

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

+ **R.S.A. No.85/2007 & C.M. Nos.19141/2012, 19142/2012**

Decided on : 18th March, 2015

ROOP NARAIN SHARMA Appellant
Through: Mr. Sandeep Sharma, Advocate.

Versus

MANOJ KUMAR Respondent
Through: Mr. Sandeep Khatri, Advocate.

WITH

+ **R.S.A. No.93/2007 & C.M. Nos.19787/2012, 19788/2012,
13951/2012, 13952/2015**

ROOP NARAIN SHARMA Appellant
Through: Mr. Sandeep Sharma, Advocate.

Versus

ASHOK KUMAR & ORS. Respondents
Through: Mr. Sandeep Khatri, Advocate.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. These are regular second appeals which were filed way back on 19.3.2007. Although application for restoration is listed today along with application seeking condonation of delay in filing the restoration

application but till date no substantial question of law has been framed despite sufficient number of opportunities having been given to the appellant in this regard.

2. For the sake of convenience, the facts of R.S.A. No.85/2007 are being referred to as both the appeals are filed against the same impugned order. A perusal of the order sheet shows that on 24.1.2011, the court had renotified the matter for formulation of substantial question of law, if any and adjourned it to 18.4.2011 as by that time more than four years had elapsed from the date of filing. On the next date, i.e., on 18.4.2011, nobody appeared on behalf of the appellant and the matter was again renotified for 20.7.2011 on which date as well, since there was no appearance on behalf of the appellant, the appeal had been dismissed for non-prosecution. It gives an impression that the appellant wanted to keep the appeals pending without formulation of any substantial question of law.

3. On 8.8.2011, an application being C.M. No.14723/2011 was filed seeking restoration of the matter. On the next date, that is, on 29.11.2011, the respondent had drawn the attention of the court to an earlier order dated 19.8.2009 whereby the appellant had been visited with

a cost of Rs.20,000/- which was also not paid and, therefore, the application for restoration was opposed as it was pointed out to the court that Section 35-A CPC mandates that the case should not proceed unless and until the cost is paid. The court was pleased to pass a peremptory order directing that cost of Rs.20,000/- be paid within a week failing which the appeal shall stand dismissed for non-prosecution.

4. On 12.12.2011, the application for restoration of the appeal was also dismissed in default for non-prosecution and non-compliance of the order as the cost had not been deposited. A fresh application was filed on 9.11.2012 bearing C.M. No.19141/2012 seeking restoration of the appeal along with an application seeking condonation of 263 days delay which is still under consideration.

5. It has been stated by the learned counsel that the cost has already been deposited and, therefore, the appeal may be restored. The ground which had resulted in delay are that the appellant is an old person and his son, Ranish Sharma, who was working in the Ministry of Urban Development was stated to have expired because of which his condition was stated to have become miserable. He also claims that he had taken the file back from his earlier counsel and approached Legal Aid Services

Authority of the High Court for the purpose of obtaining legal aid. It has been stated that on account of having taken the file back in order to get the legal aid and make alternative arrangements for his representation, it took some time and the intention was not to delay the proceedings. This resulted in delay of 263 days in filing the application.

6. Section 5 of the Limitation Act clearly lays down that before the delay is condoned, it must be shown that there is a 'sufficient cause' for the same and the 'sufficient cause' which has been interpreted by the Apex Court time and again is a cause which is beyond the human control. In the instant case *prima facie* I am not convinced that any cogent reason has been given by the appellant in the application which may constitute sufficient cause in the eyes of law. The appellant seems to have only tried to move the court mainly by mentioning the unfortunate demise of his son. Strictly and legally speaking the delay cannot be condoned but even if a lenient view is taken and the said delay is condoned, the conduct as is reflected in the order sheet clearly shows that the appellant has not been taking any interest in getting the appeal argued so as to show that there is any substantial question of law involved in the matter. This is reflected from the fact that the appeal has been filed in the year 2007 and

we are in the year 2015, that is, nearly eight years from the date of filing of the appeal, the matter is still at the threshold. It is such like litigants who have clogged the arteries of justice which has resulted in piling up of cases in courts and consequently, not only the number of pending cases swells but even the day to day hearing of cases which deserve attention of the court gets diminished. Since the counsel is present on behalf of the appellant, I am intending hear the appellant with regard to formulation of substantial question of law.

7. Before dealing with the submissions made by Mr. Sharma, the learned counsel for the appellant, it may be pertinent here to give brief background of the facts of the case.

8. The appellant filed a suit for permanent injunction against the respondent praying therein that the respondent be restrained from closing the gate and the window at the back of his property on the ground that the same opens towards the *gali* which was a public *gali*.

9. The respondent contested the claim of the appellant and took the plea that the *gali* at the back of the house was a private *gali* and therefore, the appellant could not open the gate and the window.

10 Simultaneously, the respondent also filed a separate suit for mandatory injunction against the present appellant praying therein that the appellant himself be directed to close the gate and the window failing which he may be permitted to raise a wall so that his gate and window is closed. Both these suits were consolidated and tried together. Common issues were framed and both the cases were clubbed together and common evidence was recorded.

11. The learned trial court vide judgment and decree dated 30.4.1999, dismissed the suit of the appellant holding that he had failed to prove that the *gali* at the back side was a private *gali* and it was also observed that the door and the window which were opened by him at the back of his house were opened in the year 1979 while as the respondent was living there much prior to him. In the suit for mandatory injunction, which was filed by the respondent, the relief was allowed and a mandatory injunction was issued against the present appellant for closing of the door and the window.

12. The appellant feeling aggrieved against the aforesaid judgment and the decree, preferred two first appeals against the judgments on account of the fact that the two suits; one filed by the appellant and the other filed

by the respondent, were decided by a common order. Vide order dated 30.11.2006, the learned appellate court dismissed the appeals and upheld the judgment and the decree of the learned Civil Judge. Still not feeling satisfied, the present appeals have been filed by the appellant.

13. Mr. Sandeep Sharma, the learned counsel for the appellant has tried to urge before this court that the finding or rather observation of the court that the appellant was not able to prove that the *gali* which was at the back of the premises in question was a public *gali* and consequently, the injunction was refused to him, was not correct factually. In this regard, he wanted to draw the attention of the court to the document Exhibit DW 3/1 purported to have been issued by the land owning agency to contend that this document shows that the *gali* was a public *gali*. It was also contended by him that even if it is assumed that the appellant was not able to establish that the *gali* was a public *gali* even then the respondent was also not able to establish that the *gali* was a private *gali*. Therefore, the observations passed by the learned civil judge as well as the first appellate court ought not to have been passed observing that the *gali* was a private *gali*. It was contended by Mr. Sharma that by passing such observations, the court, as a matter of fact, has passed a declaratory relief

in favour of the respondent without their being any prayer and accordingly, the learned counsel for the appellant has contended that this constitutes a substantial question of law which needs to be considered by the court. The learned counsel has also taken the court through some of the passages of the trial court judgment as well as the first appellate court's judgment.

14. I have carefully considered the submissions made by the learned counsel for the appellant and have also gone through the record. The question as to whether the *gali* was a private *gali* or a public *gali*, is essentially a question of fact and not a question of law, therefore, this aspect of the matter having been examined by the two courts concurrently against the appellant, it cannot be said today that the holding of the *gali* not being a public *gali* and being a private *gali* is a substantial question of law. Admittedly, it is not the case of the appellant that the judgment which has been referred by the learned trial court or for that matter, first appellate court, is suffering from any perversity. I, therefore, feel that the condonation of delay which has been urged by the learned counsel for the appellant is essentially a question of fact and that having been adjudicated

against the appellant by the two courts concurrently, cannot be set aside by this court in the absence of any argument of perversity.

15. Therefore, in my view, both the appeals do not involve any substantial question of law and deserve to be dismissed.

16. The appeals also deserve not to be entertained as the appellant has not been able to show any 'sufficient cause' for condoning the delay. I have examined the merits of the matter for the appeal in terms of Section 100 CPC only to allay the fears of the appellant that the appellant may not carry an impression that he is being non-suited on technical ground so that the matter is put at rest purely on account of the fact that these appeals have been hanging fire for the last more than eight years. Accordingly, both the appeals are dismissed.

V.K. SHALI, J.

MARCH 18, 2015
'AA'