

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

Date of Reserve: 7th January, 2010
Date of Order: 16th February, 2010

CM (M) No. 78/2008 & CM No. 10163/2007

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16.02.2010

Bishan Pawar

... Petitioner

Through: Mr. Sunil Mittal, Advocate

Versus

Dayawanti

... Respondent

Through: Mr. Sumit Bansal & Mr. Manish Paliwal, Advs.

JUSTICE SHIV NARAYAN DHINGRA

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 judgment should be reported in Digest? Yes.

JUDGMENT

Against judgment of the first Appellate court dismissing appeal, the petitioner preferred second appeal before this Court. This Court vide order dated 1.8.2007 observed that the second appeal was not maintainable as it did not lie however, at the request of the appellant this second appeal was treated as Civil Miscellaneous (Main).

2. The petitioner/appellate did not amend the memorandum of appeal and CM(M) is in the form of second appeal however the only ground pressed by the petitioner for allowing this CM(M) is that the learned first Appellate Court wrongly dismissed the first appeal of the petitioner on the ground of limitation. It is submitted that the appeal was filed within the period of limitation however, it was not accompanied by a certified copy of the judgment of trial Court and an exemption application was made seeking exemption from filing certified copy of the judgment as the same had been applied for and would be filed as and when obtained. The certified copy was not filed for about five months period and it was filed later on along with an application under Section 5 of the Limitation Act and the trial Court dismissed this application for condoning delay in filing certified copy.

3. I have perused the record of the trial Court as well as first Appellate Court. A perusal of record would show that at every stage, the petitioner had been delaying the proceedings deliberately and several times costs were imposed on the petitioner/defendant at the trial stage for different reasons viz. for not filing WS, for not appearing for admission/denial, for not producing the documents and for taking adjournments. Ultimately the issues were framed and when the case was at the stage of evidence again on behalf of defendant adjournment was sought on the ground of non availability of Counsel and on various other grounds. The suit was for recovery of around Rs.1 lac odd amount and it continued from 2000 till 2006 mainly because of the dilatory tactics of the defendant. After the suit was decreed, petitioner filed this appeal without certified copy and filed an exemption application stating that he had applied for certified copy but the same was not ready and he shall file the same as and when delivered to him. On the date, he filed this exemption application he had not bothered to check if the certified copy was ready or not. The record shows that the certified copy was applied on 19th July, 2006 and it was ready on 22nd July, 2006. The appeal was filed on 25th July, 2006 thus the appellant had not bothered to check whether certified copy was ready or not, and filed an exemption application with a false affidavit. Certified copy was not collected from the Copying Agency by the appellant till December, 2007. This is despite the fact that the respondent had taken a plea before the first Appellate Court that the appeal was no appeal in the eyes of law since it was not accompanied by the certified copy of the judgment. The appellant had also made an application under Order 41 Rule 27 CPC for additional evidence which he later on withdrew. The appellant filed an application under Section 151 CPC for filing certified copy sometime in January 2007 and the learned first Appellate Court after considering the contentions of both the sides passed the impugned order.

4. The Counsel for the petitioner submitted since the petitioner had filed a true copy of the judgment of lower Court along with appeal, the appeal should not have been dismissed on technical ground and the Court should have considered the appeal on merits.

5. This Court under Article 227 does not act as a court of appeal and cannot substitute its own appreciation of facts in place of the appreciation done by the Appellate Court, unless it is shown that the Appellate Court acted contrary to the established law and the order of the Appellate Court was beyond jurisdiction or the Appellate Court failed to exercise its jurisdiction or the order was so grossly unjust

that it would result into grave injustice. I do not find that the present case falls in any of the categories.

6. It is a mandatory condition of Order 41 Rule 1 CPC that a certified copy of the judgment is to be filed along with appeal. In case appeal is filed before preparation of the certified copy, an exemption is normally allowed by the Court but certified copy is to be filed as and when it is ready. The admission of the appeal without certified copy is always a conditional admission and if certified copy is not filed as and when it becomes ready and available or certified copy is not obtained and filed then it is not an appeal in the eyes of law. In the present case the petitioner filed exemption application and an affidavit stating that certified copy was not ready despite the fact that record shows that copy was ready with the Copying Agency and it was not obtained after payment of the necessary Court fees. Thereafter, the appellant did not bother about collection of the certified copy. In the application for condonation of delay, the Counsel had given his personal reasons for not collecting the certified copy. These reasons given by the Counsel cannot be entertained by the Court. It is appellant who is responsible for collection of certified copy and filing it in the Court. No reasons whatsoever were given as to why the appellant did not collect the certified copy and filed it in the Court.

7. The order of the Appellate Court does not suffer from any infirmity. I find no reason to set aside the order of the Appellate Court. The petition is hereby dismissed.

February 16, 2010
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SHIV NARAYAN DHINGRA, J.