

**(2014) 08 P&H CK 0188**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** S.A.O. No. 51 of 2009 (OandM)

Sharda Arora

APPELLANT

Vs

Jasbir Singh

RESPONDENT

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**Date of Decision:** Aug. 22, 2014

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 21, 96

**Citation:** (2014) 4 RCR(Civil) 707

**Hon'ble Judges:** Rakesh Kumar Jain, J

**Bench:** Single Bench

**Advocate:** Baldev Raj Mahajan, Senior Advocate and Gaganpreet Kaur, Advocate for the Appellant; M.K. Dogra, Advocate for the Respondent

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**Judgement**

Rakesh Kumar Jain, J.

This appeal is against the order dated 02.05.2009 by which an application filed by the appellant under Order 41 Rule 21 of the C.P.C. for setting aside the ex-parte judgment and decree passed by the learned lower Appellate Court on 31.01.2008 and for re-hearing of the appeal on merits, has been declined. The facts, as narrated before me, are that the plaintiff-appellant filed a suit for possession by way of specific performance on 13.05.1998 against the respondents which was decreed on 27.02.2003. As per the decree, the balance sale consideration was to be deposited within 3 months which was deposited by the appellant on 23.05.2003. Thereafter, the respondents filed statutory appeal under Section 96 of the C.P.C. on 28.04.2003 which was dismissed being barred by limitation as their application for condonation of delay was dismissed by the lower Appellate Court on 05.11.2005. This led to the filing of Civil Revision No. 5501 of 2006. The revision petition was allowed by this Court on 30.10.2007 by observing that the lower Appellate Court was very technical as the law settled by the Supreme Court is that the law of limitation has to be liberally construed. It was also observed that the Supreme Court has held that a party does not gain anything by filing the appeal late and in case the limitation is

condoned, it only gives an opportunity to get the matter decided on merit, whereas rejection of the application may lead to rejecting the good cause without contest. The case was remanded and the parties were directed to appear before the lower Appellate Court on 14.12.2007. The plaintiff through her counsel appeared on 14.12.2007 and 04.01.2008, but thereafter her counsel did not appear and also did not inform about the date of hearing to the appellant, as a result thereof the appeal was decided ex-parte on 31.01.2008 in favour of the respondents. The appellant applied for the certified copy of the judgment and decree dated 31.01.2008 on 04.03.2008 which was made available to her on 14.03.2008 and on the basis thereof she had filed an application under Order 41 Rule 21 of the C.P.C. on 01.05.2008 along with an application for condonation of delay of 62 days. The said application is contested by the respondents and as a result thereof, the lower Appellate Court framed two issues and allowed the parties to lead their respective evidence. The appellant examined her attorney Rajinder Kumar as AW 1 and tendered documents Ex. A1 to Ex. A18. She also examined Dr. Jagdish Goswami as AW 2 who testified that Rajinder Kumar, attorney of the appellant, was suffering from heart disease with hypertension with hypercholesteremia and was receiving treatment from him since 07.03.2008 and on 15.04.2008, he was again suffering from the same problem and was advised complete bed rest by him.

2. On the other hand, the respondent examined Jasbir Singh as a witness and did not lead any documentary evidence.

3. On the basis of the evidence led by the parties, the lower Appellate Court dismissed the application observing that AW 2 has not brought any record except Ex. A1 which proves that he had given treatment to Rajinder Kumar and admitted in his cross-examination that Rajinder Kumar was never admitted in the hospital and was treated as an Out Door Patient. It was thus presumed that Rajinder Kumar was fit enough to engage a counsel for the purpose of appearing in the appeal when earlier counsel Shri S.M. Vermani stopped appearing. It was also observed that since the appellant was herself negligent, therefore, the delay of 62 days in filing of the application under Order 41 Rule 21 of the C.P.C. was good enough to dismiss the application being devoid of any "sufficient cause".

4. Learned counsel for the appellant has argued that the learned lower Appellate Court has erred in not examining the entire conduct of the appellant while passing the impugned order. It is submitted that the suit was filed by him on 13.05.1998 which was decreed on 27.02.2003. As per the decree, the amount of balance sale consideration was to be deposited within 3 months which was also deposited within the stipulated period. Thereafter, when the appeal was filed by the respondents which was barred by limitation, the application for condonation of delay was contested by the appellant and an order was passed on 05.11.2005 dismissing the said application. Against the order dated 05.11.2005, the respondents had filed revision petition, which too was contested by the appellant, however, the same was

allowed on 30.10.2007. Even after remand, an advocate was engaged by the appellant who appeared on 14.12.2007 and also on the adjourned date, i.e. 04.01.2008, but thereafter he stopped hearing without notice to the attorney of the appellant who had suffered heart disease, as testified by AW 2, and was not in a position to contact the counsel about the date because in the appeal, no evidence was to be led and the case was to be argued only on the basis of the available record. The appellant was having supreme confidence in her advocate that he would look after her interest in the appeal as he had already been appearing after having been paid his remuneration. When she came to know on 04.03.2008 that the appeal has been allowed ex-parte on 31.01.2008 in favour of the respondents, the certified copy was applied and after obtaining the certified copy and getting the record, the application was filed on 01.05.2008 and, therefore, there was hardly any delay for seeking setting aside of the ex-parte decree.

5. In support of his submission, counsel for the appellant has relied upon a judgment of the Supreme Court in the case of [Rafiq and Another Vs. Munshilal and Another](#), which is also a case of appeal which was dismissed for non-appearance of the counsel for the appellant. It was held by the Supreme Court in that case that "a party who, as per the present adversary legal system, has selected his advocate, briefed him and paid his fee can remain supremely confident that his lawyer will look after his interest and such a innocent party who has done everything in his power and expected of him should not suffer for the inaction, deliberate omission or misdemeanour of his counsel."

6. In reply, counsel for the respondents has argued that there is a deliberate delay on the part of the appellant who should have followed the proceedings of the appeal after 04.01.2008 and since her counsel did not appear thereafter, there was no error committed by the lower Appellate Court in allowing the appeal ex-parte on 31.01.2008. He further submits that there is no explanation given by the appellant for not applying certified copy till 04.03.2008 and even after obtaining certified copy on 14.03.2008, the appeal was filed only on 01.05.2008. It is thus submitted that even if the appeal is barred by only 62 days and the appellant is not required to give account of every-day's delay, the delay could be condoned only on furnishing of a sufficient cause, which is conspicuous by its absence in the present case.

7. After hearing learned counsel for the parties and examining the record, I am of the considered opinion that this appeal deserves to be allowed because it is a case where the appellant had filed the suit on 13.05.1998. Since then, she has been diligently and vigilantly pursuing her cause inasmuch as the suit was contested and a decree was passed on 27.02.2003. Not only that, she also deposited the balance sale consideration within the stipulated period. It was rather the delay on the part of the respondents in filing appeal in time which was dismissed by the lower Appellate Court being barred by limitation on the contest of the appellant. However, it is altogether different thing that their revision petition was allowed by this Court on

the ground that the lower Appellate Court was hyper-technical in dismissing the appeal of the respondents for the delay of even 2 days. At the time when the appeal was allowed, this Court had observed that it is the settled law by the Supreme Court that the law of limitation has to be liberally construed. It was also observed that a party does not gain anything by filing the appeal late and in case the limitation is condoned, it only gives an opportunity to get the matter decided on merit, whereas rejection of the application may lead to rejecting the good cause without contest. After remand, the appellant through her counsel appeared on 14.12.2007 and on the adjourned date, i.e. 04.01.2008, but later on her counsel stopped appearing for the reasons best known to him, even without notice to the attorney of the appellant who was suffering from heart disease, may be he was not admitted in the hospital and was treated as an Out Door Patient, but he was advised complete bed rest, as stated by AW 2 Jagdish Goswami in his deposition. Thus, it cannot be said that the appellant was deliberately not appearing before the lower Appellate Court despite the fact that there was a decree in her favour which has been contested by her right up to the year 2008, i.e. for a decade, and when the time came for reaping the fruits, she stopped appearing. Moreover, the argument raised by learned counsel for the respondents that there is no explanation by the appellant as to why she applied certified copy of the order on 04.03.2008 and even after obtaining the certified copy on 14.03.2008, filed appeal only on 01.05.2008 is concerned, the appellant has clearly stated that she came to know about the ex-parte order on 04.03.2008 and immediately thereafter she applied certified copy of the order on 04.03.2008 which was made available to her on 14.03.2008. Since AW 2 has stated in his deposition that attorney of the appellant was receiving treatment from him since 07.03.2008 and on 15.04.2008, he was again suffering from the same problem and was advised complete bed rest by him, therefore, it can be very well assumed that he was not in a position to seek legal advice for setting aside the ex-parte decree of the lower Appellate Court. As soon as he became able enough to prosecute his litigation, he filed the application on 01.05.2008 under Order 41 Rule 21 of the C.P.C. which has been dismissed by the learned lower Appellate Court. In these facts and circumstances coupled with the observation of the Supreme Court in Rafiq's case (supra), I am of the considered opinion that there was a "sufficient cause" with the appellant for her absence from the Court when the ex-parte decree was passed.

In view of the aforesaid discussion, the present appeal is hereby allowed and the impugned order is hereby set aside.