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

+ RFA 252/2009

***Date of Judgment 09 July, 2010***

MCD

..... Appellant

Through: Ms.Maninder Acharya, Adv.

versus

ANAND PRAKASH GUPTA

..... Respondent

Through: Mr.Deepak Gupta and Mr.Gaurav  
Shankar, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE G.S.SISTANI**

1. Whether reporters of local papers may be allowed to see the Judgment ? **Yes**
2. To be referred to the Reporter or not? **Yes**
3. Whether the judgment should be reported in the Digest? **Yes**

**G.S.SISTANI, J (ORAL):**

**CM.No.10177/2009**

1. This is an application seeking condonation of delay in re-filing the appeal. It is contended by counsel for the appellant that the appeal was filed within the period of limitation, however, the same was returned with objections and the same was re-filed late.
2. It is submitted that the objections could not be removed within the time allowed by the Registry on account of some personal problem of the earlier counsel. It is also submitted that the file of this matter was received by present counsel on or around 29 – 30 January, 2009, when it was found that along with the appeal neither the pleadings nor evidence had been filed. Thereafter present counsel applied for certified copies of the pleadings and filed the same, resulting in delay of 350 days. It is contended by counsel for the appellant that the delay was on account of *bona fide* reasons and on account of personal problem of the earlier counsel, who had been

engaged in the matter. Paragraphs 3, 4 and 5 of the application reads as under:

“3. That the delay in re-filing is on account of the fact that when it was first filed on 07.07.2009 (sic. 07.07.2008) by the earlier counsel, various objections were raised. The said objection was removed and the matter was re-filed on 18.08.2009 (sic. 18.08.2008) by the said counsel. The objections were again raised by the Registry but on account of some personal problems of the earlier counsel, the said matter thereafter could not be refilled after removing the objections.

4. That the matter thereafter was marked to the present counsel and engagement form in this respect was received by her around 29 or 30<sup>th</sup> January, 2009, the file handed over to the present counsel neither contained the suit pleading and evidence nor contained the filed appeal with objections as clerk of the earlier counsel had inadvertently not received it from the Registry. Thereafter the efforts were made by the department to get the said filed appeal traced from the Registry and finally appeal returned with objections was handed over to the present counsel in the month of April, 2009. In the meanwhile the certified copies of the entire suit records had to be applied by the department as the suit file with pleadings and evidence could not be traced by the department.

5. That on receipt of the certified copies of the pleadings of the trial court on 08.06.2009 the present appeal is being re-filed immediately. It is submitted that the delay in re-filing the appeal is neither intentional nor deliberate. It is on account of the fact stated hereinabove.”

3. The application is vehemently opposed by counsel for the respondent. Mr.Gupta, relies on volume 5 Rule 5 Chapter ‘1’ of Part A of the High Court Rules and Orders in support of his plea that since the objections were not removed by the appellant within 30 days it would amount to refilling of the appeal. Counsel for respondent has relied upon **Asha Sharma & Ors. Vs. Sanimiya Vanijiya P. Ltd. & Ors.** 162 (2009) DLT 542 a decision rendered by the Division Bench of this Court and more particularly paragraphs 8

and 9 thereto, which reads as under:

“8. The Rules of Delhi High Court in the matter of filing and scrutiny of appeals are contained in Volume V of High Court Rules and Orders. Rule 5 Chapter ‘1’, Part A prescribes as under:

5. *Amendment* -- The Deputy Registrar, Assistant Registrar, Incharge of the Filing Counter, may specify the objections (a copy of which will be kept for the Court Record) and return for amendment and re-filing within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him, any memorandum of appeal, for the reason specified in Order 41 Rule 3, Civil Procedure Code.

(2) If the memorandum of appeal is not taken back for amendment within the time allowed by the Deputy Registrar, Assistant Registrar, in charge of filing counter under Sub-rule (1), it shall be registered and listed before the Court for its dismissal for non-prosecution.

(3) If the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar, Asstt. Registrar, In-charge of the Filing Counter, under Sub-rule (1) it shall be considered as fresh institution.

[Note: The provision contained in Rules 5(1), 5 (2) and 5 (3) shall mutatis mutandis apply to all matters, whether civil or criminal.]

The above referred Rule was substituted with effect from 1.12.1988 vide notification No.208/DHC/Rules dated 5.8.1988.

9. It is quite clear from a bare perusal of the above Rule that the Deputy Registrar cannot grant time of more than 30 days in aggregate for re-filing of a Memorandum of Appeal, for the reasons specified in Order XLI Rule 3 of the Code of Civil Procedure. If the Memorandum of Appeal, after removing the defects notified by the registry, is filed after more than 30 days, it shall be considered as a fresh appeal, filed on the date on which it is presented after removal of the defects.”

4. It is next submitted by counsel for the respondent that initially the

appeal filed was an eye wash as neither the appeal contained the pleadings, nor certified copy of the impugned judgment/ decree was annexed, nor Vakalatnama nor court fee was filed.

5. Mr.Gupta submits that as the relevant and mandatory documents were not filed along with the appeal, on this ground alone the present application should be dismissed. In support of this plea, he relies on paragraph 11 of **Asha Sharma (Supra)**, wherein it was held:

“11. No doubt the term “sufficient cause” appearing in Section 5 of Limitation Act and Order XLI Rule 3 of the Code of Civil Procedure needs to be liberally construed so as to advance justice. As was held by the Hon“ble Supreme Court in Indian Statistical Institute v. M/s Associated Builders and Ors. AIR 1978 SC 335, the delay in re-filing is not subject to the rigours – which are usually applied in excluding the delay in a petition filed u/s 5 of the Limitation Act. While considering condonation of delay in re-filing, the court has also to consider the nature of the defects which led to return of the document. If the objections are minor and technical in nature, the courts ought to be more liberal in condoning the delay. The standard for testing bonafides of the Appellant have to be more strict, in a case where mandatory documents are not filed with the Memorandum of Appeal. The approach of the court, therefore, has to be different where it is found that the Memorandum of Appeal was not accompanied by documents such as certified copy of the impugned judgment/order/decreed or the requisite court fee was not paid. The court has to be mindful that when there is delay in filing the appeal, a vested right accrues in favour of the respondent who, on account of non-filing of the appeal, becomes entitled to benefit of the judgment/decreed/order against which the appeal is preferred. Non registration and consequent non listing of an Appeal within the prescribed period leads the opposite party to believe that the judgement/order passed in his favour has been accepted by the opponent and that is the reason for not filing the Appeal. Therefore, even while adopting a liberal approach in such matters, the courts cannot mechanically condone even if no reasonable cause is shown at all.”

6. Para 1 of the reply filed by respondent to the application for

condonation of delay, reads as under:

“1. The present application ..... The records shall reveal that the captioned appeal was originally filed vide filing No.96516 of 2008. A bare perusal of the objections as raised by the Registry of this Hon’ble Court at that point of time shall reveal that the same was not even accompanied by the mandatory documents required to be filed with the Memorandum of Appeal. Even the certified copy of the impugned judgment dated 7.4.2008 was not filed. The record shall also reveal that the appropriate amount of court fee required to be filed along with Memorandum of Appeal was not filed by the appellant. The original Memorandum of Appeal also reveals that even most of the documents/ pleadings were not even signed by the then counsel. Apparently, the original appeal was filed just to circumvent the limitation in filing the appeal.”

7. Even on merits it is submitted by counsel for the respondent that present application is casual in nature and the same does not set out any good ground whatsoever for delay in re-filing the appeal. He also submits that present application is neither supported by the affidavit of the earlier counsel, who was appointed nor the application sets out the grounds or the nature of personal problems which were being faced by the counsel appearing in the matter.
8. I have heard counsel for the parties and also perused the application and the record of this case. The suit of the plaintiff (respondent herein) was decreed on 07.04.2008. It is not disputed that the appeal was originally filed on 07.07.2008 within the period of limitation, but the same was returned along with objections. Although the Registry has raised objections, but the appellant did not bother to either take back the appeal or remove the objections till April, 2009. Having regard to the settled position of law and relying on the case of **Asha Sharma (Supra)**, since the objections were not removed within thirty days of the filing of the appeal, the appeal is to be considered as a fresh filing. Thus it cannot be said that there is delay in re-filing. I also find force in the submission of

counsel for the respondent that present appeal was filed on 07.07.2008 as a mere formality and to circumvent the limitation in filing the appeal, in view of the fact that basic and mandatory documents, such as certified copy of the impugned judgment/decree were not filed with the memorandum of appeal; the court fee was also not paid and in fact counsel had not even filed Vakalatnama and pleadings along with the memorandum of appeal. Perusal of the record shows that the court fee was filed on 27.07.2009 which shows the negligent and callous attitude of the appellant. This Court cannot lose track of the fact that MCD has duly trained legal department, which is meant to follow up its cases and there is no justification for filing the appeal without the mandatory documents.

9. I have also perused the application for condonation of delay which is vague and lacks material particulars and extremely casual in nature. The only ground taken in the application for not filing the appeal on time is on account of some personal problems of the earlier counsel. The application does not mention nature of problems neither the application is supported by affidavit of the counsel. In case of **P.K. Ramachandran Vs. State of Kerala & Anr.** (1997) 7 SCC 556, the Supreme Court has held that an essential pre-requisite of exercising discretion to condone the delay is that the Court must record its satisfaction that the explanation for delay was either reasonable or satisfactory. Reading the application this court is unable to record its satisfaction that the grounds taken in the application for delay were either reasonable or satisfactory.
10. In the case of **Asha Sharma (Supra)** it was further observed by the Division Bench that :

“23. It is trite law that Rules of Procedure being hand-mades of justice, a party should not be refused relief merely because of some mistakes, negligence or inadvertence. Rules of Procedure are designed to facilitate justice and further its ends. But, even if we take a rather liberal

approach in this matter, we are unable to find any good ground for condonation of delay in filing this appeal. None of the reasons given in the application is convincing or logical. The impression we gather is that the appellants deliberately delayed filing of the appeal so as to prolong the litigation. It cannot be said that even if the appellants were totally negligent and careless and have not come forward with any worthwhile explanation for the delay, the court ought to condone the delay in re-filing. The Rules framed by the High Court cannot be allowed to be taken so casually and there will be no sanctity behind the rules if every delay in re-filing, is to be condoned irrespective of howsoever unreasonably long and unexplained it be, and howsoever mandatory be the nature of the documents, non-filing of which renders the Appeal defective. We cannot condone the delay merely because an application for condonation of delay has been filed. No court would not like to reject an appeal as time barred unless there are strong reasons, which compel the court to take such a view. Some indulgence and a liberal view in such matters is well-accepted but to say that the court has no option in the matter and must accept the Memorandum of Appeal irrespective of the nature of the objections and delay in re-filing, even where there is no reasonable explanation to justify the delay, would only be travesty of justice and will be as good as removing the relevant Rule in High Court Rules and Orders, from the Statute Book.

24. These days we find a growing tendency to file an incomplete Memorandum of Appeal and then take unreasonably long time to remove the defects, even where such defects can be cured within a very short time. Such a practice cannot be said to be conducive to be fair and reasonable and therefore needs to be curbed. An unduly liberal and benevolent approach will only give encouragement to such unfair practices and therefore is not called for. When an Appeal comes up for hearing long after expiry of the prescribed period of limitation, it springs surprise on opposite party, which assumes finality in his favour on account of non-filing of Appeal within a reasonable period.
11. The conduct of the appellant in this case is callous and negligent. The present case cannot be equated with the case of illiterate litigant who is solely dependent on his advocate nor the appellant can be permitted to shift the blame on the previous advocate.
12. While dealing with the application for condonation of delay, the Court must also take into account that when there is delay in filing of an appeal, a vested right accrues in favour of the respondent, who would become entitled to the benefit of the judgment and decree against which no appeal is preferred. Taking into consideration the grounds for condonation of delay in the application, I am of the view that the appellant has miserably failed to show any cause much less a sufficient cause for delay in filing the appeal. Paras 3 to 5 of the application, which have been extracted in the foregoing paragraphs, do not disclose any cogent reason for the delay. There is no explanation as to what was the personal problem of the earlier counsel and at least why the mandatory documents were not filed along with the appeal, neither there is any explanation why the objections were not removed. It is a case of inaction and negligence on the part of the appellant for which no indulgence can be given. Accordingly, the application for condonation of delay is dismissed.

**RFA No.252/2009**

13. In view of the order passed in the application [CM.No.10177/2009], the appeal is dismissed.

**July 09, 2010**  
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**G.S. SISTANI, J.**