

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

+ **RSA 234/2008**

Date of Decision: May 13, 2010

M/S. LOVELEENA (INDIA) & ORS. Appellants

Through: Mr. Ratnesh Bansal Adv.

versus

SYNDICATE BANK Respondent

Through: Mr. Roshan Lal Goel Adv.

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CORAM:

HON'BLE MS. JUSTICE ARUNA SURESH

- (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. (Oral)

CM APPL NOS. 16068/2008 (delay in re-filing the appeal) & 17015/2008 (delay in filing the appeal) in RSA 234/2008

1. Respondent Syndicate Bank filed a suit for recovery of Rs.2,20,173.98p. against the appellants, M/s. Lovleena (India) and its partners. Appellants duly contested the suit. Trial Court vide its judgment and decree dated 5.8.2005 decreed the suit of the

Respondent Bank with simple interest @ 7% per annum from the date of filing of suit till realisation of the suit amount. The said judgment and decree of the Trial Court was challenged by the appellants in appeal. Appellate Court while concurring with the findings of the Trial Court dismissed the appeal vide its impugned judgment and decree dated 09.03.2007. Aggrieved by the said judgment and decree of courts below, the present appeal has been filed.

2. By way of present applications, appellants have sought condonation of delay of 476 days in filing and 2½ months in refiling the appeal.
3. The case of the appellants is that Mr. Rishi Manchanda Advocate appointed by the appellants had filed the appeal on 30.05.2007 and again it was filed on 10.09.2007, 27.09.2007, 25.10.2007, 20.11.2007, 15.12.2007 and 1.07.2008. Appellants were directly in touch with Mr. Rishi Manchanda and were informed that he had filed the appeal and the appellants would be informed when the case would be listed for hearing. Mr. Manchanda was also conducting the case of Mr. J.C. Popli, husband of appellant No.3. Some misunderstanding developed between Mr. Rishi Manchanda and Mr.

J.C. Popli and thereafter Mr. J.C. Popli filed a complaint against Mr. Manchanda and Mr. S.S. Shastri, who was also engaged to argue the matter filed by Mr. J.C. Popli on 29.05.2008. Despite this, appellants regularly remained in touch with Mr. Manchanda and they were always assured that the appeal was under process and would be re-filed after removing objections. The appeal was again refiled on 01.07.2008.

4. Thereafter, appellants were informed by Mr. Manchanda that their file has been misplaced. It could be traced out only on 3.10.2008 when he returned the file to the appellants. Thereafter, appellants engaged the services of Mr. Ratnesh Bansal, the present counsel who filed the appeal after removing the objections on 24.10.2008. Since, still there were some objections to the appeal, the same could be refiled only on 4.11.2008 and the matter was listed for 17.11.2008 and again on 26.11.2008. It was during the course of arguments that appellants came to know that there was delay in filing the appeal and thereafter the present applications have been filed.
5. It is also the case of the appellants that appellant No.3 was suffering from illness since August 2007 and was admitted in hospital on

17.08.2007. She was discharged only on 24.08.2007. Therefore, the appeal could not be filed within the period of limitation. It is contended by the counsel for the appellant that since the appellants have a very good *prima facie* case as substantial questions of law are involved, delay in filing the appeal deserves to be condoned.

6. Order 41 Rule 3A Code of Civil Procedure (hereinafter referred to as 'CPC'), enables an appellant to file his appeal after the expiry of period of limitation specified thereof, to be accompanied by an application supported by an affidavit setting forth the facts on which the appellant relies on, to satisfy the Court that he had sufficient cause for not preferring the appeal within such period. The Court is within its powers to reject the application, without even issuance of notice to the respondent, if it finds no reason to condone the delay, *prima facie* on the averments contained in the application. But where the court sees any reason not to reject the application without the issuance of a notice to the Respondent, the court is empowered to serve a notice upon the Respondent giving him an opportunity to submit on the application.
7. The present appeal was presented within the period of limitation.

However, after it was returned to the appellants for removal of objections raised by the Registry, delay of 470 days in refiling the appeal occurred. Therefore, the delay in refiling the appeal is sought to be condoned.

8. Part G, 'Rules relating to proceedings in the High Court of Delhi', Chapter 1, Rule 5 Part A sub(a) lays down the statutory period for refiling of the appeal and also the power of the Deputy Registrar to return the appeal for amendment and refiling the same. This rule reads as below:-

“5.(1) 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 XLI Rule 3, Civil Procedure Code.

(2).....

(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.

9. As per Sub rule (3) if the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar, Asstt. Registrar, Incharge of the Filing Counter under sub-rule (1), it would be considered as a fresh institution.
10. Therefore, provisions of Section 5 of the Limitation Act would not be attracted to a case, where appeal was initially filed within the period of limitation but was returned back with certain objections to be refiled within the period specified by the Dealing Assistant.
11. Appeal was initially filed on 30.05.2007. The impugned judgment is dated 09.03.2007. Therefore, appeal was filed within the period of limitation. It was refiled on 11.09.2007 i.e. after the expiry of one week's time which was granted to the appellant to remove the objections and refile the appeal.
12. Dealing Assistant had no power to extend the period of refiling beyond 30 days. Therefore, refiling of the appeal on 11.09.2007 tantamounted to filing of the appeal afresh. Since objections were not properly removed, appeal was again returned to the appellants. After removing the objections, it was refiled on 27.9.2007. Again the appeal was returned for removal of objection and it was refiled

on 25.10.2007. It seems that counsel for the appellants did not care to remove all the objections properly with the result, the appeal had to be refiled on 2.11.2007. This process continued and again appeal was refiled on 15.12.2007 and 01.07.2008 respectively.

13. Some objections were raised by the Registry on 24.10.2008. As stated above, the Dealing Assistant had no power to extend the period to refile beyond 30 days. However, the appeal was refiled on 4.11.2008 after removing the objections and it was listed before the Court on 17.11.2008.

14. Since appellants failed to remove the objections repeatedly within the time prescribed by the Dealing Assistant and refiled the appeal only on 4.11.2008, the delay in refiling the appeal tantamounted to its fresh filing beyond the period of limitation. Condonation of delay, if any, is to be considered on facts and circumstances of a case, on the threshold of provisions contained under Order 41 Rule 3A CPC. Therefore, condonation of delay, if any, in this case has to be considered on its facts and circumstances. Reference is made to '*Asha Sharma & Ors. Vs. Sanimiya Vanijiya P. Ltd. & Ors*', 162 (2009) DLT 542 (DB).

15. Appellants, to my mind, have not been able to explain any sufficient cause either in the application or in their affidavit for non filing of the appeal within the period of limitation. The entire blame has been placed on Mr. Rishi Manchanda, Advocate, who was initially engaged by the appellants to file this appeal, because he failed to file or refile the appeal after removing objections within the period of limitation.
16. The term "sufficient cause" appearing in Order 41 Rule 3 CPC is generally to be construed liberally, so as to advance justice to the parties and the delay in refiling is not subject to the rigors, which are usually applied in excluding the delay in a petition filed under Section 5 of the Limitation Act. Therefore, while considering condonation of delay in refiling, the Court is required to consider the nature of defects which led to return of the document and if the objections are minor and technical in nature, the Courts should be more liberal in condoning the delay. However, standards of testing bonafides of the appellant have to be more strict where mandatory documents are required to be filed with the Memorandum of Appeal. The court should adopt different approach depending upon the nature of the objections raised by the Registry and required to be removed

by the appellant.

17. In '*Collector, Land Acquisition, Anantnag & Anr. vs. Mst. Katiji & Ors., AIR 1987 SC 1353*', the Apex Court laid down the principles which a Court should adopt while having a liberal approach to an application for condonation of delay, these are :-

“1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. “Every day’s delay must be explained” does not mean that a pedantic approach should be made. Why not every hour’s delay, every second’s delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by restoring to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize

injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”

18. At the same time the Court has to be conscious of the fact that delay in refiling the appeal vests a right in favour of the respondent who, on account of non-filing of the appeal, becomes entitled to the benefits of the judgment/decreed/order against which the appeal is preferred. Non filing of the appeal within the period of limitation or refiling of the appeal beyond the period of limitation makes the other party believe that the appellant has accepted the order/judgment and decree of the Trial Court or the First Appellate Court, as the case may be. Therefore, the Court cannot mechanically condone the delay in refiling the appeal, if no reasonable cause is shown.

19. In *Asha Sharma's* case (*supra*), it was further observed by this Court as follows:-

“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.”

20. Coming back to the facts and circumstances of this case, as pointed out above, appellants have made Mr. Rishi Manchanda Advocate responsible for delay in refiling the appeal. As per the case of the appellants themselves, they regularly remained in touch with the said Advocate and repeatedly requested him to file the instant appeal but, every time they were told that he had filed the appeal and the appellants would be informed when the case would be listed for hearing. It is pertinent that Mr. Manchanda was also conducting the cases of Mr. J.C. Popli, husband of appellant no.3. According to appellant No.3 her husband Mr. J.C. Popli developed some misunderstanding with Mr. Manchanda which resulted into filing of a complaint against the Advocate by her husband. This complaint was filed on 29.5.2008. Thus, it is clear that the appeal which should have been filed within 90 days of the passing of the impugned judgment and decree and the objections were required to be removed within the period granted by the Dealing Assistant or the Deputy Registrar, as the case may be. It is surprising that despite J.C. Popli having filed a complaint against Mr. Manchanda, appellants continued to remain in touch with him to pursue their appeal, and he

continued to assure them that their appeal was under process. These averments, under the circumstances cannot be accepted as correct. It is not known as to when appellants were informed by Mr. Manchanda that their file had been misplaced during renovation work. The file was allegedly handed over to the appellants only on 23.10.2008.

21. Present appeal was finally re-filed on 4.11.2008. Intriguingly, despite the fact that Mr. J.C. Popli had filed a complaint against Mr. Rishi Manchanda, appellants continued to remain in contact with him and persuaded him to proceed with the appeal. Once the client had lost faith in his lawyer, it is not believable that he would continue to contact the same lawyer for redressal of his grievances.
22. Admittedly, appellants did not file any complaint against Mr. Rishi Manchanda for non filing of the appeal within time. The application is not supported by any affidavit of Mr. Rishi Manchanda to explain as to why he could not refile the appeal in time after removing the objections raised from time to time.
23. Court Fees was purchased by the appellants on 17.08.2007 i.e. after the objections were raised on filing of the appeal. The Court fee was

actually filed on 4.11.2008 as per noting on the objection sheet. Similarly, the appellants were required to state question of law to be formulated as per objection 9-A. Some blanks were left in the paragraphs, which were required to be filled in as per objection 11-A. There was some objection regarding Trial Court record and pencil marking made in the appeal besides other objections like 'Caveat report to be obtained', etc. Noting by the Registry indicates that no objection was removed by the counsel when he refiled the appeal. These notings are dated 25.10.2007, 21.11.2007, 11.09.2007, 15.12.2007 and 24.10.2008. Objections were removed only before refiling of the appeal on 4.11.2008. Objections raised by the Registry were very material which were required to be removed before refiling of the appeal. The only plea that it was the fault of the lawyer in handling the case of the client or of not informing him about the fate of the case cannot be considered as 'sufficient cause' for condonation of delay.

24. It is also important to note that Mr. Ratnesh Bansal, present counsel who refiled the appeal on 4.11.2008 knew that there was delay in refiling the appeal but he did not file any such application along with the appeal. It was only on 26.11.2008, that appellant realized that an

application under Order 41 Rule 3-A CPC was required to be filed.

25. Even on merits, I find nothing in the appeal which may result into appeal being allowed. A money decree was passed in favour of the respondent Bank against the appellants. Appellants do admit that they had availed overdraft facility in the respondent Bank. The appellants do admit the signatures on the loan documents like Promissory Note, Guarantee Deed, etc. executed in favour of the respondent Bank. Once appellants admitted having executed the documents, it was for them to rebut the presumption that the said documents were executed for consideration. It has come in evidence that appellants vide letter dated 29.7.1980 had agreed to pay overdue interest @ 16.5 % per annum. They made last payment of Rs.3,000/- on 12.01.1985. Appellants also acknowledge their liability to the extent of Rs.1,49,271.10 Ps. as on 26.07.1983. Appellants in fact did not lead any evidence to prove their defence and therefore failed to rebut the presumption that the documents were executed for consideration. Objection of the appellants regarding the applicability of law of Damdupat was considered by the Trial Court as it concluded that the claim of the Respondent Bank was not hit by the said law, interest being compoundable in nature.

26. Under the circumstances, no substantial question of law arises in this appeal nor can be formulated. Since even if liberal approach is adopted by the Court in condoning the delay, the appeal would not survive. Hence, I find no merit in the applications, the same are accordingly dismissed with cost of Rs.25,000/-.

RSA 234/2008

In view of the dismissal of the applications for condonation of delay, appeal is hereby dismissed as barred by period of limitation.

**(ARUNA SURESH)
JUDGE**

**MAY 13, 2010
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