

(2010) 11 DEL CK 0074

Delhi High Court

Case No: Regular First Appeal 97 of 2010

Prashant Chauhan

APPELLANT

Vs

Habib Ahmed

RESPONDENT

Date of Decision: Nov. 30, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 9, Order 41 Rule 3, 151
- Limitation Act, 1963 - Section 5

Hon'ble Judges: G.S. Sistani, J

Bench: Single Bench

Advocate: Saurabh Trivedi, for the Appellant; R.K. Sharma, for the Respondent

Final Decision: Dismissed

Judgement

G.S. Sistani, J.

C.N. No. 3343/2010 (delay in filing) and CM. No. 3345/2010 (delay in refilling)

1. Aforesaid are the two applications, one u/s 5 of the Limitation Act seeking condonation of 54 days delay in filing the appeal and second, is the application u/s 151 CPC seeking condonation of 243 days delay in re-filing the appeal.

2. Counsel for the Appellant submits that the appeal could not be filed within the prescribed period of limitation in view of the fact that the Appellant was informed about the judgment and decree dated 15.12.2008 by his counsel only on 5.1.2009. It is submitted that although, the certified copy was made available by 14.1.2009, however, same was obtained by him on 28.01.2009. It is further submitted that since the counsel, who was initially engaged in the matter, was delaying the case, a new counsel was engaged on 25.02.2009. The new counsel thereafter studied the papers and asked for some additional papers and took the whole month of March for drafting the appeal and thereafter the same was sent to the Appellant in the month of April, 2009 and after the Appellant's approval the appeal was filed on 8th May,

2009. It is further submitted that the delay on account of re-filing has accrued only on account of the fact that the present counsel was suffering from serious Tropical Sprue disease which prevented him from attending the Court, resultantly it led to delay in re-filing the appeal.

3. Counsel for the Respondent has opposed this application on the ground that the Appellant has been extremely careless and negligent in pursuing the appeal. It is submitted that there are no grounds much less sufficient grounds for condoning the 54 days delay in filing the appeal or 243 days delay in re-filing the appeal. Counsel further submits that it has been repeatedly held that while considering the application for condonation of delay it is not the period of delay which is relevant but the reasons for the same.

4. Condonation of delay has been a subject matter of various judgments of this Court as also the Apex Court. A consistent view of the Supreme Court has been that while deciding the application for condonation of delay, the Court must satisfy itself that sufficient grounds exist to condone the delay. Counsel for the Appellant has relied upon [Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others](#), it was held as under:

3. xxx

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.

5. I have heard counsel for the parties and given my thoughtful consideration to the matter.

6. While dealing with an application for condonation of delay u/s 5 of the Limitation Act, the Court must bear in mind two important considerations. Firstly, the expiration of limitation for filing an appeal gives rise to a legal right to a decree-holder to treat the decree as binding between the parties and this right should not be lightly disturbed. Second, if sufficient cause is shown for condonation of delay, the delay should be condoned. It has been repeatedly held by the Supreme Court of India that the words "sufficient cause" should receive a liberal construction so as to advance substantial justice. In the same breath, it has been held that the discretion should be exercised, when there is no negligence or inaction nor want of bona fides imputable to the Appellant; the Court must be satisfied that there was due diligence on the part of the Appellant.

7. In a recent decision rendered by the Supreme Court of India in *Balwant Singh v. Jagdish Singh and Ors.*, reported at 2010 (6) SCALE 749, while deciding an application under Order XXII Rule 9 CPC and Section 5 of the Limitation Act, it was held as under:

13. ...We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the concerned party. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right, as accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly. The application filed by the applicants lack in details. Even the averments made are not correct and ex-facie lack bona fide. The explanation has to be reasonable or plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but is worthy of exercising judicial discretion in favour of the applicant. If it does not specify any of the enunciated ingredients of judicial pronouncements, then the application should be dismissed. On the other hand, if the application is bona fide and based upon true and plausible explanations, as well as reflect normal behaviour of a common prudent person on the part of the applicant, the Court would normally tilt the judicial discretion in favour of such an applicant. Liberal construction cannot be equated with doing injustice to the other party. In the case of [State of Bihar and Others Vs. Kameshwar Prasad Singh and Another](#), this Court had taken a liberal approach for condoning the delay in cases

of the Government, to do substantial justice. Facts of that case were entirely different as that was the case of fixation of seniority of 400 officers and the facts were required to be verified. But what we are impressing upon is that delay should be condoned to do substantial justice without resulting in injustice to the other party. This balance has to be kept in mind by the Court while deciding such applications. In the case of [Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.](#), this Court took the view:

7. In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree holder by lapse of time should not be lightly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in *Krishna v. Chathappan* ILR Mad 269.

It is however, necessary to emphasize that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration;...

8. It has been held by the Supreme Court in the case of [Salil Dutta Vs. T.M. and M.C. Private Ltd.](#), that:

The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. It is true that in certain situations, the Court may, in the interest of justice, set aside a dismissal order or an ex- parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised. Such an absolute rule would make the working of the system extremely difficult. The observations made in *Rafiq* must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition.

9. Further with regard to delay in re-filing, has been discussed in the case of [Asha Sharma and Others Vs. Sanimiya Vanijiya P. Ltd. and Others](#), . Paragraphs 8 and 9 of the same reads as under:

8. The Rules of Delhi High Court in the matter of filing and scrutiny of appeals are contained in Volume v. of High Court Rules and Orders. Rule 5 Chapter "1", Part A prescribes as under:

5. Amendment -- The Deputy Registrar, Assistant Registrar, Incharge of the Filing Counter, may specify the objections (a copy of which will be kept for the Court Record) and return for amendment and re-filing within a time not exceeding 7 days at a time and 30 days in the aggregate to be fixed by him, any memorandum of appeal, for the reason specified in Order 41 Rule 3, CPC Code.

(2) If the memorandum of appeal is not taken back for amendment within the time allowed by the Deputy Registrar, Assistant Registrar, in charge of filing counter under Sub-rule (1), it shall be registered and listed before the Court for its dismissal for non-prosecution.

(3) If the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar, Asstt. Registrar, In-charge of the Filing Counter, under Sub-rule (1) it shall be considered as fresh institution.

[Note: The provision contained in Rules 5(1), 5 (2) and 5 (3) shall mutatis mutandis apply to all matters, whether civil or criminal.]

The above referred Rule was substituted with effect from 1.12.1988 vide notification No. 208/DHC/Rules dated 5.8.1988.

9. It is quite clear from a bare perusal of the above Rule that the Deputy Registrar cannot grant time of more than 30 days in aggregate for re-filing of a Memorandum of Appeal, for the reasons specified in Order XLI Rule 3 of the Code of Civil Procedure. If the Memorandum of Appeal, after removing the defects notified by the registry, is filed after more than 30 days, it shall be considered as a fresh appeal, filed on the date on which it is presented after removal of the defects.

10. The facts of this case are to be considered on the touchstone of the broad principles which have been laid down by the Supreme Court of India while considering the present application for condonation of delay. The conduct of the Appellant in the present case shows total callousness and negligence. While it has been repeatedly held that while dealing with an application for condonation of delay, the Court must have a liberal approach, it has also been held that Appellant must satisfy the Court that the delay was not caused on account of inaction or negligence.

11. From the present applications it appears that the judgment and decree, were passed on 15.12.2008. The Appellant was duly informed about the same on

5.01.2009. No steps were taken by the Appellant for filing the appeal within the period of limitation. The list of dates which have been extracted in this application would show that in spite of the fact that counsel had informed the Appellant and had even applied for certified copy of the same as early on 14.01.2009, the appeal was filed only on 08.05.2009. This application does not disclose any material particulars as to what prevented the Appellant from filing the appeal within the prescribed period of limitation.

12. The only ground taken for delay in filing the appeal is that since the Appellant was resentful about the shoddy manner/ conduct of the earlier counsel at the district court. He requested the counsel at Dehradun, to change the counsel, in New Delhi. However, there is no reasonable and plausible explanation for the delay for period 15.02.2009 to 25.02.2009 despite a new counsel having been arranged. Also there is no reasonable explanation as to why the new counsel did not file the appeal during February, 2009 to May, 2009. This is a clear attempt on the part of the Appellant to shift the blame on the lawyer. Once the Appellant was aware that there was delay in filing the appeal, he should have been vigilant in filing of the appeal with the new counsel. In case the new counsel was unwell, as stated he should have made alternate arrangements to remove objections and have the appeal re-filed. Further having regard to the settled position of law that since the obligations were not removed within 30 days of filing of the appeal, the appeal is to be considered as fresh filing. Accordingly, it cannot be said that there is delay in re-filing.

13. I have given my thoughtful consideration to the matter and find the Appellant is shifting the entire burden on the counsel, though his own conduct has been negligent and callous.

14. Accordingly, the applications are dismissed.

RFA No. 97/2010

15. In view of the order passed in the applications, the appeal is dismissed.