

(2006) 11 GUJ CK 0091
In the Gujarat High Court

Case No : Civil Application No. 9153 of 2006 in Letters Patent Appeal No. 189 of 2006

Indravijaysinh Bhikhubha Gohil

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 07-11-2006

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2006) 11 GUJ CK 0091

Hon'ble Judges : J.M. Panchal, J;Abhilasha Kumari, J

Bench : Division Bench

Advocate : Bhaskar P.Tanna and Nikhil S. Kariel, for Tanna Associates for Petitioner 1, for the Appellant; L.R. Pujari, Learned AGP for Respondent 1, V.D. Nanavati, for Respondents 2 - 3 and B.B. Naik, for Bhargav N. Bhatt, for Respondent 4, for the Respondent

Judgement

J.M. Panchal, J.—Rule. Mr. L.R. Pujari, learned AGP, waives service of notice on behalf of opponent No. 1. Mrs. V.D. Nanavati, learned Counsel, waives service of notice on behalf of respondent Nos. 2 and 3. Mr. Bhargav N Bhatt, learned Counsel, waives service of notice on behalf of the respondent No. 4. Having regard to the facts of the case, the application is heard today.

2. By filing the instant application u/s 5 of the Limitation Act, 1963, the applicant has prayed to condone the delay of 44 days caused in filing the above numbered appeal, which is directed against the judgment dated October 26,2005 rendered by the learned single Judge in Special Civil Application No. 7635 of 2005.

3. The applicant has averred in the application that the delay caused in preferring the above numbered appeal was neither deliberate nor willful nor due to negligence on the part of the applicant and, therefore, the same should be condoned. According to the applicant, the applicant was represented before the learned Single Judge by his advocate Mr. A.J. Yagnik and the clerk working in the office of his learned advocate Mr. A.J. Yagnik had applied for certified copy on

October 27,2005, which was made ready for delivery on November 21,2005. According to the applicant after obtaining certified copy he had approached M/S. Tanna Advocates for preferring Letters Patent Appeal but since the papers were with the office of learned advocate Mr. Yagnik, the applicant was required to obtain all the papers and after obtaining the papers, the appeal was filed on December 20,2005 with no grounds so as to avoid any delay occurring in the matter and, therefore, the delay should be condoned. It is mentioned in the application that the Registry of the High Court had raised certain office objections on January 26,2006,one of which was that there were blanks in the memorandum of appeal and, therefore, substantive grounds in the memorandum of appeal were filed on February 2,2006, as a result of which delay of 44 days had taken place. What is mentioned in the application is that though the applicant is of the view that there is no delay in filing the Letters Patent Appeal, the delay be condoned for the reasons stated in the application, if the Court comes to the conclusion that the appeal was, for all practical purposes, filed on February 2,2006. Under the circumstances, the applicant has filed the instant application and claimed relief to which reference is made earlier.

4. Dr.Prashant N.Bhatt, who is respondent No. 4, has filed affidavit-in-reply controverting the averments made in the application. In the reply it is stated that the appeal against the judgment of the learned single Judge was filed by the applicant on December 20,2005 without mentioning any ground of challenge but the xerox copy of the Memorandum of appeal dated December 20,2005 was served upon him as he had filed caveat in the proceedings. It is further mentioned by him that thereafter on February 2,2006 his learned advocate was served with altogether a new memorandum of appeal which was also bearing the date of December 20,2005 and on inquiry his learned advocate had learnt that the applicant had, without permission of the Court and in violation of the Gujarat High Court Rules, 1993 (?the Rules? for short) removed the original memorandum of appeal filed on December 20,2005 and replaced it with another detailed memorandum of appeal wherein the same date was mentioned, as a result of which the delay should not be condoned. What is stated by the respondent No. 4 in his affidavit-in-reply is that the applicant has committed fraud with the court and has also forged the court record and, therefore, he is not entitled to discretionary relief of condonation of delay. It is maintained by the respondent No. 4 in his reply that the averments made in paragraph 4 of the application are false because on January 26,2006 the office of the High Court was closed as it was Republic Day and on the basis of false averments made on oath, the applicant would not be entitled to relief of condonation of delay. By filing the reply, the respondent No. 4 has demanded dismissal of the application.

5. On service of affidavit-in-reply filed by the respondent No. 4, the applicant has filed rejoinder and has denied the averment that the applicant had without permission of the Court and in violation of the Rules removed the original memorandum of appeal filed on December 20,2005 or that he had replaced it with another detailed memo of appeal bearing the same date. What is pointed

out by filing the rejoinder is that originally when the Letters Patent Appeal had been filed there were several office objections such as (1) index-cum-chronology not filed, (2) paging not done, (3) blanks in memo etc. which were removed by the learned advocate on February 2, 2006 i.e. before the expiry of the period of 15 days granted for removal of office objections and, therefore, removal of the otherwise incomplete memo of appeal and substitution of the same by a complete memorandum of appeal, does not amount to committing fraud or forging records of the case. What is claimed in the reply is that it is normal procedure prevalent in the Court of initially filing incomplete memo alongwith certified copy of the judgment of the learned single Judge, which is under challenge to ensure that the Letters Patent Appeal is not filed in the Registry with delay and in normal course, within the stipulated time as provided under the Rules, the office objections, including objection of blanks in the memo, are removed and, therefore, the instant application should be accepted by the Court. By filing the rejoinder, the applicant has claimed that the delay caused in filing the appeal should be condoned for the reasons stated in the application.

6. This Court has heard Mr. Bhaskar P. Tanna, learned senior advocate for the applicant as well as Mr. B.B. Naik, learned Counsel for respondent No. 4 and Mrs. V.D. Nanavati, learned Counsel for the respondent Nos. 2 and 3.

7. Mr. Bhaskar P. Tanna, learned senior counsel for the applicant, argued that the applicant was of the view that there was no delay in filing the Letters Patent Appeal but even if the said claim is not accepted by the Court and if the court proceeds on the footing that the Memorandum of Appeal was filed for the first time on February 2, 2006, sufficient cause has been made out by the applicant for condonation of delay and, therefore, the application should be accepted. Mr. Tanna, learned senior advocate, expressed regrets and stated that something wrong was done by the Clerk of his office when the memorandum of appeal bearing the same date as that of earlier memorandum of appeal, was placed in the Registry for which the applicant should not be penalised and pleaded that having regard to the grounds mentioned in the application, the application should be accepted.

8. Mr. B.B. Naik, learned Counsel for the respondent No. 4, contended that in view of the fraud committed by the office of the learned advocate engaged by the applicant, the delay should not be condoned. It was argued that the original memorandum of appeal filed on December 20, 2005 is not available on the record and as the same was substituted by presenting memorandum of Appeal bearing the same date without obtaining permission of the Registry or the Court, the delay should not be condoned in view of the fraud committed by the applicant. What was asserted on behalf of the respondent No. 4 was that the conduct of the applicant was such which disentitles him from claiming discretionary relief u/s 5 of the Limitation Act, 1963 and, therefore, the application should be rejected.

9. Mrs. V.D. Nanavati, learned Counsel for the respondent Nos. 2 and 3, contended that in view of the regrets expressed by the learned senior advocate

for the applicant, appropriate orders be passed in the matter.

10. This Court has heard the learned Counsels for the parties at length and considered the merits of the case. From the record of the case, it is evident that feeling aggrieved by the judgment dated October 26,2005, Letters Patent Appeal was filed by the applicant on December 20,2005 but the memorandum did not contain grounds of challenge at all and, therefore, one of the objections which was raised by the Registry was that there were blanks in the memorandum. In order to remove the office objections what was done by the applicant was to place on the record the memorandum of appeal by replacing the original memorandum of appeal bearing the same date, which was not in accordance with the requirements of the Rules at all. Before substituting the memorandum of appeal, the office of the learned Counsel for the applicant had not obtained permission either from the Registry or the Court. Under the circumstances, the Court cannot uphold the claim of the applicant that the appeal was filed for the first time on December 20,2005 and there was no delay in filing the appeal. There is no manner of doubt that for all practical purposes the Appeal was filed by the applicant on February 2,2006 and, therefore, the Registry is justified in pointing out to the Court that there is delay of 44 days in filing the appeal. In view of the regrets expressed by Mr. Tanna, the learned senior counsel for the applicant, this Court is of the opinion that it is not necessary for the Court to go into the question whether any fraud was committed by the office of the learned advocate engaged by the applicant in substituting the memorandum of appeal.

11. In view of the averments made in the application and more particularly paragraph 4 of the application, this Court is of the opinion that delay caused in filing the appeal is satisfactorily explained, more particularly when the Supreme Court in catena of reported decisions has ruled that on technical grounds a case should not be permitted to surfer but must be examined on its own merit.

12. For the foregoing reasons, the application succeeds. The delay caused in filing the above numbered appeal is condoned. Rule is made absolute. Having regard to the facts of the case, the applicant is directed to pay cost of Rs. 2000/- (Rupees two thousand only) to each of the respondents.