

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

+ **RSA No.266 OF 2007 & CM No.14449/2007**

Decided on : 31st May, 2013

VIJAY PRAKASH GUPTA Appellant
Through: Mr.Hameed Shaikh, Mr.Amar Pal and
Ms. Nisha Rawat, Advs.

Versus

J.N. PRASAD Respondent
Through : None

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

V.K. SHALI, J.

1. This is a regular second appeal filed by the appellant against the judgment dated 18.8.2007 dismissing RCA No.21/2005 titled *Sh.Vijay Prakash Gupta (deceased) Thr. LRs Vs. Sh.J.N.Prasad (deceased) Thr. LRs.*
2. Briefly stated the facts of the case are that the respondent/J.N.Prasad (since deceased) had filed a suit for permanent and mandatory injunction against the appellant(since deceased) and against the respondent nos. 6 and 7 in respect of a godown situated at the back side of shop No.3356-7, Hauz Quazi,

opposite Police Station no.2, Delhi-06 and the staircase leading towards the said godown. It was alleged in the plaint that originally M/s Ram Richpal Mal Ghasi Ram were the tenants in the suit premises. The respondent had filed an eviction petition u/S 14(1)(b) of the Delhi Rent Control Act against the said tenants. After the decision on the said matter, M/s Ram Richpal Mal Ghasi Ram filed an appeal before Rent Control Tribunal bearing No.618/1974 titled *M/s Ram Richpal Ghasi Ram Vs. Sh.Jagan Nath Prasad*. The said appeal was compromised on 25.1.1974 and according to RTI, the plaintiff nos.2 and 3(respondent nos.6 and 7 in the present case) and the appellant (since deceased) became the joint tenants with respect of the suit property. It was alleged that the respondent no.1 was entitled to build the first floor of the suit premises i.e. tenanted godown and he was also entitled to widen the staircase upto two feet without any interference from the parties. Since they were restrained, accordingly, the suit was filed.

3. The aforesaid suit was contested by the appellant and the respondent nos.6 and 7, however, after filing an application under

Order 12 Rule 6, CPC and hearing arguments, the trial court passed a decree in favour of the respondent no.1, stating that the appellant and the respondent nos. 6 and 7 shall remove their goods from the tenanted godown in order to facilitate the respondent no.1 to raise the said construction in the said godown and in case the appellant finds any illegal construction, he can approach to the authorities. This judgment and decree was passed on 22.1.2003 whereby the suit was decreed against the appellant (since deceased represented through LRs) and respondent no.6 and 7. The appellant before filing the appeal filed an application u/S 151 CPC before the Civil Judge for recalling of that order, which was also dismissed. Thereafter, the appeal was filed after expiry of more than 2 years on 29.4.2005 along with an application Section 14 of the Limitation Act. It was alleged in the application that the judgment and the decree dated 22.1.2003 was passed and the period of limitation expired on 21.2.2003. But as a matter of fact, on 22.1.2003 when arguments were heard in the pre lunch session, the matter was reserved for orders and the appellant was asked to come on 21.1.2003. It was alleged that on 21.1.2003, the case was listed

in the daily cause-list at serial No.30. All cases were typed except serial no.30, wherein the particulars were hand written. It was also alleged that the appellant contacted the Reader, who told him the next date of hearing as 5.3.2003. The appellant is stated to have been informed about the next date of hearing to his counsel after which on account of illness, he was admitted to hospital on 23.1.2003 and remained there till 1.2.2003. He requested his counsel to inspect the file and prepare the case for 5.3.03. On inspection, it was learnt that the decree had been passed on 22.1.2003. It was stated that on inspection, it was revealed that on 22.1.2003, there was an impression of rubber stamp on the order sheet and the date was written wrongly as 22.1.2003 which was later on scored off. It was stated that the appellant was accordingly constrained to file an application u/S 151 CPC for recalling of the order dated 22.1.2003 on the basis of which the court originally stayed the judgment and decree but ultimately the application was dismissed on 16.4.2005, whereupon the appellant was constrained to file the present appeal on 29.4.2005 and thus there was a delay of more than 2 years. The appellant has contended that the

aforesaid delay had taken place as a *bona fide* mistake on the part of the appellant in pursuing the matter before the trial court and since this has been sufficiently explained by the appellant, the said delay may be condoned and the judgment and decree be set aside.

4. The first appellate Court heard arguments and dismissed the plea by passing a detailed and reasoned order. A reference was made wherein on 22.1.2003, it was noticed that the matter was called out as many as four times. Since the appellant did not appear, the court was left with no other option but to pass the judgment on the basis of the application under Order 12 Rule 6 CPC by passing a decree in favour of the respondent.
5. It was accordingly observed by the trial court that the plea which was taken by the appellant that he was told about the next date of hearing i.e. 5.3.2003 by the Reader of the Court, does not seem to be correct. It has also been observed by the trial court that the appellant was fully aware that the judgment and the decree was passed and he ought to have filed an appeal against the said order as has been done by him on 29.4.2005 while as, he chose to file an application under Section 151 CPC for recalling of that order. It

has been held by the trial court that Section 14 of the Limitation Act would be applicable when a party is pursuing his case in a forum which on account of lack of jurisdiction is not competent to give the relief or entitled to entertain the petition. While as in the instant case, the appellant knew that the impugned order was assailable by way of an appeal yet chose to file an application under section 151 CPC. Therefore, it was observed by the trial court that section 14 of the limitation Act is not applicable and accordingly, the trial court came to the conclusion that after referring to various case laws that as the appellant has not been able to show any 'sufficient cause' for belated filing of the appeal and there the appeal is not maintainable.

6. Still feeling dissatisfied, the appellant filed the present regular second appeal.
7. The main contention of the learned counsel for the appellant is that the trial court has erroneously dismissed the appeal by not condoning the delay, considering the merits of the appellant. It has been stated that there is a rubber stamp in the order sheet which shows that there was a mistake on the part of the trial court in

giving a date which has been later on scored off. It was stated by the learned counsel that the act of the Court is wrong and the same can be rectified by entertaining the regular second appeal as it involves substantial question of law.

8. The learned counsel in support of his contention has placed reliance in case titled *Central Bank of India Vs. Vrajlal Kapurchand Gandhi & Anr.* AIR 2003 SC 3028, wherein it has been observed as under:-

“11. The rival contentions need careful consideration. There can be quarrel with the proposition as submitted by Mr.Nariman that if an order records something, a party cannot be permitted to plead to the contrary specially in the matters as to whether there was any concession regarding a point or whether it was given at the time of hearing.

12. The only course open to a party taking the stand that order does not reflect actual position is to move the High Court in line with what has been said in State of Maharashtra v. Ramdas Shrinivas Nayak and another (1982 (2) SCC 463). In recent decisions i.e. Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. (2002 AIR SCW 4939) and Room Kumar v. Mohan Thedant (2003 (3) Scale 611) the view in the said case was reiterated. Statements of fact as to what transpired at the hearing recorded in the judgment of the Court, are conclusive of the facts so stated and no one can

contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter much necessarily end there. It is not open to a party to contend before this Court to the contrary. This Court cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy and Judicial decorum do not permit it. Matters of judicial record in that sense are unquestionable. However, the Court can pass appropriate orders if a party moves it contending that the order has not correctly reflected happenings in Court.”

9. As against this, the learned counsel for the respondent has refuted the contention of the learned counsel for the appellant and has stated that no substantial question of law arises in the present regular second appeal and therefore, it cannot be considered.
10. I have carefully considered the submissions made by the learned counsel for the appellant and gone through the judgment cited by him.
11. At the outset, it must be said that so far as the judgment cited by the appellant is concerned, that is not applicable to the facts of the

present case. Parallel can be drawn between the facts of the reported case with the facts of the present case.

12. In the instant case, admittedly there is a mistake committed by the Court Officer in putting a rubber stamp on the order sheet which has been scored off later. It has been noticed that it was scored off at the instance of the Presiding Officer who has put his initials. The appellant has given a plea that on 20.1.2003, the arguments were heard in pre lunch session and the matter was reserved for orders and he was asked to come on 21.1.2003 for the purpose of orders. On 23.1.2003, the appellant has stated that he was informed about the next date of hearing i.e. 05.3.2003 while as the record shows that the matter was called out four times and each time, the appellant was not present, therefore, this Court was left with no other option but to pass a judgment and decree.
13. The trial court has rightly disbelieved the version of the appellant and stated that it does not constitute 'sufficient cause'.
14. So far as the applicability of Section 14 of the Limitation Act is concerned that would be of no avail to the appellant because the said section is applicable to a contingency where a party pursues

the matter in a forum which on account of lack of jurisdiction is not competent to give the relief.

15. The appellate court has in the instant case, specifically noted that the judgment and decree having been passed by the trial court, the appellant was aware that such a judgment and decree is assailable before the appellate Court and once the appellant was aware that the judgment and decree was assailable before the appellate court, he ought to have chosen to file the appeal rather than filing an application under section 151 CPC for recalling the order. By wasting time on filing an application under section 151 CPC, it could not be said that this was being done by the appellant *bona fide*. In my considered opinion and as has been rightly observed by the trial court, this cannot be termed to be *bona fide* exercise of judgment by the appellant in pursuing the remedy in a forum on account of lack of jurisdiction could not give relief within the definition of Section 14 of the Limitation Act.
16. I accordingly feel that there is no illegality and impropriety in the order passed by the first appellate court refusing to condone the delay inasmuch as no substantial question of law is arising from the

present regular second appeal and accordingly, the same is dismissed.

V.K. SHALI, J.

31st MAY, 2013
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