

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

+ **R.F.A. (OS) 35/2009 and CMs No. 5373/09 & 11767/09**

Reserved on: 24th August, 2009

Pronounced on: 1st September, 2009

ASHA SHARMA & ORS Petitioner

! Through: Mr Rajat Joseph, Advocate.

Versus

\$ SANIMIYA VANIJIYA P. LTD. & ORS. Respondent

^ Through: Dr. A.M. Singhvi, Sr. Advocate
with Mr. C. Mukund, Mr. Ashok Jain and
Mr. N. Niohram Sharma, Advocates
Mr. A. Muakund, Advocate for R-9.

CORAM:

HON'BLE MR. JUSTICE VIKRAMAJIT SEN

HON'BLE MR. JUSTICE V.K. JAIN

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

V.K.Jain, J.

CM 5373/2009 & 11767/2009

1. This Appeal is directed against the Judgment dated 20.8.2008 in CS(OS) 1883/2006, whereby the plaint was rejected,

under Order VII Rule 11(d) of Code of Civil Procedure was rejected. The Appeal was initially filed on 26.9.2008 but was returned with the following objections:

- (1) Caveat Report is to be obtained or at the time of each subsequent filing (1)
- (2) Scrutiny charges of Rs. 100/- is to be deposited. (2)
- (3) Opening sheet is to be filed and be placed just before the appeal.(4)
- (4) Court Fee is to be affixed according to valuation.(7)
- (5) It should be stated whether the annexures filed are part of trial court record.(9)
- (6) Certified copy of Judgment & decree is to be filed and stamped accordingly.(10)
- (7) Petition/applications/ annexures / order / power of attorney should be stamped.(109)
- (8) Fair typed copy of dim annexure and hand written annexure to be filed(115)
- (9) List of dates to be filed.
- (10) Application for delay in refilling be filed.

2. The appeal was re-filed on 20th October, 2008 but was returned as objections had not been removed. It was again filed on 30th October, 2008 but was returned on the same ground.

Thereafter it was filed on 19th December, 2008 but was returned as objections had not been removed. It was then filed on 13th April, 2009 and was returned yet again as objections had not been removed. It was thereafter filed on 15th April, 2009 and was returned for the same reasons. Ultimately, it was filed on 16.4.2009. CM 5373/2009 has been filed for condonation of delay in re-filing the Appeal. Since no Court fee stamp was affixed on this appeal when it was filed, CM No. 11767/2009 under Section 149 Code of Civil Procedure for condonation of delay in making deficiency in the Court fee has also been filed by the Appellants.

3. Section 149 of the Code of Civil Procedure provides that where the whole or any part of any fee prescribed for any document relating to Court fee has not been paid, the Court may in its discretion, at any stage, allow payment of the whole or in part of such Court fee, and upon such payment, the document, in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.

4. Section 4 of the Court Fee Act prohibits filing or receiving of any Memorandum of Appeal, chargeable with court fee in case the court fee as indicated in the relevant schedule of the Act is paid on it.

5. Section 149 of the Code of Civil Procedure therefore mitigates the rigours of Section 4 of Court Fee Act and if sufficient cause is shown, the court may in its discretion allow a person who has filed a Memorandum of Appeal without court fee or with deficient court fee to make up the deficiency and the making good of such deficiency cures the defect in the Memorandum, to the extent it pertains to deficiency in court fee, not from the time when it is made but from the time when it was presented in court. In *Mannan Lal Vs. Chhotaka Bibi, (Dead) by LRs. B. Sharda Shankar and Ors.* 1970(1) SCC 769, the Hon'ble Supreme Court held that the provisions of Section 149 of Code of Civil Procedure should be read as a proviso to Section 4 of Court Fee Act which places an embargo on filing of any document of prescribed nature by the High Court unless requisite court fee is paid on it. This proposition of law was reiterated by the Hon'ble Supreme Court in *State of U.P. Vs. Rehmatullah* AIR 1971 SC 1374. Similar view was taken by the Hon'ble Supreme Court recently in *P.K. Palanisamy Vs. N. Aruanugham and Anr.* in Civil Appeal No.4643/2009 decided on 23.07.09. The Hon'ble Supreme Court specifically held that if the deficiency in the court fee is made good in terms of the order of the court, it must be held that the defects must be treated as remedied from the date of original institution.

6. Ordinarily, a document which is insufficiently stamped is not to be received, filed or exhibited in a court. If and when an insufficiently stamped document is filed in a court or is presented before it, it has to be decided whether it has to exercise its discretion in allowing time to the party presenting the document to make good the deficiency. If it decides that the time should not be granted, it will return the document as insufficiently stamped. If the court decides that time should be granted, it will give time to the party to make good the deficiency. If the deficiency is made good within the time fixed by the court, the document is deemed to have been filed or presented on the date it was originally filed or presented.

7. No hard and fast rule can be laid down as to the circumstances in which the discretion u/s 149 should be exercised by extension of time. Each case has to be decided upon its own facts. The use of the expression “at any stage” in Section 149 of the Code of Civil Procedure leaves no doubt that the court can allow deficiency in court fee to be made up at any stage. The power of extension of time can be exercised even after lapse of the period originally fixed by the Court (*Mahanth Ram Vs. Ganga Dass* AIR 1961 SC 882). The discretion u/s 149 applies not only where the court fee paid is not sufficient but also where no court fee has

been paid at all as was held by the Privy Council in *Faizullah Khan Vs. Mauladed Khan* AIR 1929 PC 147, and is otherwise evident from use of the words “whole or any part of any fee” in Section 149 of the Code.

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 XLI, 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, Asstt. Registrar, in charge of the 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 Rule 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.

10. In the present case, since the appeal was filed, after removing defects only on 16th April, 2009, it cannot be disputed that in view of the provisions contained in the Rules of Delhi High Court, it shall be deemed to have been instituted only on

16.4.2009 and it cannot be considered on merit unless the court condones the delay in re-filing the Appeal and also extends the time for paying the deficient court fee.

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/decree 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.

12. Coming to the grounds set out in the applications, we find that there is no explanation as to why certified copy of the judgment and decree which were mandatory documents required to be filed with Memorandum of Appeal were not filed in the first instance. A perusal of the certified copy filed by the appellants would show that it was delivered to them on 28th August, 2008. Thus, certified copy of the impugned judgment was available with the appellants when the appeal was filed. Despite that, it was not filed alongwith Memorandum of Appeal and there is absolutely no explanation as to why the certified copy of the judgment did not accompany the Memorandum of Appeal.

13. A perusal of the Memorandum of Appeal would show that no court fee at all was filed alongwith it. As is evident from the endorsement on stamp papers, the Court fee stamps were purchased only on 13.10.08. No reason at all has been given by the appellants for not purchasing court fee before the Memorandum of Appeal was initially filed on 26th September, 2008. The reason for not filing the court fee is contained in paras 3 & 4 of CM No.11767/2009, which read as under:-

3. That the Applicants are filing the instant Application as a measure of abundant caution for reason that the Counsel for Respondent Nos. 1 – 6 on the last date of hearing on 08.07.2009 raised the issue of the subject Appeal having been filed without the requisite Court Fees in the first instance. However, it is earnestly believed that there exist no reasonable grounds for those protestations by that Counsel.

4. That the Appellants first filed the accompanying Appeal against the impugned Order dated 20.8.2008 on 26.09.2008. However, at that time due to reasons inadvertent the Appeal was unaccompanied by the requisite Court Fees and the same came to be deposited subsequently.”

14. It is not correct for the appellants to say that “inadvertently the appeal was unaccompanied by requisite court fee”. As noted earlier, the court fee stamps had not at all been purchased by the date on which the Appeal was initially filed. There could be no quantum of inadvertently not filing the court fee, when it had not been even purchased by that time. This is not the case of the appellants that they did not possess sufficient means to purchase the requisite court fee or that they were in some financial difficulty which caused delay in purchase of court fee stamps. In fact, we do not know on which date the court fee was actually filed by the appellant. Since the date of filing court fee stamps has not been given in the application, the inference is that it was filed only when the appeal was finally filed on 16th April, 2009 after removal of all the defects.

15. According to the appellant, the first delay occurred for the reason that in the course of typing illegible and dim annexures and documents the clerk of the counsel for the appellant misplaced part of the annexures and only after extensive time consuming efforts were those documents found, after which typing of those documents/annexures also consumed considerable time. No affidavit of the clerk of the counsel has been filed in support of this averment. It has been alleged in CM No.5373/2009 that after

filing on 20th October, 2008, the page numbering of appeal was corrected and certain other documents had also to be typed out being illegible and, therefore, it was re-filed on 31.10.08. We fail to understand what could be the occasion for typing out more documents when this is appellant's own case that the matter was re-filed on 20th October, 2008 as illegible and dim documents were to be typed. Surely, the documents which had already been typed before re-filing on 20th October, 2008 were not required to be re-typed. This is not the case of the Appellants that even the typed documents filed by them were not acceptable to Registry and therefore had to be retyped. What is more noteworthy in this regard is that the Appellants have filed an application dated 09.04.09, (CM 5374/09) for exemption from filing clear / legible / typed copies of documents. Filing of this application totally belies the ground that the delay occurred on account of time taken in typing certain illegible documents.

16. This is appellants' own case that the illegible documents had been re-typed before the appeal was re-filed for the second time on 31st October, 2008. The court fee stamps had already been purchased by them before that date. Certified copy of the impugned judgment / decree was also available with them since prior to initial filing of the appeal. This is not the case of the

appellants that they were not in a position to remove the other defects notified by the Registry or had actually not removed those defects by the time of second re-filing on 31st October, 2008. There was absolutely no difficulty in removing the other defects viz. i) Obtaining Caveat Report, ii) depositing scrutiny charges of Rs. 100/-, iii) placing opening sheet just before the appeal, iv) stating whether the annexures filed were on trial court record, v) stamping petition/ applications/ annexures / orders / Power of Attorney, vi) filing list of dates and vii) filing application for delay in re-filing. In any case, the appellants do not say that they had some difficulty in removing any of these, otherwise, minor defects. Therefore, there is no explanation for the appellants not being in a position to file the Memorandum of Appeal free from all the difficulties notified by the Registry, when it was re-filed for the second time on 30.10.2008. If the appellants had removed these minor defects, there could have been no difficulty in filing the appeal free from the defects notified by the Registry as certified copy of the impugned judgment was also available with the appellants and the court fee stamps had also been purchased by them prior to 31.10.2008.

17. It has been alleged in para 5 of the application that when the matter was re-filed on 19th December, 2008 after a passage of

about 49 days since last filing the delay occurred as certified copies of sale-deeds registered at Kolkata, West Bengal were applied for and the same came in possession of the appellants only around 15.11.2008. A perusal of the objections raised by the registry would show that the appellant was not asked by the Registry to file certified copies of sale deeds along with the appeal. We have perused these certified copies. They have been filed along with an application under Order XLI Rule 27 of Code for Civil Procedure, for additional evidence. If the appellants wanted to file an application under Order XLI Rule 27 of CPC to produce these certified copies of sale-deeds by way of evidence, nothing prevented them from filing such an application at a later date, after they had obtained certified copies of sale deeds, but they could not have withheld filing of the appeal for this reason. In fact, the application could have been filed even without these certified copies. A bare perusal of these documents would show that the application for certified copies of these documents was filed on 4th November, 2008. The impugned judgment was passed on 20th August, 2008. There is absolutely no explanation for not applying for certified copies prior to 4.11.08. In case the appellants felt need of filing these documents they should have applied for certified copies not later than 26th September, 2008 when this appeal was filed. The registry would definitely not have refused to

accept the Memorandum of Appeal on the ground that it was not accompanied by certified copies of the sale deeds. A perusal of the reply filed by the respondents to CM No. 5373/09 would show that the copies of these sale deeds were filed by them in a trial court, even before filing of CS (OS) No. 1883/06 and copies were also supplied to the counsel for the Appellants.

18. Unfortunately, the Appeal was not free from all defects, even when it was re-filed on 19.12.2008 after certified copies of sale deeds had been received by the Appellants.

19. It has been alleged in para 5 of the application that after 15.11.08, the learned counsel for the appellant had to travel out of station to attend to urgent personal obligations. However, no particulars in this regard have been given in the application. It has not been stated where the counsel had to go, on which date he left Delhi and on which date he returned from outstation. The averments made in this regard lack particulars and are totally vague. In any case travel of counsel after 15.11.2008 could not have come in the way of filing of Appeal, free from defects, before he left Delhi as he had received certified copies of sale deeds before that date.

20. It has been alleged in para 6 of the application that during vacation, the learned counsel for the applicant was out of station

and at the same time the appellants were also to procure statements of bank accounts of deceased Satyawati Sharma. Again, we fail to appreciate how copies of bank accounts of deceased Satyawati Sharma could have delayed filing of appeal. These were not the documents required to be filed with Memorandum of Appeal. Therefore, it appears to us that this ground is not at all bona fide and has been made only in an attempt to cover the unexplained delay in re-filing the appeal. In fact, we do not find any application by the appellants for permission to summon the record of these bank accounts. We would like to add here that Bank Ledgers are not destroyed so soon and in any case there is no certificate from the bank in this regard so as to justify the time claimed to have been taken for this purpose.

21. It has also been alleged in the application that in the course of shifting of residence of the appellant in February, 2009, the main appeal copy which had been taken by the appellants to scrutinize/read came to be misplaced and was located only in the second week of March, which also contributed to the delay. This ground is not convincing at all and is absolutely flimsy, to say the least. If the appellants were to read the appeals, they would do so before its initial filing and not 5 months after filing the appeal. In

fact, the Appeal ought to have been re-filed prior to Feb. 2009, when the alleged shifting of residence took place.

22. The last ground given in the application is that the worsening economic scenario paralysed and debilitated appellant No.2 financially and, therefore, he remained unable to attend to the appeal for a considerable period during the first quarter of this year. No particulars of the alleged economic paralysis of appellant No.2 have been given in the application. We fail to appreciate how economic condition of appellant No.2 could have come in the way of refilling of appeal when the court fee had already been purchased in October, 2008, the lawyer had been engaged, certified copy of the impugned judgment was already available and the appeal had already been drafted, typed and filed way back in September, 2008.

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.

25. In *Parvati and Ors. Vs. Anand Parkash alias Nand Lal* AIR 1987 Delhi 90, this court refused to condone the delay of 9 months as the explanation given for the delay was not found to be satisfactory

In *Radhey Shyam Gupta & Ors. Vs. Kamal Oil and Allied Industries and Ors.* 2005 (82) DRJ 530, this court refused to condone the delay in re-filing as the appellant failed to justify the delay in filing the matter.

In *Gurbachan Singh V. Master Singh, etc.*, 1984(1) RCJ 619, Punjab & Haryana High Court observed that these rules having been made by the High Court to further the ends of justice, a party

cannot be given undue latitude in complying with the orders of Registry to remove the defects and to move at leisure. If latitude is given to the litigants then they might take not only months but years to comply with the orders.

26. For the reasons given in the preceding paragraphs, we find no ground at all for extending the time for payment of deficient court fee and for condoning the delay in filing the appeal.

CMs 5373/2009 and 11767/2009 are hereby dismissed.

RFA (OS) No. 35/2009

In view of dismissal of CMs No. 5373/2009 and 11767/2009, the appeal is liable to be dismissed being barred by limitation.

The appeal is dismissed accordingly.

V.K.JAIN, J.

VIKRAMAJIT SEN, J.

SEPTEMBER 1, 2009
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