



2024 : DHC : 2186



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

+ **RSA 127/2022**

PRIYA ALIAS POOJA Appellant

Through: **Mr. B.S. Randhawa, Adv.**

versus

HARI CHAND AND ORS Respondents

Through: **Mr. Aakash Naval & Ms. Gulzam Mirza, Advs. for R1 & R2.**

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

13.03.2024

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1. The order/judgment under challenge in this second appeal, preferred under Section 100 of the Code of Civil Procedure, 1908 (CPC) was passed by learned Additional District Judge (ADJ) in RCA case No.137/2019 (*Priya @ Pooja vs. Hari Chand & Ors.*)

2. The proceedings emanate from Civil Suit 11516/2016 which was instituted by the respondents Hari Chand and Santosh Kumari against Jatin and the present appellant Priya. Priya, it may be noted, is the wife of Jatin. As such husband and wife were the defendants in the suit which was instituted before the learned Senior Civil Judge (SCJ).

3. Respondent 1, Hari Chand claimed to be the absolute owner of property/flat No. 68, A-3, Manav Apartment, Paschim Vihar, New

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KUMAR RSA 127/2022
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2024 : DHC : 2186



Delhi-110063 (hereinafter referred to as “the suit property”). Jatin is his son and the present appellant Priya is his daughter-in-law.

4. The respondents contended that they had permitted Priya and her husband Jatin to stay in the suit property as gratuitous licensees. When conditions between them became acrimonious, the respondents claimed to have terminated the licence of Priya and Jatin and call upon them to vacate the suit property. On their demurring from doing so, the respondents instituted CS 11516/2016 against Priya and her husband Jatin.

5. The learned SCJ decreed the suit in favour of the respondents and against Priya and her husband Jatin.

6. Priya chose to challenge the said decision by way of RCA 137/2019 (*Priya @ Pooja v. Hari Chand & Ors.*) which has come to be dismissed by the learned ADJ by the impugned judgment dated 28 March 2022.

7. It is not necessary to deal in detail into the merits of the matter. The impugned judgment is *ex facie* unsustainable in law as the learned ADJ has proceeded to deal with the appeal before her, which was a first appeal under Section 96 of the CPC, as though it was a second appeal under Section 100 of the CPC.

8. Mr. Aakash Naval, learned counsel for the Respondents 1 and 2, candidly acknowledges this legal position.



2024:DHC:2186



9. The error in the manner in which the learned ADJ has proceeded is apparent from paras 14 to 21 of the impugned judgment which read:

“14. After considering arguments from both sides, this court deliberates as under:

15. *At the outset, it must be kept in mind that in an appeal, the settled position of law is that the Court is not to re-appreciate the evidence on record, but to see if there is any glaring error or any substantial question of law, as held by the Supreme Court in C Doddanarayana Reddy (Dead) by LRs & Ors v. C Jayarama Reddy (Dead) by LRs & ors¹ and most recently reiterated in K N Nagarajappa & Ors. v. H Narsimha Reddy² [Civil Appeal Nos. 5033-5034 of 2009, decided on 2nd September, 2021].*

16. *The appellant-herein (defendant no.2 in the suit) contended before the Ld. Trial Court that the documents of ownership of the plaintiff-Harichand was forged and not genuine. To this assertion the Ld. Trial Court found that there was no reason for the official witness to produce a false record regarding the ownership of the suit property. It was also observed by the Ld. Trial Court that the Defendant no. 2 had not presented any alternative claim regarding the ownership of plaintiff no. 1 over the suit property. There was a categorical observation of the Ld. Trial Court which reads:*

“8.3 The defendants have failed to show that they have any independent right to reside in the suit property or use the same in any manner against wish and without consent of plaintiff no. 1. It is settled law that children (including children in law residing with parents/parents in law in the property owned by parents/parents in law) are mere licensees/permissive users and they do not have any independent right to occupy the property owned by parents / parents in law.”

17. The Hon'ble Supreme Court in **Laliteshwar Prasad Singh and others v. S.P. Srivastava (Dead) Through legal representatives³** while discussing the powers and duties of the first appellate Court in the disposal of the first appeal held thus:

¹ AIR 2020 SC 912

² (2021) 18 SCC 263

³ (2017) 2 SCC 415



13. The first appellate Court is the final court of facts. The judgment of the said appellate court must, therefore, reflect the court's application of mind and record its findings supported by reasons. It is well settled that the first appellate court shall state the points for determination, the decision thereon and the reasons for decision. However, it is equally well settled that mere omission to frame point/points for determination does not vitiate the judgment of the first appellate court provided that the first appellate court records its reasons based on evidence adduced by both the parties. (Paras 13 and 12). Further, the points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague When the appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by the trial court; expression of general agreement with reasons given by the trial court would ordinarily suffice. "

18. As per the Trial Court record the defendant No.1 before the Ld. Trial Court, though appeared before the court, did not file any Written Statement to the suit of the respondents No.1 & 2 herein. The Written Statement was filed by the appellant-herein (defendant no.2 before the Ld. Trial Court) and impugned the ownership of Sh. Hari Chand (plaintiff in the Suit). It was also the case of appellant-herein that the respondents No.1 & 2 in this appeal were in collusion before the Ld. Trial Court.

19. *The respondents No.1 & 2 had adduced oral evidence before the Ld. Trial Court as per the issues framed as well documentary evidence regarding the ownership etc. to prove their case. The witnesses produced by the respondents No.1 & 2 were cross-examination only by the counsel of the appellant-herein. In the due course of the trial, the appellant-herein also adduced oral and documentary evidence while examining the DWs before the Ld. Trial Court.*

20. *In the present case, the Ld. Trial Court had appreciated all the evidence placed before it. The Ld. Trial Court had granted relief to the plaintive in the suit on the basis of the oral and documentary evidence. There is no reason for this court to intervene in the judgment impugned-herein.*

21. The present Appeal is dismissed. A copy of this judgment be sent to the Id Trial Court with Trial Court record. Appeal file be consigned to record room as per law."



2024 : DHC : 2186



10. The impugned order reflects clear confusion, in the mind of the learned ADJ, about the legal position. In para 15, she relies on judgments rendered by the Supreme Court in the context of the powers of the High Court in second appeal under Section 100 of the CPC, while referring to the powers vested in her as a court of first appeal under Section 96. Thereafter, in para 17, she refers to a decision of the Supreme Court which deals with the duty of the first appellate Court, and clearly requires the first appellate Court to identify the issues that arise for consideration, re-examine the evidence and thereby arrive at a finding regarding the correctness of the judgment of the learned Trial Court. This, in fact, is what is ordained by Order XLI Rule 31⁴ of the CPC as well. Thereafter, the learned ADJ, in the impugned order, proceeds merely to state that the learned Trial Court has examined the matter on merits, and that she finds no reason to differ with the decision.

11. The Hon'ble Supreme Court has, in *Somakka v. K. P. Basavaraj*⁵, held, apropos the manner in which the first appellate Court is required to deal with the matter, thus:

“26. The High Court in a very cursory and cryptic manner, partly allowed the first appeal. It did not consider the evidence

⁴ 31. **Contents, date and signature of judgment.** – The judgment of the Appellate Court shall be in writing and shall state –

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

⁵ (2022) 8 SCC 261



considered by the trial court. Neither did it deal with the statements or the other documentary evidence on record and only on a bald statement of the respondent, which according to it, was mentioned in the order of the Land Tribunal that the respondent was jointly cultivating the said land along with his father held that it became a joint family estate and, accordingly, reduced the share of the appellant to one-fourth from one-half.

27. The only discussion made by the High Court in the impugned judgment is reproduced hereunder:

“The contention of the defendant that the properties were given to plaintiff during the lifetime of her father. Therefore, not entitled to any share in the estate of her father by way of succession is an untenable contention and not a triable defence. Whatever the properties gifted to her during his lifetime constitute separate properties of the plaintiff and such a gift/assignment does not deprive the right of the plaintiff to seek share by way of succession after the demise of the father. Item 3 of ‘A’ schedule property is an agricultural land and it was Devadaya Inamathi land cultivated by the father of the plaintiff. He had made an application in Form No. 1 for grant of occupancy rights. The defendant also made an application in Form No. 7 for grant of occupancy rights in respect of the same land. Ext. P-5 is the order of the Land Tribunal, in which, it categorically mentions that the defendant had made a statement before the Tribunal that the land was jointly cultivated by himself and by his father. Therefore, it becomes a joint family estate.

In that view, after the demise of the father, the defendant and his father are entitled to the notional share of 1-½ each and the plaintiff would be entitled to the one-fourth share in Item 3 of ‘A’ schedule property and not half share as claimed.”

28. Section 96 CPC provides for filing an appeal from original decree. Further Order 41 Rule 31CPC provides for the contents of the judgment of the first appellate court. *According to it, the judgment of the appellate court shall be in writing and would include the points for determination, the decision thereon, the reasons for the decision and where the decree is reversed or varied, the relief to which the appellant is entitled.*

30. It has been a matter of debate in a catena of decisions as to what would be the scope, power and duty of the first appellate



2024:DHC:2186



court in deciding an appeal under Section 96CPC read with Order 41 Rule 31CPC. We briefly deal with the law on the point.

31. The learned Judge V.R. Krishna Iyer, J., (as he then was a Judge of the Kerala High Court) in 1969, while deciding the case between **Kurian Chacko v. Varkey Ouseph**⁶, dealing with a similar judgment of the first appellate court which had been disposed of by a brief order, observed as follows:

“2. An appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate court.”

32. Further following the above, there have been a series of judgments by this Court:

32.1. In **Santosh Hazari v. Purushottam Tiwari** [Santosh Hazari v. Purushottam Tiwari]⁷:

“15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect if conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.”

32.2. In **H.K.N. Swami v. Irshad Basith**⁸:

“3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first

⁶AIR 1969 Ker 316

⁷(2001) 3 SCC 179

⁸(2005) 10 SCC 243



2024: DHC: 2186



appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title.”

32.3 In 2015, this Court again in **Vinod Kumar v. Gangadhar**⁹, considering the previous judgment recorded its view in paras 18 and 19 which are reproduced hereunder :

“18. In our considered opinion, the High Court did not deal with any of the submissions urged by the appellant and/or the respondent nor it took note of the grounds taken by the appellant in grounds of appeal nor made any attempt to appreciate the evidence adduced by the parties in the light of the settled legal principles and decided case law applicable to the issues arising in the case with a view to find out as to whether the judgment of the trial court can be sustained or not and if so, how, and if not, why.

19. Being the first appellate court, it was the duty of the High Court to have decided the first appeal keeping in view the scope and powers conferred on it under Section 96 read with Order 41 Rule 31CPC mentioned above. It was unfortunately not done, thereby, resulting in causing prejudice to the appellant whose valuable right to prosecute in the first appeal on facts and law was adversely affected which, in turn, deprived him of a hearing in the appeal in accordance with law. It is for this reason, we were unable to uphold the impugned judgment of the High Court.”

32.4. Very recently, this Court in 2022 (to which one of us, Brother Abdul Nazeer, J. was a member) in **Manjula v. Shyamsundar**¹⁰, reiterated the same view in para 8 thereof, which is reproduced hereunder :

“8. Section 96 of the Civil Procedure Code, 1908 (for short “CPC”) provides for filing of an appeal from the decree passed by a court of original jurisdiction. Order 41 Rule 31CPC provides the guidelines to the appellate court for deciding the appeal. This rule mandates that the judgment of the appellate court shall state:

(a) points for determination;

⁹ (2015) 1 SCC 391

¹⁰ (2022) 3 SCC 90



2024:DHC:2186



- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

Thus, the appellate court has the jurisdiction to reverse or affirm the findings of the trial court. *It is settled law that an appeal is a continuation of the original proceedings. The appellate court's jurisdiction involves a rehearing of appeal on questions of law as well as fact. The first appeal is a valuable right, and, at that stage, all questions of fact and law decided by the trial court are open for reconsideration. The judgment of the appellate court must, therefore, reflect conscious application of mind and must record the court's findings, supported by reasons for its decision in respect of all the issues, along with the contentions put forth and pressed by the parties. Needless to say, the first appellate court is required to comply with the requirements of Order 41 Rule 31CPC and non-observance of these requirements lead to infirmity in the judgment.*"

(Emphasis supplied)

12. Compliance with Order XLI Rule 31 of the CPC, and a wholesale re-appreciation of the evidence is, therefore, the inexorable requirement of a Court exercising first appellate jurisdiction. No doubt, in the event of the Court finding itself in agreement with the view of the Trial Court, it is not necessary for the first appellate Court to return a detailed finding on every aspect of the case, and an overall agreement with the view of the learned Trial Court may suffice. Even then, the order of the first Appellate Court must reflect independent application of mind to all issues of fact and law, and the evidence available in the matter.

13. Viewed any which way, the learned ADJ has not, in passing the impugned order, proceeded in the manner in which she was required to proceed as a first appellate court. There is no independent

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13:05:21



2024:DHC:2186



appreciation, by her, of evidence or of the merits of the matter.

14. The impugned order is, therefore, liable to be set aside on merits. As already noted, Mr. Aakash Naval does not dispute this position.

15. Mr. Naval, however, submits that the present appeal has been instituted after considerable delay and that, as there is no substantial ground disclosed for condonation thereof, the appeal, irrespective of its merits, cannot be entertained.

16. There is a delay of 91 days in institution of the present appeal. The appeal is accompanied by CM APPL. 43932/2022 under Section 5 of the Limitation Act seeking condonation of the said delay. The grounds for condonation, as set out in paras 3 to 9 of the said application, read thus:

“3. That the applicant/appellant was supposed to file the appeal against the impugned judgment and decree dated 28/03/2022 within 90 days from the date of order of the impugned judgment i.e. on or before 27/06/2022.

4. That in the month of January, 2021 some talks for settlement were going on between the parties which were duly informed to the Ld. Appellate court on 18/01/2021 but after grant of stay, the respondents and appellant arrived at an amicable settlement and it was agreed between the parties that they will not dispose the appellant and her children from the suit property and assured that they will appear before the court and inform about the settlement on the date already fixed.

5. That the appellant believed the respondents and stopped appearing believing the assurance of the respondent and even the respondents were behaving properly. But the respondents cheated upon the appellant and by keeping her in dark that the appeal has been



2024:DHC:2186



disposed off as settled, kept on appearing in the matter and got the appeal dismissed in their favour.

6. That the applicant/appellant was not aware about proceeding of the present appeal after 26/02/2021 and came to know about the dismissal of the appeal vide order dated 28/03/2022 only on 17/09/2022 when bailiff visited the suit property for taking possession of the suit property.

7. That immediately after discovery of fraud played upon her by the respondent, the appellant contacted the undersigned counsel and instructed him for taking necessary action into the matter.

8. That thereafter undersigned counsel downloaded the copy of the impugned judgment from the site of District Court on 18/09/2022 and thereafter a period of about 20 week was spent in legal research, drafting, vetting and finalization of the appeal and could file the present appeal on 28/09/2022.

9. That there is an admitted delay of about 93 days in filing the appeal from the date of impugned judgement and if the period of limitation is counted from the date of knowledge i.e.17/09/2022, then the present appeal is being filed within the period of limitation. The delay in filing the appeal is neither intentional nor deliberate but was due to reasons stated hereinabove.”

17. Mr. Naval submits that the appellant has concocted an entirely fictitious ground for seeking condonation of delay. He submits that there was no question of any settlement between the parties or any such proposal for settlement either.

18. In fact, points out Mr. Naval, the appellant had remained absent for several dates of hearing, as a result of which the learned ADJ had directed issuance of court notice to the appellant, which was also received by her on 21 October 2021. She, nonetheless, chose to remain absent even on subsequent dates of hearing, resulting in the passing of the impugned judgment.



2024 : DHC : 2186



19. Thus, submits Mr. Naval, an appellant who is acting with such indolence, and also fabricates an imaginary ground for seeking condonation of delay, has no right to entertainment of her appeal on merits.

20. Limitation is a statute of equity and repose. The guiding philosophy behind limitation is that, if proceedings are not instituted within the time provided by law, rights stand created in favour of the party who has succeeded in the court below, and such rights have to be respected.

21. Nonetheless, while considering an application for condonation of delay, the court cannot be totally oblivious to the merits of the case and the nature of the *lis* before it. If the order under challenge has resulted in complete miscarriage of justice, and the delay in instituting the challenge is not inordinate, the Court has to be expansive and pragmatic in considering the merits of the grounds on which condonation of delay is sought.

22. As far back in 1987, the Hon'ble Supreme Court in ***Collector, Land Acquisition v. Mst. Katiji***¹¹, held thus:

“3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on “*merits*”. The expression “sufficient cause” employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice — that being the life-purpose for the existence



of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
 2. *Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated.* As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
 3. “Every day's delay must be explained” does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.
 4. *When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*
 5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.
 6. *It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.*
23. *Making a justice-oriented approach from this perspective,* there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the “State” which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step-motherly treatment when the “State” is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought



2024:DHC:2186



to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file-pushing and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. *The courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression “sufficient cause”. So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits.”*

(Emphasis supplied)

24. If an order is *ex facie* unsustainable, it would be unfair and unjust to allow it to stand. The right of first appeal, conferred by Section 96 of the CPC is a valuable right. A litigant who has lost in a suit is statutorily entitled to maintain an appeal against such decision under Section 96 of the CPC. The CPC envisages a complete re-examination of the facts of the case and the evidence on record by the first appellate court. No doubt the unsuccessful litigation in the first appeal is restricted, in second appeal, only to substantial question of law.

25. In view of the nature of the impugned order, this Court, even while issuing notice in the appeal framed the following substantial questions of law as arising for consideration.

“(i) Whether the impugned order dated 28th March 2022 is not liable to be set aside in view of para 15 thereof which reveals that the learned ADJ has proceeded on the basis of tests which are relatable to second appellate jurisdiction under Section 100 of the CPC, rather than first appellate jurisdiction under Section 96?

(ii) Whether the impugned order is not liable to be set aside as it does not comply with the requirement of Sections 96 read with



2024:DHC:2186



Order XLI Rule 31 of the CPC?”

26. There is no dispute about the facts that these questions of law, on merits, are required to be answered in favour of the appellant and against the respondents.

27. The question before the court is, therefore, in such circumstances, the appeal should be dismissed on the ground that there is no reason/satisfactory explanation for the delay of 91 days in preferring the appeal.

28. The delay cannot be set to be deliberate or inordinate. It is just a little over three months. Though Mr. Naval sought to contend that the appellant has raised false contentions in his application, the highest that can be said is that the appellant has not been able to substantiate the ground that she has sought to urge.

29. Mr. Randhawa, who appears for the appellant, has drawn my attention to orders dated 18 January 2021 and 26 February 2021 passed by learned ADJ in the present proceedings. In the first order dated 18 January 2021, there is a specific submission made by the present appellant before the learned ADJ that talks of settlement were on between the parties, though learned counsel for the respondents stated that he was ignorant of any such settlement talks. Subsequently, *vide* order dated 26 February 2021, learned counsel for the respondents himself acquiesced to a stay of execution proceedings.



2024 : DHC : 2186



30. Mr. Randhawa's submission is that these orders themselves indicate that the respondents were not adopting, at that stage, as adversarial a stance as they are adopting at present, and that the appellant was actually hopeful of the matter being settled. It is for this reason, he submits, that appellant did not appear before the court when the matter was listed.

31. Keeping in mind (i) the clearly unsustainable character of the impugned order dated 28 March 2022 passed by the learned ADJ, (ii) the valuable right of appeal that is available to an appellant under Section 96 of the CPC, (iii) the law laid down by the Supreme Court in *Katiji* and (iv) the fact that the respondents are already in possession of a part of the suit property so that no irreparable loss would endure to the respondents if the impugned order is set aside and the learned ADJ is directed to deal with the first appeal filed by the appellant in accordance with the provisions of order XLI of the CPC, I am of the opinion that it would not be fair or just to dismiss the present appeal on the grounds of delay.

32. For the aforesaid reasons, keeping in mind the necessity to ensure that justice is ultimately done, the delay of 91 days in preferring the present appeal is condoned.

33. Inasmuch as the impugned judgment of the learned ADJ is clearly erroneous, the questions of law framed by this Court in para 12 of order dated 11 October 2022 are answered in the affirmative in favour of the appellant and against the respondents.



2024:DHC:2186



34. The impugned judgment dated 28 March 2022 is accordingly, quashed and set aside. RCA 137/2019 (*Priya @ Pooja vs. Hari Chand & Ors.*) stands remitted to the learned ADJ for being decided *de novo* in accordance with law.

35. In order to ensure that matters are expedited, the learned ADJ is requested to decide the appeal expeditiously and preferably within a period of four months from today.

36. Neither side would be permitted any unnecessary adjournment.

37. The appeal stands allowed in the aforesaid terms.

C. HARI SHANKAR, J.

MARCH 13, 2024
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