

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.4690 of 2011 (O&M)

Date of Decision: September 11, 2015

Gauri Shankar

...Appellant

Versus

Kishan Chand & others

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr.Sanjay Vij, Advocate,
for the appellant.

Mr.Sachin Mittal, Advocate,
for respondent No.1.

AMIT RAWAL, J. (Oral)

The challenge in the present Regular Second Appeal is to the impugned judgment and decree dated 30.8.2011 of the Lower Appellate Court, whereby the appeal filed by the appellant-defendant against the judgment and decree dated 30.7.2009 passed by the trial Court has been dismissed being barred by law of limitation. In essence, it was barred by 585 days.

Mr.Sanjay Vij, learned counsel appearing on behalf of the appellant-defendant submits that when the case was listed for defendants' evidence, the Advocate representing the defendants, i.e., father and son did not put in appearance and the defendants were proceeded *ex-parte* and thereafter the judgment and decree dated 30.7.2009 was passed. The

Advocate engaged by the defendants did not inform them about the non-appearance, much less, the appellant did not acquire the knowledge of *ex-parte* judgment and decree. He further submits that the knowledge about the *ex-parte* judgment and decree was acquired when the people made a *reccee* of the area with regard to the property in question and in this process, delay of 585 days has occurred. He further submits that no prejudice would be caused to the respondent-plaintiff in case the appeal is heard on merits. He further submits that the following substantial questions of law arise in the present appeal for determination by the Court:-

- 1) Whether there was a sufficient cause for non-appearance of the appellant-defendant in a suit filed by the respondent-plaintiff for claiming declaration and injunction in respect of the suit property?
- 2) Whether the appellant-defendant can be made to suffer for the lapse on the part of the counsel in view of the law laid down by the Hon'ble Supreme Court in **AIR 1981 SC 1400?**
- 3) Whether the Court was enjoined upon an obligation to issue notice to the appellant-defendant when the Advocate representing the appellant-defendant did not put in appearance?

Mr.Sachin Mittal, learned counsel appearing on behalf of the respondent-plaintiff submits that no explanation, much less, reasonable explanation is forthcoming in the application filed for seeking condonation of delay, though the application was decided summarily on the basis of the affidavit, but the Lower Appellate Court found that there was an intentional delay on the part of the appellant-defendant in not choosing to even seek setting-aside the *ex-parte* proceedings. He further submits that there is no illegality and perversity in the impugned judgment and decree, much less,

no substantial question of law arises for determination.

I have heard the learned counsel for the parties and appraised the paper book.

It is a matter of record that the appellant-defendant has been proceeded *ex-parte* during the pendency of the suit when the case was listed for defendants' evidence. Once the counsel for the appellant-defendant did not appear, it was incumbent upon the Court to call upon him as to whether he had any instructions or otherwise and after recording the statement of the counsel, as per the ratio decidendi culled out in **Rafiz & another Versus Munshi Lal & another,** AIR 1981 (SC) 1400, the Lower Court ought to have sent a notice to the appellant-defendant at the address given in the memo of parties and thereafter ought to have resorted to the procedure under the Civil Procedure Code. Parties should not be made to suffer for the lapse on the part of the counsel as has been consistently held by this Court in AIR 1981 SC 1400 (Supra).

The Hon'ble Supreme Court in **Esha Bhattacharjee Versus Managing Committee of Raghunathpur Nafar Academy and others,** (2013) 12 Supreme Court Cases 649, culled out the following principles for entertaining the application seeking condonation of delay:-

“i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

ii) The terms “sufficient cause” should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact- situation.

iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.

viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

xii) The entire gamut of facts are to be carefully scrutinized

and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.”

The case in hand squarely falls within the aforementioned principles and, therefore, I am of the view that no harm would be caused to the respondent-plaintiff in case the appeal filed against the *ex-parte* judgment and decree dated 30.7.2009 is heard on merits.

In view of what has been observed above, the substantial questions of law, noticed above, are answered in favour of the appellant-defendant and against the respondent-plaintiff. The impugned judgment and decree is set-aside.

The matter is remitted back to the Lower Appellate Court to decide Civil Appeal No.11 of 2010 afresh on merits in accordance with law.

It is expected that the Lower Appellate Court shall made an endeavour to decide the appeal as expeditiously as possible, preferably within a period of six months.

The parties, through their counsel, are directed to appear before the District Judge, Gurgaon, on 1.10.2015 who shall, either decide the appeal on his own or assign the same to the competent Court.

The appeal is accordingly allowed.

September 11, 2015
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(AMIT RAWAL)
JUDGE