

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

C.R. No. 8765 of 2016

Date of decision:- 15.11.2017

Seth Dal Chand Memorial Trust & Management
Society Sadar Bazar & anr.

...Petitioners

Versus

Mohinder Kumar and anr.

...Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present:- Mr. Vinod Khunger, Advocate
for the petitioners.

Mr. Arihant Jain, Advocate
for the respondent-caveator.

RITU BAHRI J. (Oral)

C.M. No. 8044-CII-2017

Application is allowed as prayed for.

Accordingly, Annexure P-5 is taken on record.

C.R. No. 8765-2016

This petition under Article 227 of the Constitution of India is for setting aside order dated 03.11.2016 (Annexure P-4) passed by the learned Addl. District Judge Ferozepur condoning the delay of respondents in filing of the appeal.

Petitioners-plaintiffs (for short 'petitioners') filed a suit on 16.01.2009 for declaration that petitioner No. 1-Trust is the owner in possession of the properties mentioned in the head note of the plaint in which a higher secondary school is run by the Trust with its President i.e petitioner No. 2 with consequential relief of permanent injunction restraining the respondents from claiming any right, title or interest in the said properties.

The suit was dismissed, vide judgment and decree dated 24.09.2014 with certain observations. Against this judgment, respondent No. 1 preferred an appeal in Court of District Judge, Ferozepur which was barred by limitation of 11 days in filing of the appeal. Further no application of condonation of delay was filed by respondent No. 1 along with appeal. During the pendency of the appeal, respondent No. 1 filed an application (Annexure P-1) for of condonation of delay in filing the appeal under Section 5 of the Limitation Act on 27.08.2016 i.e after a gap of 01 year 09 months alleging therein that he contacted and inquired from one Ravinder Sharma, Advocate about the filing of the appeal and it was informed that the limitation period is 90 days. Along with appeal respondent No. 1 even did not file his affidavit to this effect to the averments made therein and has attached the affidavit dated 27.08.2016 (Annexure P-2).

Thereafter, respondent No. 1 filed an application for amendment of the application filed under Section 5 of the Limitation Act on 05.10.2016 (Annexure P-3). Vide order dated 03.11.2016, learned Addl. District Judge, Ferozepur allowed respondent No. 1 to amend the application under Section 5 and even without getting the reply to the amended application, allowed the application for condonation of delay in filing the appeal on the same day i.e 03.11.2016 (Annexure P-4) . Hence the present petition.

Learned counsel for the petitioner submits that according to the provisions of Order 41, Rule 3-A, if an appeal is presented after the expiry of period, it shall be accompanied by an application supported by an affidavit in order to satisfy the Court that there was sufficient cause for non preferring the appeal within time. In the present case, the time barred

appeal was filed without an application for condonation of delay supported by affidavit and so, the appeal preferred by respondent No. 1 was no maintainable.

Learned counsel for the petitioner has relied upon a judgment of Hon'ble the Supreme Court of India in a case of ***H. Dohil Constructions P Ltd vs. Nahar Exports Ltd and another, 2015(1) SCC (Civil) 646*** wherein the appellants preferred SLP aggrieved against the order of the High Court condoning the delay of 9 days in filing of the appeal and 1727 days in re-filing of the appeal, subject to payment of cost of Rs.50,000/-. The SLP was allowed and the order of the High Court was set aside.

This judgment is of no help to the petitioners in the present case, as in that case, the appellants have explained as to how they had to spend a huge amount to upkeep the property by approaching the authorities of the DMC, the enormous amount spent to the tune of Rs.28,00,000/- by way of house tax from the year 2004 up to this date and various other improvements made in the property during the period wherein the delay in the matter of filing of the appeals and re-filing was made by the respondent.

Reference at this stage can be made to para 11 of ***Nahar's case (supra)*** which reads as under:-

11. *Though in the first blush, the said submission appears to be plausible, that very submission was repelled by this Court in Pradeep Kumar (supra). While considering that very submission, this Court has held as under in paragraphs 10 and 11:*

"10. What is the consequence if such an appeal is not accompanied by an application mentioned in sub-rule

(1) of Rule 3-A? It must be noted that the Code indicates

in the immediately preceding Rule that the consequence of not complying with the requirements in Rule 1 would include rejection of the memorandum of appeal. Even so, another option is given to the court by the said Rule and that is to return the memorandum of appeal to the Appellant for amending it within a specified time or then and there. It is to be noted that there is no such rule prescribing for rejection of memorandum of appeal in a case where the appeal is not accompanied by an application for condoning the delay. If the memorandum of appeal is filed in such appeal without an accompanying application to condone delay the consequence cannot be fatal. The court can regard in such a case that there was no valid presentation of the appeal. In turn, it means that if the Appellant subsequently files an application to condone the delay before the appeal is rejected the same should be taken up along with the already filed memorandum of appeal. Only then the court can treat the appeal as lawfully presented. There is nothing wrong if the court returns the memorandum of appeal (which was not accompanied by an application explaining the delay) as defective. Such defect can be cured by the party concerned and present the appeal without further delay.

11. No doubt sub-rule (1) of Rule 3-A has used the word "shall". It was contended that employment of the word "shall" would clearly indicate that the requirement is peremptory in tone. But such peremptoriness does not

foreclose a chance for the Appellant to rectify the mistake, either on his own or being pointed out by the court. The word "shall" in the context need be interpreted as an obligation cast on the Appellant. Why should a more restrictive interpretation be placed on the sub-rule? The Rule cannot be interpreted very harshly and make the non-compliance punitive to an Appellant. It can happen that due to some mistake or lapse an Appellant may omit to file the application (explaining the delay) along with the appeal."

The ratio of the above said judgment is that if an appeal is returned on the ground that it was not accompanied by an application explaining the delay, then such a defect can be cured by the authority concerned. The non filing of the application can be due to some mistake or lapse and thus the rule is not to be interpreted very harshly.

Applying the ratio of the above said judgment, there is no infirmity or illegality in the impugned order

Accordingly, the present petition is being disposed of and direction is given to the trial Court to conclude the proceedings in the appeal, within a period of six months from the date of receipt of certified copy of this order.

15.11.2017

G Arora

(**RITU BAHRI**)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
No