

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

% *Date of Judgment: 18.02.2011*

+ **R.S.A.No.173/2008 & C.M.Nos.10630-31/2008**

SH. MUKESH KHURANA Appellant
Through: Mr. Bakhshi Uday Dip Singh,
Advocate.

Versus

SMT. PARVATI DEVI & ORS. Respondents
Through: Mr. S.P. Pandey, Advocate for
respondent No. 2.
Mr. A.S. Singh, Advocate for
respondent No. 3.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers 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

INDERMEET KAUR, J. (Oral)

C.M.No.10631/2008 (for delay) in R.S.A.No.173/2008

1 There is delay of 333 days in re-filling the appeal. The prayer made in this application has been vehemently opposed by learned counsel for respondents. Learned counsel for the respondents has placed reliance upon 162 (2009) DLT 542 (DB) Asha Sharma & Ors Vs. Sanimiya Vanijiya P. Ltd. & Ors., 38 (1989) DLT 10 S.V. Khadekar Vs. Shri Ram Scientific Industries Research Foundation, 120 (2005) DLT 429 (DB) Commissioner of Central Excise, Delhi-II Vs. Bluemax Sport Wear as also another judgment of this Court reported in 2010 V AD (Delhi) 677 Brij Mohan Vs. Sunita to substantiate his submission that such an unexplainable delay cannot be condoned as a matter of right; it is submitted that the application is bereft of all material

particulars and in these circumstances, no ground is made out to condone the delay in filing of the appeal.

2 Admittedly there was no delay in filing of the appeal; appeal was filed in time. Delay had occurred in re-filing of the appeal. In para 2 of the application it has been stated that the appeal had taken back for removing and curing the objections and defects raised by the Registry; the said appeal paper book had got inadvertently tagged with the case file of another case titled 'M/s BNC Securities Vs. Sh. Rakesh Gupta' which was found on 30.05.2008; thereafter the present appeal was filed on 29.07.2008. Along with this application, the affidavit of the counsel Mr. Bakhshi Uday Dip Singh has also been annexed who has reiterated these submissions on oath stating therein that the appeal paper book had got mixed up with the other file which was found on 30.05.2008.

3 The facts of each case are distinct and the law has to be applied in their context. Delay and laches has to be condoned but at the same time if the explanation furnished by a litigant is satisfactory and acceptable, substantive justice demands that the provisions of section 5 of the Limitation Act should be construed sympathetically in favour of such a party. The objections had first been noticed on 27.07.2007 which were partly removed on 17.08.2007. Again some objections were removed on 21.08.2007 but thereafter (as is evident from the records) the details of objections placed on record by the learned counsel for the respondents, the objections had not been removed. This was for the reason as has been stated in the present application duly supported by the affidavit of the counsel.

4 Delay in re-filing of the objections is accordingly condoned.

R.S.A.No.173/2008

5 This second appeal has impugned the judgment and decree dated 17.03.2007 which had endorsed the findings of the trial Judge dated 12.04.2005 whereby the suit filed by the plaintiff Mukesh Khurana seeking specific performance of the agreement dated 10.07.1990 had been dismissed.

6 The plaintiff had filed the present suit against the defendants. His contention was that the parties had entered into an agreement dated 10.07.1990 whereby defendant No. 1 had agreed to execute the sale deed qua the suit property i.e. property bearing No.X-21, West Patel Nagar, New Delhi in favour of the plaintiff in terms of the aforementioned agreement to sell. Admittedly, defendant No. 1 was the owner of the suit property. She was the paternal aunt of the plaintiff. The total consideration in terms of this agreement to sell was ₹1.75 lacs. The plaintiff had paid a sum of ₹8,000/- on 10.07.1990; this was part payment; balance sum of ₹1,67,000/- was to be paid at the time of registration of the sale deed. The plaintiff had thereafter paid further sums of ₹5,000/-, ₹ 6,000/-, ₹6,000/- & ₹10,000/- to defendant No. 1 on 10.07.1991, 14.07.1991, 19.11.1991 & 08.01.1992 respectively.

7 On 29.10.1992, the plaintiff learnt that defendant No. 1 was negotiating the sale of this property with defendant No. 2 and defendants No. 1 & 2 had in fact entered into an agreement to the said effect on 04.09.1992. The plaintiff was all alone willing to perform his part of the agreement; defendant No. 1 did not adhere to. The present suit was accordingly filed.

8 The defence of defendants No. 1 & 2 was that no such agreement to sell dated 10.07.1990 was executed between the parties,

the document is forged and fabricated; the defendants specifically denied receipt of any of the aforementioned payments. It was contended that defendant No. 1 had executed an agreement to sell in favour of defendant No. 2.

9 On the pleadings of the parties, issues were framed. Oral and documentary evidence was led. Admittedly the payments made by the plaintiff to defendant No. 1 (as aforementioned) were through cash. Apart from the bald statement of PW-2, there was no other evidence either oral or documentary to substantiate this submission. The handwriting expert had submitted his report dated 28.02.2001. The admitted and questioned signatures of defendant No. 1 on the disputed document i.e. agreement to sell dated 10.07.1990 had been examined by the Central Forensic Scientific Laboratory (CFSL). A non-conclusive report has been furnished. It was stated that the admitted signatures marked A1 to A3 were not sufficient for the comparison of the questioned signatures marked Q1 to Q7. This report did not help the case of the plaintiff. The plaintiff was not able to prove before the Court that the disputed document i.e. agreement to sell dated 10.07.1990 had in fact been executed by defendant No. 1.

10 Thereafter a second handwriting opinion was obtained. This was by the Court. This report is dated 07.01.2002. The questioned signatures marked Q1 to Q3 were examined and compared with the admitted signatures of defendant No. 1 marked A1 to A3. The conclusion was that the authorship of the questioned signatures could be connected to the writer of the admitted signatures. This report has given a positive finding against the plaintiff. This finding had been noted by the trial Judge. Result was that the suit of the plaintiff was dismissed.

11 In appeal, this finding was affirmed by the first appellate court. The scrutiny of evidence which included the oral and documentary evidence led before the two courts below had been detailed. The finding reads as under:-

“9. In order to decide the real controversy between the parties that whether the agreement Ex.PW1/B was executed by the respondent no.1 in favour of appellant, trial court has sent the agreement to sell Ex.PW1/B to 7 CFSL for scientific analysis vide order dated 25.09.2001. The concerned document expert after analysis of the admitted signatures of the respondent no.1 with that of the questioned signatures submitted two reports which are dated 28.02.2001 Ex.CW1/C and dated 07.01.2002 Ex.CW1/E.

10. The perusal of record reflects that initially the three admitted signatures of the respondent no.1 i.e.A1 to A3 which are taken from the written statement and vakalatnama were sent for comparison with that of the questioned signatures i.e.Q1 to Q3 available on agreement to sell dated 10.07.1990 Ex.PW1/B and Q4 to Q7 available on receipts Ex.PW1/C to Ex.PW1/F. However, the Director of the CFSL vide report dated 28.02.2001 reported that for the comparison of the questioned signatures marked Q1 to Q7, the admitted signatures marked A1 to A3 have not been found sufficient. It was requested that a few sheets of specimen and a few admitted genuine signatures written in Gurumukhi during the course of business be sent for comparison. Thereafter, two more signatures A4 and A5 which were available on letter dated 03.11.1979 written by the respondent no.1 to the Asstt. Settlement Commissioner and on writing in gurmukhi were sent to the CFSL for comparison with the questioned signatures. The documents examiner vide report dated 07.01.2002 Ex.CW1/E opined that the authorship of the questioned signatures marked Q1 to Q7 could not be connected to the writer of the admitted signatures marked A1 to A5. The findings were supported by the reasons. The trial court on the basis of that report decided in favour of the respondents.

11. Sh.Ajay Dabas, Advocate, counsel for the appellant argued that the signatures of the respondent no.1 which were available on the written statement and vakalatnama and were genuine signatures sent to the CFSL for comparison with that of the questioned signatures Q1 to Q7

but the CFSL has opined that the admitted signatures are not sufficient for comparison with the questioned signatures; the documents from which signatures A4 and A5 were taken have been proved in accordance with law and as such report Ex.CW1/E dated 07.01.2002 on the basis of admitted signatures A4 and A5 does not inspire confidence and is liable to be rejected.

12. The legal heirs of respondent no.1 have filed an application for seeking permission to lead evidence but the said permission was declined vide order dated 15.07.2004. Thereafter a review application u/O XLVII Rule 1 CPC was filed for review of order dated 15.07.2004 which was also dismissed by the trial court vide order dated 05.10.2004. The appellant has not raised appropriate objection regarding the sending of document Ex.PW1/B for documentation examination and also the subsequent sending of admitted signatures A4 and A5. Even otherwise the appellant has based his claim on the execution of agreement to sell dated 10.07.1990 Ex.PW1/B. The said agreement to sell and purchase Ex.PW1/B is perused. The perusal of this document reveals that the Ex.PW1/B was witnessed by Surinder Malhotra and Prahaladnama. The appellant has not called any attesting witness to prove the execution of document Ex.PW1/B and to prove that the Ex.PW1/B was executed by the respondent no.1 in favour of the appellant after receipt of Rs.8,000/-for a sale consideration of Rs.1,75,000/-. The said witnesses were material. The perusal of record further reveals that the attesting witness Prahaladnama was available who submitted one affidavit which is Ex.PW/D1. The appellant has also cross examined the CW1 at length but nothing has come out from the cross examination of CW1 which can raise any doubt about the report Ex.CW1/E. The CW1 during cross examination stated that he has examined all the admitted signatures A1 to A5 and his report is based after comparing the questioned signatures with admitted signatures.

13. The impugned judgment perused. The trial court has carefully examined all the aspects of the genuineness of the document dated 10.07.1990 Ex.PW1/B and after careful analysis of the facts and evidence available on record came to the conclusion that agreement to sell dated 10.07.1990 Ex.PW1/B is a fabricated document. It was for the appellant to prove the genuineness of the document agreement to

sell dated 10.07.1990 Ex.PW1/B in order to establish his claim. The said burden is not discharged by the appellant by leading appropriate evidence. The impugned judgment passed by the trial court is reasoned and the trial court has analysed the material and evidence on record carefully. There is no reason to interfere in the impugned judgment passed by the trial court. The appellant has failed to prove the genuineness of the agreement to sell dated 10.07.1990 Ex.PW1/B. The appeal is devoid of any merit. Hence, dismissed. No order as to costs. A copy of this order be sent to the trial court with TCR for information. File be consigned to the record room.”

12 This is a second appeal court. It cannot interfere with the findings of fact unless they are perverse. The findings returned in no manner be termed as ‘perverse’. The plaintiff had to establish his case. He had based his case on the agreement to sell dated 10.07.1990 which has been specifically denied by the defendants on the ground that the said document was forged. No other documentary evidence had been led by the plaintiff to substantiate this submission; CFSL report dated 28.02.2001 had not advanced his case. The second report dated 07.01.2002 had gone against the plaintiff. The agreement to sell Ex. PW-1/B dated 10.07.1990 was held not to have been signed by defendant No. 1; his admitted signatures did not match the questioned document. There is no about that the opinion of the expert is only a relevant piece of evidence and has to be examined and scrutinized along with other evidence which is led by the respective parties.

13 Both the facts finding courts had returned a positive finding against the plaintiff dismissing his suit.

14 The substantial questions of law have been embodied on page 17 of the body of the appeal. They read as under:-

“1. Whether reliance can be placed on a report of the hand writing expert who had compared one set of disputed signatures with the other set of disputed signatures?

2. Whether the learned trial court was justified in sending the agreement to sell, for comparison with documents submitted by respondent No. 2 which were signatures disputed by the appellant.

3 Whether the learned trial court and the first appellate court were justified in ignoring the testimony of the appellant qua the execution of the agreement to sell and identification of the signatures on the agreement to sell?

4. Whether the learned trial court and the first appellate court were justified in drawing adverse inference against the appellant for not having examined the said witnesses to the agreement to sell when in fact it is respondent No. 1 who had filed the affidavit of the said witness in the witness box and adverse inference should have been drawn against respondent No. 2.”

15 They are all facts based and bordering upon the opinion of the handwriting expert which was a fact finding issue and had been delved into in detail by the two courts below. No such substantial question of law has arisen. There is no merit in this appeal.

16 Appeal as also pending application are dismissed in limine.

INDERMEET KAUR, J.

FEBRUARY 18, 2011

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