

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RSA No.143/2016**

% **3rd October, 2016**

SHRI KISHORE KUMAR AND ORS. Appellants

Through: Mr. Ashish Dhingra, Advocate with Mr.
Rahul Rajan, Advocate.

versus

SMT. SHEELA DEVI AND ORS. Respondents

Through: Mr. Sumesh Gandhi, Advocate for
respondent nos.2 to 10.
Mr. S.K. Jha, Record Keeper for
respondent no.13 in person.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) is filed by the appellant/plaintiff against the Judgment of the First Appellate Court dated 28.3.2016 by which the first appellate court has dismissed the appeal as barred by time by refusing to condone the delay of 108 days in filing of the first appeal.

2. The reasons given for seeking condonation of delay are stated in para 4 of the Judgment of the First Appellate Court dated 28.3.2016 and which para 4 reads as under:-

“4. The appellant in the application under consideration has contended that the impugned decree and judgment is of date 24.07.2015, whose certified copies were applied on 11.08.2015, which were prepared on 18.08.2015. In terms thereof the appellants/plaintiffs had the time till 30.08.2015 to file the present appeal. Present appeal was filed on 10.02.2016. It is the averment of the appellant/applicant that on 18.09.2015, father of the Counsel for appellants/plaintiffs met with an accident and got severely injured; thereafter the Counsel for appellants/plaintiffs on 19.09.2015 had to rush to his home town in Patna as there was none to look after his father where two months time was taken for recovery of father of Counsel for appellants/plaintiffs. It is also averred that on returning from home town, Counsel for appellants/ plaintiffs had to shift his residence in last week of November 2015 as well as the office renovation was under process due to which the files kept in the office of Counsel for appellants/plaintiffs were shifted to newly constructed office-cum-residence of Counsel for appellants/ plaintiffs and during shifting, the file of the present matter was misplaced by the staff of Counsel for appellants/plaintiffs. Also has been laid that in second week of January, the file of present matter was located by Counsel for appellants/plaintiffs after which the Counsel for appellants/plaintiffs applied for certain relevant material documents from concerned departments and thereafter on receipt of documents, the present appeal was filed. In the application under consideration, it has been prayed that delay of 108 days in filing appeal be condoned. In fact, there is delay of 163 days in filing appeal in view of above elicited facts, since appeal was filed on 10.02.2016. Ld. Counsel for appellant/applicant has relied upon the case of *Manoharan Vs. Sivarajan & Ors., Civil Appeal No. 10581 of 2013, decided by Supreme Court of India*, on 25.11.2013, submitting that the 'sufficient cause' should be considered with pragmatism injustice oriented process approach rather than the technical detention of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of pragmatic approach in justice-oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit.”

3. I may note that delay is not a large delay running into years and years, and it is settled law that valuable rights of parties are decided by a judgment on merits and not by considering the issue of limitation very strongly. In fact, the Supreme Court in the judgment in the case of *N. Balakrishnan Vs. M. Krishnamurthy AIR 1998 SC 3222* has held that it should not be presumed that a person is interested in delay in filing a petition or an appeal unless illegal advantage can be derived therefrom. The Supreme Court has held that unless

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there is gross negligence or *malafide* delay, delay should ordinarily be condoned. Accordingly, by applying the ratio of the judgment of the Supreme Court in the case of *N. Balakrishnan (supra)* the delay is liable to be condoned. Also, the reasons given for filing of appeal with delay is lack of application by the counsel and therefore parties must not suffer for the inaction of the counsel as held by the Supreme Court in the judgment in the case of *Rafiq and Anr. Vs. Munshilal and Anr. (1981) 2 SCC 788*.

4. Learned counsel for respondent nos.2 to 10 places reliance upon a Single Bench judgment of this Court in the case of *Suresh Kumar Vs. State and Others 1981 Crl. L. J. 928* to argue that a counsel must file an affidavit in support of the application with respect to the facts in his knowledge and there was no affidavit of the counsel for the appellants in the first appellate court and therefore the delay cannot be condoned. However, I cannot agree with the argument urged on behalf of the respondent nos.2 to 10 because surely the appellants who are interested persons and are aware of facts of lack of application by their counsel could well have filed an affidavit in support of the application for condonation of delay.

5. In view of the above, this second appeal is allowed, however, the same is allowed subject to payment of costs of Rs.5,000/- to the counsel for respondent nos.2 to 10 for condoning the delay in filing the first appeal. Let parties appear before the District & Sessions Judge, Central, Tis Hazari Courts,

Delhi on 3rd November, 2016 and the District & Sessions Judge will mark the first appeal for disposal to a competent court in accordance with law. Costs be paid by the appellants on the first date of hearing before the competent court to whom the first appeal is marked for hearing.

OCTOBER 03, 2016

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VALMIKI J. MEHTA, J

