellants filed this appeal after period of limitation for filing it had expired. An objection was accordingly raised by the

Registry and thereafter appellants filed an application being CM No.15073/2004 seeking condonation of delay in refiling the appeal. With the change of counsel, appellants have filed the present application seeking amendment of the application for condonation of delay invoking provisions of Order VI Rule 17 read with Section 151 of the Code of Civil Procedure (hereinafter to be referred as 'CPC').

2. At the outset, provisions of Order VI Rule 17 CPC are not applicable for amendment of an application filed under Section 5 of the Limitation Act. Order VI CPC speaks of pleadings. As per Order VI Rule 1 CPC pleadings mean plaint or written statement. However, wrong mentioning or non-mentioning of provisions of law is not fatal to the maintainability of the application as the Court has inherent jurisdiction to pass appropriate orders on an application of the party or on oral submissions made before the Court during the course of arguments. Substance of the application is to be seen. Therefore, this application is considered to be an application under Section 151 CPC only.

3. In para-7 of the application, appellants have sought deletion of para-8 and prayer clause of CM No. 15073/2004 to be replaced by para-8, as suggested in this para. One of the amendments sought is that application to be treated as an application

for condonation of delay in filing the appeal as fresh institution, because the objections could not be removed within thirty days, the period prescribed for removal of objections. Second amendment sought is for recording the correct computation of period of delay in filing the appeal, which according to the appellants is 158 days. Third amendment sought is that delay in filing the appeal was not intentional and due to reasons beyond the control of the appellants and consequent amendment in the prayer clause.

4. Respondents have seriously contested this application. However, since amendments sought relate to admitted principles of law, no prejudice is likely to be caused to the opposite party if amendment is allowed. Therefore, amendment sought for is hereby allowed. Since proposed amended application has not been annexed to this application, to avoid further delay in the proceedings of the case, amendment as suggested in para-7 of this application would be considered by the Court while deciding application for condonation of delay in filing the appeal.

C.M.No. 15073/2004 (U/s. 5 of the Limitation Act)

5. Appellants have sought condonation of delay in filing of the appeal after removal of objections on the grounds that, appeal was initially filed within the period of limitation but, on account of

Summer vacations, Registry was closed till 2nd July, 2004. Thereafter Registry raised certain objections and after removal of objections, appeal was refiled on 20th July, 2004. Registry again returned the appeal on 22nd July 2004 as objections had not been removed, with directions to remove them within a week.

6. It is alleged that the file containing the appeal was misplaced in the office of counsel for the appellants, Mr.Raman Duggal and all necessary papers and documents relating to the appeal were in the said file. This resulted into non-filing of the appeal in time. When appellants found alternative documents, they refiled the appeal on 5th October, 2004. Finding the appeal not in order, Registry again raised few objections on 5th October, 2004. Appellants took time to reconstruct the misplaced file to remove the objections and appeal was refiled on 20th November, 2004. It was on an objection of the Registry that appellants filed this application seeking condonation of 158 days delay in filing the appeal.

7. Mr.Arun Khosla, counsel appearing for the respondents has submitted that appellants have sought condonation of delay in filing the appeal alleging false grounds as the documents annexed to the appeal were available with the appellants when appeal was filed and refiled. He has submitted that appellants have

failed to show any sufficient cause for not filing the appeal within the period of limitation and therefore application deserves dismissal and the appeal also deserves dismissal as having become barred by period of limitation.

8. There is no dispute that if the appeal is not refiled within the period of thirty days in accordance with Part G, 'Rules relating to proceedings in the High Court of Delhi', Chapter 1, Rule 5 Part A (a) contained in Delhi High Court Rules, filing of memorandum of appeal, after removal of objections, has to be considered as fresh institution.

9. One of the causes for not refiling the appeal within the time prescribed by the Registry is that appeal file was misplaced in the office of Mr.Raman Duggal Advocate, the then counsel for the appellants as all necessary papers and documents were in the said file. Perusal of the record indicate that memorandum of appeal is annexed with the certified copy of the impugned order dated 1st March, 2004 along with other documents, which were received by the appellants on 27th March, 2004 from the Copy Agency Department of the District Court. Therefore, it cannot be accepted that appeal could not be refiled in time because it was misplaced and appellants took some time to get the documents prepared. It is not

clear from the application if at all appellants had applied for the certified copies of the documents afresh, earlier ones having been misplaced the by the counsel. Appeal was filed on 24th May 2004, annexed with documents and an affidavit of the appellant Dinesh Kumar. Same paper book was refiled on 5th October. Thus, it is clear that Appellants throughout were in possession of the documents annexed to the appeal. Obviously, appeal file was available with the appellants or their advocate.

10. To my mind, a sham and baseless reason has been assigned by the appellants for not filing the appeal within the period prescribed as per Rules. Para-5 of the application suggests that the misplaced file was reconstructed for removal of the objections and after it was reconstructed on 5th October, 2004 and therefore till 20th November 2004, appeal could not be refiled. This is not borne out from the record as the appeal filed on 28th May 2004, was the same appeal filed before this Court and not any other reconstructed file/ appeal. It is not out of place to mention here that even the true copies of the statements of the witnesses and other documents annexed to the appeal are all attested by the Advocate on 24th May, 2004. Application is not supported by an affidavit of Mr.Raman Duggal, Advocate to certify that the file was misplaced by him in his

office. It is pertinent that appeal does not bear signatures of any of the appellants. Even the affidavit attached to the application is that of the clerk of the counsel.

11. Principles as laid down in “ *Indian Statistical Institute Vs/ M/s. Associated Builders & Ors.* ” , *AIR 1987 SC 335* and “ *Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors.* ”, *AIR 1987 SC 1353* are not disputed and are being followed by the Court while deciding an application under Section 5 of the Limitation Act.

12. In view of my discussion as above, I conclude that appellants have failed to show sufficient cause for not filing the appeal within the period of limitation.

13. Court generally adopts a liberal approach while considering an application for condonation of delay in filing the memorandum of appeal. However, Court has to be more strict where mandatory documents are required to be filed with the memorandum of appeal. The approach to be adopted by the Court is required to be different in each case depending upon the nature of objections raised by the Registry and required to be removed by the appellants. Objections raised by the Registry in this case were mandatory in nature. Memorandum of appeal was presented without affixing the

requisite court fee. Order of the Civil Judge was not filed. Without removing the objections, it was refiled on 22nd July, 2004. Objections were initially removed on 29th November, 2004.

14. As per Part G, 'Rules relating to proceedings in the High Court of Delhi', Chapter 1, sub-rule 2, every second memorandum of appeal is required to be accompanied by copies of decree and judgment as prescribed by Order 47 Rule 1 CPC and documents prescribed by the said order. A copy of the judgment of the first instance, unless dispensed with, by the Court is necessary. An appeal is incompetent when filed without certified copies of the Trial Court's judgment and decree as it is not a valid presentation of the appeal. It is noted that appellants have neither filed certified copy nor true copy of the judgment and decree of the first instance. No appeal can be entertained without payment of sufficient court fee. Therefore, there was no proper presentation of the appeal till the court fee was paid. It was only after removal of the objections that the appeal was registered by the Registry.

15. Under these circumstances, I find no merits in the application. Appellants instead of coming to the Court with true and correct facts and sufficient reasons for condonation of delay have made every endeavour to make out a case on false facts to their own

knowledge with a view to waylay the Court. Hence, application is hereby dismissed with costs of Rs.15,000/-.

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16. Since appeal is barred by period of limitation, it is not maintainable. Hence, is accordingly dismissed.

ARUNA SURESH, J.

JULY 16, 2010

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