

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **R.S.A. No.121 of 2012 & C.M. Nos.12524/2012, 3669/2013**

Decided on : 1st April, 2013

LATE MOHD. SABIR Appellant
Through: Mr. S.K. Bhattacharya, Advocate.

Versus

M.C.D. & ORS. Respondent

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. This is a regular second appeal under Section 100 CPC against the judgment and decree dated 5.4.2010 passed by the learned Additional District Judge along with an application being C.M. No.12524/2012 seeking condonation of 695 days' delay in filing the appeal.

2. I have heard the learned counsel for the appellant. The main contention of the learned counsel for the appellant, so far as the delay of 695 days' in filing the regular second appeal is concerned, is that it was occasioned on account of the fact that Mr. Ashok Mahajan, the learned counsel for the appellant, who was engaged to file the regular second

appeal had drafted the appeal timely but the same could not be filed as he was not well. It is also stated that subsequent thereto he had expired in July, 2011 and in the meantime, because of shifting of some cases from Tis Hazari to Saket, the file was misplaced and the same could be traced belatedly only when the daughter of the deceased counsel was permitted to join the profession by her in-laws. It is stated in the application that the daughter of the deceased counsel for the appellant wanted to complete the task taken up by her father and accordingly, the present appeal was filed belatedly with delay of 695 days'. An affidavit of daughter of previous counsel was stated to be filed to explain the delay as directed by this Court vide order dated 25.7.2012; however, the same also does not say anything more than what has been already stated in the application seeking condonation of delay.

3. I have considered the submissions. It is unfortunate that the earlier counsel engaged by the appellant had died but the fact of the matter remains that the judgment which was given by the first appellate court and which is sought to be challenged in the instant case was delivered on 5.4.2010 while as the counsel died almost after 1 ½ years in the month of

July, 2011. It is really very strange that after the counsel having fallen ill, no serious efforts were made by the appellant to retrieve and pursue the appeal as all the appeals have to be filed in a time-bound manner.

4. In the instant case, the appeal had to be filed necessarily within a period of 90 days as prescribed by the statute. Even after the unfortunate death of the counsel, a considerable amount of time seems to have been wasted either by giving excuse that the daughter of the deceased counsel had got married and her in-laws were not permitting her to practice or when she was permitted to practice, she decided to complete the jobs which were left unfinished by her father. No doubt, Ms. Shikhaa Kapoor, daughter of Mr.Ashok Mahajan (the deceased counsel) might have decided in right earnest to complete the work left by her father but one cannot ignore the fact that it has been admitted by the counsel in the application that it took her six months in obtaining information from the MCD under RTI Act and it is only after receipt of the information that she chose to file the present appeal.

5. It seems that the counsel for the appellant was pursuing the matter at her own convenience and the appellant was grossly negligent and after

assigning or handing over the brief to his counsel thought that he was not required to do anything.

6. *Prima facie* I am not satisfied with this kind of explanation which is given and this may not constitute a 'sufficient cause' for condoning the delay. However, even if a liberal view is taken to believe that this constitutes a 'sufficient cause' for condoning the delay of 695 days' and the application (C.M. No.12524/2012) is allowed, even then it is *prima facie* to be seen as to whether any substantial question of law is made out by the appellant from the pleadings of the parties and the two impugned orders.

7. In this regard, the learned counsel for the appellant has contended that the appellant/plaintiff had filed a suit for perpetual, mandatory injunction and declaration against the respondent no.3/defendant No.3 claiming himself to be the owner of property bearing No.64, Village Okhla, New Delhi. His case was that the property which was under the occupation of the respondent no.3/defendant No.3 was also a part and parcel of the aforesaid property i.e. property No.64 and since the same was trespassed by the defendant, therefore, he was entitled to retrieve the

possession. In this regard, the learned counsel had sought to place reliance on some information purported to have been obtained by him in reply to RTI query.

8. I have considered this submission. I do not feel that this being a regular second appeal, the information which has been obtained by the learned counsel for the appellant can be made as a basis for setting aside the concurrent finding of fact arrived at by the courts below which is to the effect that the appellant has not been able to establish, by any stretch of imagination or by any quantum of proof, that the property which is under the occupation of the respondent no.3/defendant No.3 was in fact not property bearing No.63-B but only property bearing No.64, Village Okhla, New Delhi.

9. I have carefully considered the submissions made by the learned counsel for the appellant and have also gone through the record. The sum and substance of the suit filed by the appellant/plaintiff against the respondent no.3/defendant No.3 was that he was the owner of property No.64 belonging to his forefathers which was inherited by him in Village Okhla. It was also alleged that the property which is under the

occupation of the defendant/respondent No.3 was a part of the property No.64 but the respondent/defendant No.3 had erroneously given the number 63-B to the said portion of the property with an intention to usurp the property. The learned trial court, after examining the evidence, had come to a definite finding that the appellant has not been able to establish that the property which is under the occupation of the respondent/defendant No.3 was, in fact, a part and parcel of the property No.64. On the contrary, the trial court has referred to the evidence produced by the parties as well as the judgment of the Additional Rent Controller which had been upheld by the Rent Control Tribunal to the effect that property Nos.64 and 63-B are two separate and independent properties. This is a finding of fact which has been returned not only by this court but also by the documents on record. The appellant having not been able to establish his ownership in respect of the parcel of the land which was under the occupation of the respondent/defendant No.3, the suit was dismissed on 13.3.2009.

10. Feeling aggrieved, the appellant preferred the first appeal bearing R.C.A. No.22/2009 which came to be dismissed by the learned

Additional District Judge on 5.4.2010. Accordingly, the present regular second appeal has been filed.

11. At the outset, it must be stated that in this regular second appeal, the appellant has to formulate a substantial question of law so as to seek intervention by this court. There is no substantial question of law involved or arising from the two impugned judgments passed by the courts below. The courts below have returned a concurrent finding to the effect that the property Nos.63-B and 64 are two different set of properties and the appellant's predecessor in interest having suffered an adverse order to the effect that the property in respect of which the suit for perpetual, mandatory injunction and declaration has been filed was not property No.64 conclusively establish that the appellant has no case to pursue against the respondent No.3. The question as to whether a particular plot of land is a portion of property no. 64 or 63-B, is a question of fact which had been adjudicated against the appellant by the two courts below and this cannot form a basis for entertaining the present regular second appeal.

12. For the reasons mentioned above, no substantial question of law is involved in the appeal. Accordingly, the present regular second appeal is dismissed.

V.K. SHALI, J.

APRIL 01, 2013
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