

Court No. - 4

Case :- SECOND APPEAL DEFECTIVE No. - 40 of 2017

Appellant :- Ram Naresh

Respondent :- Chaturbhuj

Counsel for Appellant :- Karuna Shanker Rastogi, Avadhesh Kumar, Jagdish Prasad Maurya

Counsel for Respondent :- Sushil Kumar Rastogi

Hon'ble Rajnish Kumar, J.

1. Heard Shri Avadhesh Kumar, learned counsel for the appellant and Shri Sushil Kumar Rastogi, learned counsel for the respondent.
2. This delayed second appeal has been filed challenging the judgment and decree dated 30.07.2012 passed by Civil Judge (Jr. Division) Mohammadi, Kheri in Regular Suit No.54 of 2009 (Chaturbhuj Vs. Ram Naresh) and Judgment and decree dated 24.08.2016 passed by Additional District Judge, Mohammadi (out line court) Kheri in Civil Appeal No.51 of 2012.
3. Learned counsel for the appellant submits that there is delay of only one month nineteen days in filing of the appeal and the appellant has sufficiently explained the same in the affidavit filed in support of the application for condonation of delay. The appeal could not be filed earlier on account of illness of the wife of the appellant. The medical certificate of the wife have been placed on the record. He further submits that the suit filed by the respondent could not have been decreed because he has failed to prove his possession on the half share. The appeal has also wrongly been dismissed. Thus, the submission is that the delay in filling the appeal may be condoned and the appeal may be admitted and decided on merit having substantial questions

of law.

4. Per contra, learned counsel for the respondent submits that the affidavit filed in support of the application for condonation of delay is self contradictory and the certificates of illness of the wife of the appellant are also not admissible because she was not ill during the period as claimed by the appellant. Even otherwise when the son of the appellant who was doing the Pairvi of the case, was hale and hearty, the ground taken by the appellant for condonation of delay is not sustainable. He further submits that no substantial questions of law arises in this appeal because the suit for partition and mandatory injunction was filed by the respondent and during pendency of suit the appellant had raised a wall obstructing the way of use of the necessities by the plaintiffs-respondent, on which an issue was framed and the same was proved, therefore the same has only been directed to be removed and the suit has been dismissed for rest of the prayers. He further submits that the Appellate Court also has rightly dismissed the appeal. He also submits that the judgment and decree passed by the trial court and the appellate court have been executed and the wall has been removed.

5. Having considered the submissions of learned counsel for the parties, I have perused the records.

6. The office has reported the delay of one month and nineteen days in filing this second appeal. The ground for delay in filing the appeal has been given mainly in paragraph 4, 5 and 6 which are extracted here-in-below:-

"4. That wife of appellant Smt. Vishwa Devi who is also an old lady fallen ill in 01.11.2016 and became fit on 30.11.2016. Thereafter she again fallen ill on 03.12.2016 and could recover on 15.01.2017. Copies of medical certificate are being filed here with as Annexure No.1, 2 & 3 to this affidavit.

5. *That on 03.01.2017 appellant. through his son Arun Kumar Trivedi approached his counsel who handed over the file instructing him to prepare the second appeal who directed him to bring the certified copy of judgment passed by the trial court which was immediately applied on 04.01.2017 and has been provided to appellant on 10.01.2017.*

6. *That the deponent could again approached counsel along with certified copy of judgment without any further delay on 16.01.2017."*

7. It has been stated in paragraph 4 that the wife of the appellant had fallen ill on 01.11.2016, who remained ill up to 15.01.2017, therefore the submission is that he could not approach to the counsel during the said period for filing appeal, whereas in the very next paragraph, in paragraph 5 it has been stated that on 03.01.2017, the appellant through his son Arun Kumar Trivedi had approached to the counsel and handed over the file instructing him to prepare the second appeal, therefore the affidavit is self contradictory.

8. It is also noticed that the appellant had shown the illness of her wife w.e.f. 01.11.2016 up to 15.01.2017 but three medical certificates of one and the same doctor have been placed on record showing the continuous illness of the wife of the appellant. The first certificate is dated 30.11.2016, however the date has been mentioned as 30, Nov/2016, which is for the period w.e.f. 01 Nov 2016 up to 30 Nov 2016 and the ailment has been shown jaundice. The certificate has been issued on 30.11.2016 disclosing the rest has been advised for the period w.e.f. 01.11.2016 to 30.11.2016 but as to whether she was fit to resume her duty or not and from which date has not been disclosed. The second certificate is dated 31.12.2016 showing the period of treatment since 0 Dec. 2016 to 31 Dec. 2016 and it also shows the ailment jaundice. This certificate also does not

disclosed the date on which she was fit. The third certificate is dated 16 Jan 2017 showing the period of ailment jaundice w.e.f. 01 Jan 2017 to 15 Jan 2017. In this certificate the date of fitness to resume the duty has been shown 15.01. 2017. This Court failed to comprehend as to when one and the same person was under treatment of a doctor continuously w.e.f. 01.11.2016 up to 15.01.2017 as to why he would issue the three medical certificates, when the patient had not recovered and fit. On a query being put to the learned counsel for the appellant, he also failed to give any explanation as to why three certificates have been issued and about the discrepancies shown in the certificate.

9. In view of above, it appears that since the appeal could not be filed in time, therefore a concocted story of ailment of the wife of the appellant has been prepared, for which the aforesaid three certificates have been got prepared. Even otherwise learned counsel for the respondents has pointed out that the wife of the appellant was not ill during the said period. The appellant and the respondent are the real brothers and residing in one and the same house on their portion, therefore in view of the aforesaid facts and circumstances and the fact that no prescriptions and documents of treatment have been brought on record, his contention can also not be outrightly repelled. Even otherwise, in view of his contradictory statement made in paragraph 4 and 5 of the affidavit, the reason for delay is not sufficient to condone the delay.

10. So far as the merit of the case is concerned, the suit for partition and mandatory injunction was filed by the respondent claiming right and title over half portion of the land in dispute, which could not be proved. However since during pendency of the suit, a wall was constructed by the appellant-defendant obstructing the way of necessities of the appellant-respondent,

therefore an issue was framed in this regard and the same was proved, therefore the suit has been decreed only to the extent that the appellant-respondent has been directed to remove the wall and the findings recorded in this regard could not be contradicted, thus the appeal has also been dismissed. This court is of the view that the judgment and orders passed by the trial court and first appellate court does not suffer from any illegality or error and no substantial question of law arises in this appeal.

11. In view of above, the appeal is liable to be dismissed not only on the ground of delay being barred by limitation but on merit also.

12. The appeal is, accordingly, **dismissed** on the ground of limitation rejecting the C.M. Application No.8516 of 2017 for condonation of delay as well as on merit having no substantial question of law arisen in the second appeal.

(Rajnish Kumar, J.)

Order Date :- 5.3.2024

Haseen U.