

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

+ **RSA 38/2008**

Date of Decision: 1st July, 2010

TAYAL PAPER & TRADERS & ORS. Appellants

Through: Mr. Vijay Babbar, Advocate

VERSUS

SUBHASH CHAND Respondent

Through: Mr. Achal Gupta, Advocate

% **CORAM:**
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest? Yes

J U D G M E N T

ARUNA SURESH, J.

CM APPL. No.1905/2008 (delay in refiling) in RSA 38/2008

1. This application has been filed by the appellants under Section 5 of the Limitation Act seeking waiver of delay in refiling the appeal.
2. Appellant No.2 has sought condonation of delay on the ground that appellant No.2 is an illiterate old lady and was suffering from number of diseases. She was busy in her own medical treatment as well as medical treatment of her sons, that one of her sons expired in

the meantime and therefore, she could not contact and properly brief her lawyer.

3. Respondent has contested this application primarily alleging that appeal itself is not maintainable, that memo of appeal is not even signed by her or her counsel and that memo of parties has been signed by Shri Subhash Kumar Advocate who is not counsel for appellant No.2, that even if it is not signed by appellant No.2, other appellants were required to sign the appeal, especially when she had taken a defence that she had nothing to do with the business of appellant No.1, that the medical certificate placed on record are of May, 2006 and January, 2007 whereas the appeal was to be filed in April, 2007, that she has not given the details of illness of her sons, that the application is devoid of any merits and deserves dismissal.
4. Mr. Vijay Babbar Advocate appearing on behalf of the appellants has submitted that it took time to remove the objections raised by the Registry in refiling the appeal though the appeal was filed within the period of limitation for the reason that appellant no. 2 was an illiterate lady, she happened to be sick and therefore could not contact him in time to instruct him for removal of the objections to the appeal.
5. Mr. Achal Gupta counsel appearing for the Respondent has refuted

the submissions made by the counsel for the appellants.

6. Appeal was initially filed by the appellant on 7th April, 2007 challenging the judgment and decree of the Appellate Court dated 18.01.2007, therefore, the appeal was filed within the period of limitation. However, registry raised certain objections. After removing the objections, appellant refiled the appeal on 19.12.2007 i.e. after about a period of more than 8 months and 12 days.
7. On 19.12.2007 another objection was raised by the Registry taking note of the fact that even the first objection of caveat report was not removed. The appeal was refiled on 14.01.2008 i.e. after about a month of its return. Even on 18.01.2008 appeal was not found in order and the objection was raised that even petition was not signed by the counsel. It was refiled on 24.01.2008. On 25.01.2008 registry raised following objections:-
 - (i) Substantial question of law to be mentioned and
 - (ii) Underlining to be removed.
8. These objections were removed and appeal was refiled on 25.1.2008.
9. On 30.01.2008 Registry noted that appellant had not filed any application for exemption from filing court fees under Section 149 CPC mentioning period of time by which the court fees would be

filed. This resulted into filing of the applications by the appellant one for exemptions and another for filing of court fees. Appellant refiled the appeal on 6.2.2008. Thereafter the case was listed before this court on 8.2.2008.

10. Mr. Achal Gupta counsel for the Respondent has argued that at the time of filing of the appeal even the court fees was not paid by the appellant without assigning the reasons as to why the court fees was not filed. Hence, it cannot be said that the appeal was filed in time.
11. It is not in dispute that along with memo of appeal, appellants had not paid the requisite court fees despite the objections raised by the Registry at the first instance. Appellant failed to pay court fees as was required to be paid. It is pertinent that court fees was purchased by the appellant only on 4.2.2008 after registry raised objection on 30.01.2008. Court fees was filed in the court on 8.2.2008 when the matter was listed for hearing.
12. Dealing Assistant had initially raised following objections on the appeal, besides others:-
 - (i) Caveat Report be obtained.
 - (ii) Opening sheet should be filed / be placed before petition / properly filed in.

- (iii) Notice of Motion upon Counsel for concerned Respondent be filed / proof of service be filed / service be effected through nominated counsel.
- (iv) Petition / application / annexures/ order / decree should be properly dated.
- (v) Ad-valorum court fees to be paid.
- (vi) Power of attorney be filed / stamped / signed.
- (vii) Welfare stamp of Rs.10/- be affixed on valakalnama also be dated and filled up.
- (viii) Affidavit should be attested properly / age of deponent should be mentioned.
- (ix) Both impugned orders be filed.
- (x) Substantial question of law not given.

13. Even appeal was not accompanied by application for extension of time for filing the court fees or for exemption from filing the court fees for a particular period. Therefore, in the absence of any court fees, it cannot be said that the appeal was filed in time. No explanation has forth come from the appellant as to why court fees was not paid along with the memo of appeal at the first instance.

14. Even during the course of arguments no explanation has been given by the appellant as to why appeal was not accompanied by requisite court fees.
15. By virtue of Section 149 of CPC, the court has the discretion to allow a person to file the memo of appeal without court fees or with deficient court fees, and if sufficient cause is shown and to make good of such deficiency. Ordinarily, the document which is insufficiently stamped is not to be received or filed or exhibited in the court. If the deficiency is made good within the time fixed by the court, the document is deemed to be filed or presented on the date it was originally filed or presented.
16. Part G, 'Rules relating to proceedings in the High Court of Delhi', Chapter 1, Rule 5 Part A sub(a) lays down the statutory period for refiling of the appeal and also the power of the Deputy Registrar to return the appeal for amendment and refiling the same. This rule reads as below:-

“5.(1) 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 XLI Rule 3, Civil Procedure Code.

(2).....

(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.

17. As per Sub rule (3) if the memorandum of appeal is filed beyond the time allowed by the Deputy Registrar, Asstt. Registrar, Incharge of the Filing Counter under sub-rule (1), it would be considered as a fresh institution.
18. Thus, it is clear that Deputy Registry cannot grant time more than 30 days in aggregate in refiling the memo of appeal for the reasons specified in order 41 Rule 3 A CPC. If the memo of appeal after the removal of objections as raised by the registry is filed after more than 30 days, it has to be considered as a fresh appeal filed on the date on which it is presented after removal of the defects.
19. 'Sufficient Cause' appearing in Section 5 of the Limitation Act has to be construed as "sufficient cause" appearing in Order XLI Rule 3A CPC. This has to be liberally construed so as to advance justice to the parties. Delay in refiling is not subject to the rigors, which are usually applied in excluding the delay in a petition filed under Section 5 of the Limitation Act. Therefore, while considering condonation of delay in re-filing, the Court has to keep in mind and consider the nature of the defects which led to return of the

document. If objections are minor and technical in nature, the Courts must adopt liberal approach in condoning the delay. However, the standards of testing bonafides of the appellant have to be more strict where mandatory documents are required to be filed with the Memorandum of Appeal. In such like cases, the Court has to adopt a different approach depending upon the nature of objections raised by the Registry and required to be removed. The Court cannot be oblivious of the fact that delay in refiling the appeal vested a valuable right in favour of the Respondent, who on account of non filing of the appeal becomes entitled to the benefits of the judgment and decree in appeal. It gives belief in the Respondent that the judgment and decree of the trial court or the Appellate Court, as the case may be, has been accepted by the other party and therefore no appeal has been preferred. (Reference is made to *Indian Statistical Institute vs. M/s. Associated Builders & Ors. AIR 1978 SC 335*)

20. Registry at the first instance had raised the objection that ad-valorem court fees be filed. This is a mandatory and material requirement of law. In the absence of court fees, as pointed out above, appeal cannot be entertained. Despite this objection having been raised immediately on filing of the appeal, Appellant did not remove this objection for about ten months. Rather, he purchased the court fees only on 4.2.2008.

21. Another mandatory requirement of law is that the appeal should be accompanied by certified copy of the impugned judgment. The registry did raise objection that both the impugned orders should be filed.
22. Certified copies of the impugned orders were filed on 20.12.2007, after appeal was returned back by the Registry for objections having not been removed. Other objection was regarding non appearance of signatures of the counsel for the appellants on the appeal. Memo of parties has been signed by Mr. Sudesh Kumar Advocate whose authority has been disputed by the Respondent. Name of Mr. Sudesh Kumar is appearing on the vakalatnama though he has not signed it. It is an irregularity which could be removed by the concerned Advocate by subsequently signing the vakalatnama with the permission of the Court.
23. Appellant No.2 has annexed two documents to support her plea that she was sick and therefore could not contact her lawyer and brief him. The first medical record is dated 12.05.2006 of Khandelwal Hospital and Urology Centre. This document pertains to the period when even impugned order was not pronounced i.e. during the pendency of the first appeal. The second document dated 22.02.2007, is a certificate issued by Dr. Samir Aren. This indicates

that appellant No.2 was under his treatment for vertigo and hypertension since 25.01.2007 to 21.02.2007. There is no other medical record placed before this Court to explain that appellant No.2 could not contact her counsel because she was sick. It is pertinent that the appeal was presented, and may be without fulfilling the mandatory requirements of law, within the period of limitation. None of these documents being earlier in time therefore are of any help to the appellants.

24. One of the appellants Pradeep Kumar Aggarwal expired on 18.11.2007 as per the death certificate placed on record. Appellant in her application has vaguely averred that she was busy because of sickness of her sons. She has not named any of her sons who was sick and the nature of ailment which he was suffering from or they were suffering from. Cause of death of Pradeep Kumar Aggarwal is not known. He died much after the appeal was returned for removal of objections, to be refiled.
25. Appellant No. 2, therefore, to my mind has not been able to explain any sufficient cause for not filing the appeal within the period of limitation. It is pertinent that besides her, there are four other appellants to the appeal, one of which, of course has died. Any one of them could have assisted the counsel in filing and refiling the

appeal. Appellant no.2 claims herself to be an illiterate old woman. If that is so, she must have always been assisted by her sons, the other appellants in pursuing the case as well as appeal. No explanation is forthcoming in the application as to why other appellants could not assist the lawyer if appellant No.2 was not well.

26. In *Asha Sharma & Ors. Vs. Sanimiya Vanijiya P. Ltd. & Ors. 162(2009) DLT 542 (DB)*, in similar circumstances where the appeal was refiled after expiry of 30 days' period, the Division Bench of this Court considered the provisions contained in Part G Chapter 1 Rule 5, Part A sub para (a), it was observed in para 9 of the judgment as under:-

“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.”

27. Coming back to the facts of this case, unfortunately, the appeal was not free from all defects when it was refiled on 19.12.2007, 14.01.2008, 24.01.2008, 25.01.2008 and 06.02.2008. Even the court fees was filed in the court on 08.02.2008 and not with the appeal.

The reason for delay in filing the court fees goes unexplained. The nature of ailments being suffered by appellant No.2 during the interregnum period of the return of appeal to be refiled again is not disclosed by way of any documents medically or otherwise or even in the application. The names of the sons of Appellant No.2 who were allegedly not well and were being looked after by her during the period, the nature of illness suffered by her sons are all material particulars which are missing in the application. No efforts have been made by the appellant to place on record any document to indicate that her sons and which of her son was sick. Significantly, all her sons are appellants in the appeal. None of the other appellants have signed the appeal or the instant application. No explanation is forthcoming as to why the other appellants did not sign the appeal or the application or brief their counsel. The averments in the application are vague in nature and cannot be accepted by the Court as 'Sufficient Cause' or 'bonafide reasons' for filing the appeal in time.

28. It has been pointed out by the counsel for the Respondent that Rajeshwari and Vimla Devi who were impleaded as Respondent No. 5 (d) and (e) in the first appeal have neither been arrayed as the appellants nor as Respondents. He has also submitted that since appeal has not been signed by all the appellants, there is no proper

appeal before the Court. Under the circumstances, I need not go into the question whether the appeal has been properly presented by the appellants or not.

29. In view of my discussion as above the application seeking condonation of delay in filing the appeal is vague and does not disclose any sufficient cause for non filing of the appeal in time.

30. I find no reason to condone the delay in refiling the appeal as appellant has failed to show sufficient cause within the meaning of order 41 Rule 3 A CPC.

31. Hence, application is dismissed. There are no orders as to costs.

RSA 38/2008

In view of dismissal of the application for condonation of delay appeal is dismissed as barred by period of limitation.

**ARUNA SURESH
(JUDGE)**

JULY 01, 2010

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