

24.

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

+ RFA NO. 153/2009

% Judgment dated on: 15.07.2010

RAJENDER KUMAR Petitioner
Through : Ms. Vibha Mahajan, Adv. for appellant
versus

SHRI. ONKAR NATH & ORS. Respondents
Through : Mr.Vikas Agarwal Advocate for the
respondents 1 to 3
Mr.Asim, Adv. for respondent 4(B)

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

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

G.S.SISTANI, J. (ORAL)
+ CM NO.6011/2009 (delay) in RFA No. 153/2009

1. This is an application seeking condonation of delay of 1882 days in filing the appeal. In this case the suit of the appellant was dismissed by a judgment and decree dated 27.11.2003. It is contended by counsel for the appellant that on dismissal of the suit the appellant applied for a certified copy of the impugned judgment on 11.12.2003. Certified copy was received on 23.1.2004. While relying on the court fee placed on record, learned counsel submits that the Court fee was purchased on 24.2.2004 and handed over to the then counsel engaged by the appellant for preparation of the appeal. After the preparation of the appeal the same was filed in the Registry on 17.3.2004 within

the period of limitation. Admittedly due to certain objections the appeal was not listed for hearing and returned back to the counsel. After removing the objections as raised by the Registry the appeal was refiled on 24.3.2004. The Registry thereafter returned the appeal as all the objections were not cleared which resulted in refiling of the appeal on 15.4.2004, 14.5.2004, 5.7.2004, 12.7.2004, 28.7.2004, 29.7.2004, 24.8.2004, 17.9.2004 and 5.10.2004. It is submitted that during this period the appellant could not visit the counsel owing to his ill health and after 5.10.2004 the objections raised by the Registry, could not be removed nor the appeal was refiled. The appellant is stated to have visited his counsel in the last week of December and enquired about the status of the appeal and only then he was informed that the appeal could not be listed on account of certain objections having been raised by the Registry. The appeal was thereafter refiled on 3.12.2004 again without removing all the objections. It is the case of the appellant that as and when he visited the counsel and enquired about the status of the appeal he was assured that the matter is being looked into and after the objections are removed the appeal would be listed for hearing. In December, 2004, counsel again informed the appellant that the appeal would be listed on the reopening of the High Court in January, 2005. Counsel submits that on 13.1.2005 when the appellant enquired about the status of the appeal from the counsel he was told that since the Registry has again returned the appeal on account of certain objections, the appeal could not be

listed and appeal had been taken back. Being dissatisfied with the way the counsel had handled the matter the appellant decided to take back his file from the counsel as he had failed to get the appeal listed for more than one year from the date of the impugned judgement. It is next contended that after taking the file from the previous counsel the appellant approached another counsel on 13.1.2005 itself. The second counsel was already looking after another suit for specific performance, possession and declaration and injunction filed by one Smt. Srabati Devi against the appellant herein and which was also pending in the Court of the ADJ, Tis Hazari, Delhi pertaining to the same property. The second counsel advised the appellant that it would not be advisable to file any appeal against the judgment and decree dated 27.11.2003 as the subject matter of the appeal was already pending before the Court of the learned ADJ which would ultimately determine the right between the parties. On the advice of the second counsel the appellant did not pursue his appeal. Counsel states that the subsequent suit bearing Suit No.63/2006/2003 which was pending in the lower court was, however, decreed on 5.12.2006 in favour of Smt. Srabati Devi and against the appellant herein. On reading of the judgment the appellant learnt that one of the factors which was held against the appellant was non-filing of the appeal against the earlier judgment and decree. It is only thereafter that the appellant decided to file the appeal and he took his files from the second counsel and took advice from the third counsel on the same day. The third counsel

also did not advise the appellant to file an appeal against the impugned order dated 27.11.2003. Appellant was only advised to file appeal in the second suit which had been decreed which appeal admittedly has been filed and is pending in this Court. Being dissatisfied with the third counsel the appellant is stated to have approached the Delhi High Court Legal Aid Committee on 2.4.2009 and consequent thereto the present appeal along with the application has been filed. Learned counsel has strongly urged before this Court that the appellant should not be made to suffer on account of lapse, negligence or inaction on the part of the counsel. It is submitted that the appellant had done everything possible to pursue the case and also purchased court fee, so as to file the appeal within the period of limitation. She submits that the appellant has a strong case on merit and is likely to succeed. Learned counsel submits that in the case of **Collector, Land Acquisition, Anantnag and another vs. Mst. Katiji and others** reported in AIR 1987 SC 1353, it was held by the Supreme Court that ordinarily a litigant does not stand to benefit by lodging an appeal late, and also refusing to condone delay can result in a meritorious matter being thrown out at the very threshold, defeating the cause of justice.

2. While relying on **AIR 1955 Calcutta 553 Kshetramoni Dasi vs. Surendra Mohan Kundu and others** counsel for the appellant submits that in case the counsel gives misleading advice and the appellant acts on the same the appellant should not be made to suffer on account of the wrong advice given by the counsel.

3. This application has been vehemently opposed by counsel for the respondents on the ground that the appellant cannot be permitted to shift the entire blame on the counsel. It is submitted that the appellant has been appearing in the trial court and defending the second suit which has been pending. He further submits that the appellant had repeatedly made statements before the trial court that he had preferred an appeal. However, no order was ever produced. It is submitted that appellant is not a stranger to litigations and should have been vigilant in safeguarding his own interest and when the appeal was not listed for hearing after the same was filed on 17.3.2004 he should have asked his counsel about non-listing of the same. He submits that the conduct of the appellant shows that he was either not interested or he was highly negligent in pursuing his appeal. Counsel also submits that there is nothing on record to show or suggest that the appellant has taken any action against any of the three counsel on whom the entire blame has been shifted.
4. I have heard counsel for the parties and given my thoughtful consideration to the matter. The basic facts are not in dispute that the suit filed by the appellant was dismissed by the judgment and decree dated 27.11.2003. The appellant applied for a certified copy which was received on 23.01.2004. The arguments addressed by counsel for the appellant is that the court fee was purchased on 24.02.2004 within the period of limitation and handed over to counsel, who was appearing in the matter. The appeal was also prepared and filed within the period of limitation

i.e. 17.03.2004. The Registry had returned the appeal as all the objections were not cleared, which resulted in re-filing of the appeal on 15.4.2004, 14.5.2004, 5.7.2004, 12.7.2004, 28.7.2004, 29.7.2004, 24.8.2004, 17.9.2004 and 5.10.2004, but the appellant could not visit the counsel owing to his ill-health. The entire blame for not removing the objections has been shifted on the first counsel, who was engaged in the matter. Admittedly, the file was taken back from the said counsel in January, 2005.

5. Thereafter the matter was handed over to the second counsel, who was already engaged by the appellant in a suit for specific performance and possession which was pending in the trial court. Thereafter the burden for not filing the appeal has been shifted on the second counsel, who advised that it would not be necessary to file the appeal. Thereafter as per the appellant, he engaged the services of the third counsel, who also did not advise the appellant to file the appeal. A bald submission has been made that appellant not being satisfied with the third counsel, approached the Delhi High Court Legal Aid Committee on 2.4.2009, where he was advised to file the appeal and the present application for condonation of delay. The application is completely devoid of any particulars as to whether any step has been taken against the counsel, who had been approached by the appellant. There is no satisfactory explanation as to what prevented the appellant from pursuing his appeal between the period March, 2004 to January, 2005, except a submission that the appellant was unwell. No supporting document of any nature has been annexed to show the

nature of illness except a bald assertion that he could not visit the counsel due to ill-health.

6. The submission made by counsel for the appellant that the appeal was filed within the period of limitation is without any basis as, the objections were not removed by the appellant within thirty days and thus it would amount to re-filing of the appeal, as per volume 5 Rule 5 Chapter '1' of Part A of the High Court Rules and Orders. I am fortified with in my view by decision of the Division Bench of this Court in **Asha Sharma & Ors. Vs. Sanimiya Vanijiya P. Ltd. & Ors.** 162 (2009) DLT 542 and more particularly paragraphs 8 and 9 thereto, which read 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."

7. 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.
8. In the 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.
9. 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 not one, but on three lawyers.
10. While dealing with an application for condonation of delay under Section 5 of the Limitation Act, the Court must bear in mind two important considerations. Firstly, the expiration of limitation for filing an appeal gives rise to a legal right to a decree-holder to

treat the decree as binding between the parties and this right should not be lightly disturbed. Secondly, if sufficient cause is shown for condonation of delay, the delay should be condoned. It has been repeatedly held by the Supreme Court of India that the words “sufficient cause” should receive a liberal construction so as to advance substantial justice. In the same breath, it has been held that the discretion should be exercised, when there is no negligence or inaction nor want of bona fides imputable to the appellant, and the Court must be satisfied that there was due diligence on the part of the appellant.

11. Having considered this case on the touchstone of the broad principles which have been laid down by the Supreme Court of India, I find the conduct of the appellant in the present case to be callousness and negligent.

12. In these circumstances the Court is unable to satisfy itself that delay was caused due to sufficient reasons. Accordingly the application is dismissed.

RFA No.153/2009 & CM No. 6012/2009

13. In view of the order passed above in condonation of delay application, the appeal stands dismissed. CM No.6012/2009 also stands dismissed.

G.S. SISTANI, J.

July 15, 2010
'aj/ssn'