

(1999) 04 J&K CK 0001

In the Jammu And Kashmir High Court

Case No : Civil Miscellaneous Petition No. 224 Of 1998/C/W C. Rev. 36 Of 1998

Ali Mohd.Mir and Others

APPELLANT

Vs

Akbar Lone

RESPONDENT

Date of Decision : 20-04-1999

Acts Referred:

Jammu and Kashmir Limitation Act, 1995 — Section 14, 5

Citation : (1999) 2 SriLJ 463

Hon'ble Judges : G.L.Raina, J

Bench : Single Bench

Advocate : I.Sofi, A.R.Mirchal, Advocates appearing for the Parties

Judgement

1. In the suit seeking declaration and injunction it came to be pleaded by the plaintiff, the nonpetitioner herein, that he was in exclusive possession

of one kanal of land comprised in survey No. 2262/817 situated at Village Harri, Teh: Kupwara, District Kupwara whereon he had raised the

plantation of willowtrees. Apprehending wanton act of interference from the defendants, the plaintiff sought the declaration from the court that he is

the owner of the trees, planted in the land. He sought the restraint orders so as to prevent the acts of interfere, overt and covert in respect of his

possession.

2. It appears that the suit was resisted on the plank that the Village Awkaf was in possession of the land whereon construction of the Mosque was

intended. The defendants objected to the Civil Courts jurisdiction on the plank that the land was the Shamilat land the civil action was barred by

the Land Revenue Act.

3. The trial court raised the issue as to his jurisdiction to deal with/the matter.

On hearing the parties and on consideration of the averments made the trial judge, that is the SubJudge, Kupwara, held that his jurisdiction over the matter was not ousted by any law express or implied. This finding was recorded by the trial court on 31121996.

4. The finding of the trial court was sought to be got reversed by filing the appeal before the District Judge. The District Judge dismissed, vide his order dated: 551998, the appeal of the defendants on the ground that the order of the trial court was not under the Code of Civil Procedure appealable.

5. The revision motion against the order of the SubJudge dated: 31121996 came to be filed on this court on 2051998. The revision petition being beyond the period prescribed under the law necessitated the filing of the application, at hand which seeks the condonation of delay on the sole ground that it was under the mistaken advice of the counsel, engaged by the petitioners that they wrongly prosecuted the remedy of appeal upto 5th of May, 1998.

6. Time limit for filing revision petition is not prescribed but the consistent view of this court has been that normally a revision shall be filed within the same period which is prescribed for filing of appeal against the decrees or orders. Limitation for filing the appeal being admittedly ninety days this revision petition which has been filed on 2051998 is barred by 423 days. Though Section 5 of Limitation Act does not in terms apply to revision petitions yet indulgence can be granted to extend the time if the ground for such indulgence is maintainable.

7. The only ground urged in this application is that it was under the mistaken advice of the counsel engaged by the petitioners that revision motion could not be filed within the period of ninety days from the date of the SubJudge's order, but has come to be filed after 514 days of that order.

8. No general rule of law can be laid down that the mistake of a counsel, however obvious it may be, can always under every circumstance afford ground for extension of time. The counsel must show that there was bonafide mistake on his part in giving the advice and in spite of care and attention he could not avoid the mistake which was committed by him in advising the filing of the appeal against the nonappealable order.

9. The principle is well settled that where the mistaken advice of a counsel is not

associated by malafide that perse constitutes a valid ground for condonation of delay. But in order words if an error on the part of the counsel can be explained as a bonafide mistake then the delay can be condoned and time ex ended; but where the counsel's conduct in giving the wrong advice is neither bonafide or excusable but is the result of lack of care and caution in advising the litigant then the mistaken advice cannot be a valid ground to condoned the delay. Proof of due care and caution is prerequisite to involve the principle of condonation of delay.

10. In the case at hand the counsel, who advised the filing of the appeal against the trial court's nonappealable order in reference, cannot be said to have given the advice under due care and caution. Filing of the appeal against the order was not provided by the Code of Civil Procedure. The bare perusal of order 43 CPC would have cautioned the counsel not to advise the filing of the appeal against the nonappealable order. The error committed by the counsel is the outcome of lack of application of mind on his part. The mistake cannot be said to have resulted despite due care and caution having been taken by the counsel.

11. This apart the mistake of the counsel does not in every case by itself become a sufficient ground for condonation of delay. Even if the error of the counsel was not tainted by any malafide motive, yet it cannot be laid down as the principle that what is not malafide is necessarily bonafide.

Due care and caution is the least that can be expected of a counsel, a legal practitioner, while advice is given to a litigant client.

12. In this case the appeal against the trial court's order would lie to the District Judge but the revision motion would lie to the High Court.

Obviously the litigant and the counsel appear to have put on the robes or bluff in filing the appeal in the District Court though the order of the trial court was not appealable. The knowledge of the order being not appealable can be expected from even a law student who just passes out from the law College. Such an ignorance on the part of a practising lawyer, in a District Court, cannot be excused on any other hypothesis than the lack of bonafides of the counsel, the mistake of filing the appeal against the nonappealable order can by no imagination be said to be the genuine mistake. Such an advice rather betrays gross ignorance, apathy or nonapplication of mind which cannot be excused to extend the time. One has to

keep in mind that bar of limitation is the bar effecting jurisdiction, for no authority has jurisdiction to proceed with the matter if the bar of limitation intervenes.

13. In the facts and circumstances of the case the advice to file an appeal against the nonappealable order can, on no count, be said to be mistaken bonafide advice.

14. Apart from the legal aspect aforesaid there is the peculiar circumstance attendant to the motion. The application seeking condonation of delay

has in its own mode and fashion attributed the cause of delay to the mistaken advice of the counsel. Affidavit filed in support of the motion does not

say that the contents of the application, seeking condonation are sworn to be true and correct. The affidavit as filed recites on the other hand that

the submission made in the revision petition are true and correct though the revision petition does not explain the delay in its filing. It is thus manifest

that none of the petitioners has sworn to the correctness of the averments on which delay is sought to be condoned. The counsel too has not put in

an affidavit that he had inadvertently and in bonafide mistake advised the filing of the appeal. No supportive material in the nature of the affidavit of

the counsel or any of the petitioners has been filed to convince that the mistaken advice as to the remedy, against the trial court's order, had

resulted in filing of the revision motion beyond more than .four hundred and twenty days from the time that Was available for invoking the revisional

jurisdiction.

15. There is yet another aspect that merits a mention.

16. The District Judge dismissed the appeal against the SubJudge's order on 551998. The endothersements on the copy of the District Judge's

order gives out that the copy of the order was issued to one of the petitioners on 5th of May 1998 itself. This petition alongwith revision petition

came to be filed in this court on 20th of May. 1998. The delay from 5th of May, 1998 to 20th of May, 1998 has nowhere been explained. No

good ground for condoning the delay can be thus said to have been made out.

In a case of this nature where there has been great and unexpected delay or latches in making the application revisional interference has to be

refused notwithstanding that the order sought to be revised is apparently not correct or sustainable. Merits of the impugned order is not a

consideration to circumvent the bar of limitation.

17. Delay in the case at hand cannot be condoned and that too on the mere asking.

18. The application seeking condonation (CMP NO. 224/98) is for the reasons abovesaid dismissed. The revision motion is also dismissed as

barred by limitation.