
(2011) 04 DEL CK 0315

In the Delhi High Court

Case No : Regular Second Appeal No. 97 of 2007

Sh. Prakash Chand

APPELLANT

Vs

Texmaco Limited

RESPONDENT

Date of Decision : 28-04-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 2(2)
Limitation Act, 1963 — Section 5

Citation : (2011) 04 DEL CK 0315

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : S.K. Taneja and Rakesh Kumar, for the Appellant; Amit Sibal, Priyanka Gupta and Saurabh Seth, for the Respondent

Judgement

Indermeet Kaur, J.—This appeal has impugned the judgment and decree dated 19.10.2006 which had endorsed the finding of the trial judge dated 20.07.2005 whereby the suit filed by the Plaintiff M/s. Texmaco Limited seeking recovery had been decreed in their favour. This was a suit under Order 37 of the Code. The application for leave to defend preferred by the Defendant had been dismissed; decree had followed. In first appeal, the appeal had been filed belatedly by 25 days. The application for condonation of delay had been rejected; as a result the appeal stood dismissed.

2. The Plaintiff is a company registered under the Companies Act, 1956. It has various units and is engaged in the business of manufacturing and trading. M/s Birla Textiles was an independent company; by virtue of a Scheme of Arrangement approved by the High Court of Delhi in Company Petition No. 59 of 1982 on 03.10.1993, all rights and interests of the said company were taken over by M/s Texmaco Ltd. Defendant had joined the Plaintiff company on 09.07.1969. He had been allotted a residential accommodation Jhuggi, Khilonawala Bagh, Pambari Road, Delhi (hereinafter referred to as 'suit property') during his service with the Plaintiff; written contract dated 17.09.1991 was executed

between the parties. Defendant was to vacate the property at the time of cessation of his service, failing which he was to pay the damages @ Rs. 50/- per day for his unauthorized use and occupation. The work of the Plaintiff's mill was closed down under the orders of the Apex Courts on 30.11.1996. Defendant failed to vacate the suit property. Plaintiff sent legal notice dated 06.11.2003 to the Defendant demanding damages for unauthorized use and occupation as also further damages @ Rs. 50 per day from the date of the institution of the suit till the actual physical possession. This was a suit under Order 37 of the Code.

3. Application for leave to defend had been filed by the Defendant. The court was of the view that no triable issue has been raised; it was moonshine. The suit was decreed for Rs. 30,500/- as damages/mesne profits as also Rs. 50 per day which were awarded for the unauthorized use and occupation of the accommodation from the date of filing the suit till the actual, physical possession of same be handed over to the Plaintiff.

4. The first appeal court had dismissed the appeal on the ground that it was barred by limitation; there was a delay of 25 days; it was not condoned.

5. This is a second appeal. It had been admitted and on 02.05.2007, the following substantial question of law had been formulated:

Whether the appeal filed by the Appellant before the First Appellate Court is barred by time?

6. On behalf of the Appellant, it has been urged that a valuable right had been lost to the Appellant and the court should have favourably considered his application for condonation of delay when he had filed the relevant documents i.e. his medical certificate to substantiate his submission that he was ill in the intervening period when he could not file the appeal. For this proposition, reliance has been placed upon Improvement Trust, Ludhiana Vs. Ujagar Singh and Others,

7. Learned Counsel for the Respondent has rebutted this argument. It is pointed out that the terms "sufficient cause" as appearing in Section 5 of the Limitation Act implies an adequate and legal reason; delay cannot be condoned as a matter of right. It is pointed out that in dealing with an application for condonation of delay; the decisive factor is not the length of the delay but the sufficiency of satisfactory explanation. To support his submission, reliance has been placed upon the judgment reported in Balwant Singh (Dead) Vs. Jagdish Singh and Others, To advance the same proposition, reliance has also been placed upon another judgment reported in Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., ; it is pointed out that a right accrues to the opposite party when an appeal is not filed within time, decree thus becomes binding on the parties; delay in filing the appeal should not be condoned lightly.

8. Arguments have also been addressed on the maintainability of appeal. It is pointed out that Apex Court in Ratansingh Vs. Vijaysingh and Others, held that

the dismissal of an application for condonation of delay leading to the dismissal of the appeal itself would not amount to a "decree"; as defined u/s 2(2) of the CPC (hereinafter referred to as the "Code"), it would not be amenable to the jurisdiction of the High Court u/s 100 of the Code. To support this submission, reliance has also been placed upon the full bench judgment reported in *Mamuda Khateen and Others Vs. Beniyan Bibi and Others*, . It is pointed out that in *Kunhayammed and Others Vs. State of Kerala and Another*, while dealing with the doctrine of merger, the Apex Court had held that this doctrine is not of universal or unlimited application; the context and the facts of each case has to be seen. It is pointed out that in the instant case, the first appellate court had correctly dismissed the application seeking condonation of delay; it had not delved into the merits of the case; the judgment of the trial judge had not been considered on its merits; the doctrine of merger would be inapplicable; the impugned judgment dismissing the application for delay without delving into the merits of the case was thus not a decree which had merged with the judgment of the trial judge; the doctrine of merger is not attracted.

9. The Supreme Court in *Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others*, had, in fact, considered the judgment of *Ratan Singh* (supra) as also the full bench judgment of Calcutta High Court (noted supra) and had held that where an application seeking condonation of delay has been dismissed by an appeal court on the ground of delay, it must be held that this dismissal has, in fact, endorsed the finding of the trial judge on the merits as well. In this case, the Apex Court had relied upon the judgment of *Sheodan Singh v. Daryao Kunwar* reported in *Sheodan Singh Vs. Smt. Daryao Kunwar*, the relevant portion extracted from the said judgment reads as follows:

We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal.

It is thus clear that the appeal was maintainable.

10. The second question which has to be answered by this Court is as to whether the first appellate court had exercised its jurisdiction fairly and judiciously while dismissing the application seeking condonation of delay. In this context, the factual dates become relevant. They are undisputed. The judgment of the trial court was delivered on 20.07.2005. The Plaintiff had applied for certified copy on 04.08.2005; the certified copy was ready on 10.05.2005 and received on 25.08.2005. The appeal was filed on 20.09.2005. There was a delay of 25 days. Reason was that the Plaintiff was ill in this intervening period i.e. between 18.08.2005 to 17.09.2005. The Appellant came to know about the order only on 18.09.2005 when he contacted his lawyer, thereafter, the Appellant had taken the file from his earlier lawyer and appointed the new lawyer on 19.09.2005.

Appeal was filed on 20.09.2005. The impugned judgment had noted that the medical certificate filed for the period of 18.08.2005 to 03.09.2005. Before this Court, it has vehemently been urged that the delay between 03.09.2005 to 20.09.2005 has been unexplained.

11. This Court is conscious of the fact that a first appeal court is the last court on facts; after the first appeal, in a second appeal, it is only a substantial question of law which has to be examined. A valuable right accrues to a party to have his lis decided before the first appellate court; on the other hand, the right which has accrued in favour of a party who has got a decree in his hand also cannot be treated lightly. In the instant case, the purported lyunex plained delay appears to be of 17 days. Medical certificate between 18.08.2005 till 03.09.2005 is on the record. This shows that the Plaintiff was unwell in this period and he had been advised medical rest. In the judgment of Improvement Trust, Ludhiana (supra), the Apex Court has noted that the delay in filing a first appeal must not be considered on hyper technical grounds; each case has to be weighed on its facts and circumstances; the conduct, behaviour and attitude of Appellant also becomes relevant. The attitude of the Appellant must not be callous and negligent.

12. Keeping in view the afore noted parameters, in the instant scenario, this appears to be the case where the Appellant cannot be termed as either callous or an egligent litigant. In fact, he was vigilant. Due to unfortunate circumstances, he was taken ill and he could not contact his lawyer for the period between 18.08.2005 to 17.09.2005. He had otherwise been taking all requisite steps for the purpose of filing the appeal. He had applied for the certified copy of judgment in time. He had also received the same in time. However, appeal could not be filed in time for the reasons explained in his application u/s 5 of the Limitation Act which had been preferred before the first appeal court. Details are contained in paras 3 and 4. They are reproduced as follows:

3. That the Appellant was got ill on 18.08.2005 due to which unable to contact this lawyer but his lawyer applied for the certified copies of the impugned order, therefore, the limitation also starts against the Appellant. The Appellant was ill till 17.09.2005 due to which unable to contact his lawyer and failed to file the appeal against the impugned order and the appeal become time barred. The delay in filing the present appeal is neither intentional nor deliberate but due to the illness of the Appellant.

4. The Appellant contact his lawyer on 18.09.2005, then his lawyer said him about the decree against the Appellant. Thereafter, the Appellant taken the file from his earlier lawyer and engaged a new lawyer on 19.09.2005 to file the present appeal.

These averments are supported by the affidavit of the Appellant. It does give a fair explanation of the delay. The financial burden has been cast upon the Appellant by this decree which has been passed in favour of the Plaintiff company

where he was employed; he not having been able to get his lis decided on merits, it would be a fit case where the matter is remanded back to the District Judge for decision on merits. The delay in filing the first appeal is accordingly condoned.

13. The parties are directed to appear before the District & Sessions Judge, Tis Hazari at 10 p.m. on 05.05.2011 who shall assign the matter to the concerned appellate court to decide the case on its merit. The court shall positively endeavor to adhere to the time schedule. With these directions, the appeal is disposed of.