

THE HIGH COURT OF SIKKIM : GANGTOK

CIVIL REVISION NO.2 OF 2004

In the matter of a revision under section 115 of the Code of Civil Procedure, 1908.

[arising out of the order dated 28.11.2003 passed by S.W. Lepcha, District Judge (E/N) Gangtok in Civil First Appeal No. 2 of 2002]

1. M/s. Jagat Singh Amar Singh Singhi,
Mangan Bazar,
North Sikkim.
2. Jagat Singh Singhi,
S/o Late Manmull Singhi,
R/o Mangan Bazar,
North Sikkim.

.... **Petitioners**

VERSUS

Devi Kumari Pradhan,
W/o Kulman Pradhan,
R/o Mangan Bazar,
P.O. & P.S. Mangan,
North of Sikkim

.... **Respondent**

For the petitioner : M/s. A. K. Upadhyaya, Sudesh
Joshi and S. Pradhan, Advocates.

For the respondent: A. J. Sharma, Advocate.


PRESENT: THE HON'BLE SHRI JUSTICE R. K. PATRA, CHIEF JUSTICE.

Date of judgment: 11th May, 2004.

J U D G M E N T

R. K. PATRA, C.J.


This revision is directed against the order dated 28.11.2003 passed by the learned District Judge (E & N), Gangtok rejecting the petitioners' application for condonation of delay and resultantly dismissing the appeal as being barred by time.



2. The petitioners were the defendants in civil suit No. 42 of 2000 commenced by the respondent in the court of Civil Judge (East) at Gangtok. The suit was decreed on 30.8.2002. The petitioners applied for certified copies of the judgment and decree on the same day. On 4.9.2002 the certified copies were made ready but they took delivery of the same on 9.9.2002 and filed the appeal on 7.10.2002. The period of limitation prescribed for appeal is thirty days from the date of decree. In computing the period of limitation, the time spent in obtaining the certified copy of the decree is available to be excluded. The petitioners were further entitled to get the day on which they applied for the certified copy and the day on which the copy was ready for delivery i.e. 4.9.2002. Therefore the appeal should have been filed latest by 4.10.2002 but as indicated above, it was done on 7.10.2002 occasioning thereby delay of 3 days in the matter.


The appeal was filed without any application for condonation of delay. It was registered on the same day. In response to the summons issued by the court, the respondent appeared and the matter was posted for hearing on 13.12.2002. On the date of hearing neither the petitioners nor their counsel appeared. As a consequence the appeal was dismissed for default. Thereafter, the petitioners applied for restoration of the appeal which was


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allowed. The appeal was accordingly restored to file and was fixed for hearing on 25.3.2003. In the meantime i.e. on 22.3.2003 the petitioners filed an application under section 5 of the Limitation Act, 1963 (hereinafter referred to as the Act) for condonation of delay in filing the appeal. In the written objection the respondent took several grounds including lack of due care and diligence on the part of the petitioners in filing the appeal beyond the time. The learned District Judge on consideration held that there is no satisfactory explanation as to why the appeal was not filed in time and accordingly rejected the application for condonation of delay as well as the appeal giving rise to the present revision.

3. Shri Upadhyaya, learned counsel for the petitioners submitted that the petitioner no. 2 who was in charge of the litigation had gone to Sadulpur in Rajasthan on 28.9.2002 to see his ailing maternal aunt and could come back to Gangtok only on 5.10.2002. The following day i.e. 6.10.2002 was Sunday and as such the appeal was filed on 7.10.2002. According to him, absence of petitioner no. 2 from Gangtok during the relevant period prevented him from filing the appeal in time and this constituted sufficient cause to excuse the delay. He also submitted that although the counsel who drafted and filed the appeal by mistake further excluded the time covered from 4.9.2002 (the date on which






certified copy was ready) to 9.9.2002 (the date on which the petitioners took the certified copy) while counting the period of limitation, the real cause for filing the appeal beyond time was absence of petitioner no. 2 from Gangtok. Shri Sharma appearing for the respondents contended that there was no jurisdictional error committed by the learned District Judge in dismissing the appeal as being barred by time. According to him, there was total absence of reasonable care on the part of the petitioners in dealing with the matter. The application for condonation of delay was filed only after the appeal was restored to file which was once dismissed for default. It indicates lack of bona-fides. The application was also not accompanied by any medical certificate in support of the illness of the maternal aunt of petitioner no. 2. His further submission is that negligence of lawyer is no excuse for condoning delay.

4. From the above rival contentions of the parties, the following points arise for consideration:

1. Whether section 5 of the Act requires an application to be filed for grant of relief thereunder.
2. Whether in a time-barred appeal filed under section 96 read with O 41 Rule 1 CPC, as in the instant case, an application for excuse of delay should accompany the memorandum of appeal. What is the effect of filing such an application at a later stage?


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3. Whether the petitioners have been able to show sufficient cause in not preferring the appeal in time.
 4. Whether the learned District Judge committed any error of jurisdiction in refusing to condone delay so as to justify this court for interference under the revisional jurisdiction.

5. Point no. 1:

The plain language of section 5 of the Act does not indicate that an application in writing should be filed for condonation of delay in any appeal or application presented after the prescribed period. I had the occasion to consider this question while sitting in Division of the Orissa High Court in Balajinath Padhi -v- Central Administrative Tribunal 93 (2000) Cuttack Law Times, 794. Relying on an earlier bench decision of Orissa High Court in ILR 1971, Cuttack 1387, I opined that section 5 of the Act does not in terms require that an application in writing must be filed for consideration of grant of relief thereunder but as a matter of practice, a formal application is filed to excuse the delay. In absence of any application, if material is available in the case record or otherwise or the person concerned is able to convince the court that there are adequate grounds for the delay and the court is satisfied with it, the delay can be condoned. With respect, I may say that the same view has been taken by different High Courts (to wit AIR 1977 All 551, 1979 Delhi 26, 1981 AP 186, 1985 (Patna) 148.

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In view of the aforesaid, I have no hesitation to hold that merely because a written application is not filed by a party, it would be hardly a valid ground for refusing him the relief u/s 5 of the Act if he is otherwise entitled to it. It is true that it has been in vogue that a formal application is usually made for condonation of delay under section 5 of the Act. Rules of procedure are meant for advancing the cause of justice. They are not used as booby trap to obstruct advancement of the cause of justice.

6. Point no. 2:

Rule 3A inserted to Order 41 by the CPC (Amendment) Act, 104 of 1976 lays down that when an appeal is preferred after the expiry of the period of limitation, it shall be accompanied by an application supported by affidavit setting forth necessary facts to show that appellant had sufficient cause for not filing the appeal within the prescribed period. The question whether filing of an application for condonation of delay along with the memorandum of appeal is mandatory or not came up for determination before the Supreme Court in State of M.P. vs. Pradeep Kumar (2000) 7 SCC 372. It would be profitable to extract the following paragraphs of the judgment.

“10. What is the consequence if such an appeal is not accompanied by an application mentioned in sub-rule (1) of Rule 3-A? It must be noted that the Code indicates in the immediately preceding Rule that the consequence of not complying with

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the requirements in Rule 1 would include rejection of the memorandum of appeal. Even so, another option is given to the court by the said Rule and that is to return the memorandum of appeal to the appellant for amending it within a specified time or then and there. It is to be noted that there is no such rule prescribing for rejection of memorandum of appeal in a case where the appeal is not accompanied by an application for condoning the delay. If the memorandum of appeal is filed in such appeal without an accompanying application to condone delay the consequence cannot be fatal. The court can regard in such a case that there was no valid presentation of the appeal. In turn, it means that if the appellant subsequently files an application to condone the delay before the appeal is rejected the same should be taken up along with the already filed memorandum of appeal. Only then the court can treat the appeal as lawfully presented. There is nothing wrong if the court returns the memorandum of appeal (which was not accompanied by an application explaining the delay) as defective. Such defect can be cured by the party concerned and present the appeal without further delay.

11. No doubt sub-rule (1) of Rule 3-A has used the word "shall". It was contended that employment of the word "shall" would clearly indicate that the requirement is peremptory in tone. But such peremptoriness does not foreclose a chance for the appellant to rectify the mistake, either on his own or being pointed out by the court. The word "shall" in the context need be interpreted as an obligation cast on the appellant. Why should a more restrictive interpretation be placed on the sub-rule? The Rule cannot be interpreted very harshly and make the non-compliance punitive to an appellant. It can happen that due to some mistake or lapse and appellant may omit to file the application (explaining the delay) along with the appeal.

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12. It is true that the pristine maxim *vigilantibus non dormientibus jura subveniunt* (law assists those who are vigilant and not those who sleep over their rights). But even a vigilant litigant is prone to commit mistakes. As the aphorism “to err is human” is more a practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of a litigant should not normally cause the doors of the judicature permanently closed before him. The effort of the court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by him, but to see whether it is possible to entertain his grievance if it is genuine.


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19. The object of enacting Rule 3-A in Order 41 of the Code seems to be twofold. First is, to inform the appellant himself who filed a time-barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the court has to deal with application for condonation of delay as a condition precedent. Barring the above objects, we cannot find out from the Rule that it is intended to operate as unremediably or irredeemably fatal against the appellant if the memorandum is not accompanied by any such application at the first instance. In our view, the deficiency is a curable defect, and if the required application is filed subsequently the appeal can be treated as presented in accordance with the requirement contained in Rule 3-A Order 41 of the Code.”

[emphasis supplied]

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The above being the legal position, no exception can be taken in presenting the memorandum of appeal by the



petitioners without being accompanied by an application for condonation of delay which they did at a later stage on 22.3.2003.


7. Point no. 3 :

Admittedly there was delay of three days in preferring the appeal. In paragraph 6 of the application for condonation of delay it was stated that petitioner no. 2 Jagat Singh Singhi had gone to Sadulpur in Rajasthan on 28.9.2002 to see his ailing maternal aunt who wanted to see him and on 5.10.2002 he returned to Gangtok. Next day (6.10.2002) being Sunday, the memorandum of appeal was signed and filed on 7.10.2002. To this, in paragraph 10 of the written objection, the respondent stated as follows :

“10. That the averments and the grounds taken in paragraph 6 of the petition are denied. The grounds taken therein are not sufficient grounds for (i) excusing for non filing of the application for condonation of delay along with Appeal and (ii) excusing for condonation of delay in filing Memorandum of Appeal and also for (iii) accepting the instant petition filed after five months fifteen days of the filing of the Appeal. Moreover, the cause or the grounds taken in paragraph 6 are not corroborated by any documentary evidence.”

Shri Upadhyaya, learned counsel for the petitioners submitted that the main reason for filing the appeal beyond the period of limitation was the absence of petitioner no. 2 from Gangtok. He was in charge of litigation and had gone to Rajasthan to see his ailing maternal aunt and

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immediately after his arrival at Gangtok the appeal was filed and in the circumstances insistence for medical certificate in support of illness of his maternal aunt is unpracticable. According to Shri Upadhyaya, the mistake committed by the filing advocate in calculating the period of limitation was not very material and was not the real cause for the delay.

7A. The jurisdiction to condone the delay conferred under section 5 of the Act is discretionary and the court is required to exercise its discretion on well-established judicial principles. In considering the prayer for excusing the delay, two important aspects are to be kept in mind. The first aspect is that on the expiry of the period of limitation set out for filing the appeal a legal right accrues in favour of the successful party and this right accrued to him by lapse of time should not be lightly disturbed. The second is that if sufficient cause for condonation of delay is furnished, discretion is given to the court to condone the delay and admit the appeal (See AIR 1962 SC 361, Ramlal vs. Rewa Coalfields Ltd., AIR 1968 SC 222 Sarpanch, Lonand Grampachayat vs. Ramgiri Gosavi).

The Supreme Court in Collector, Land Acquisition, Anantnag vs. Mst. Katiji (AIR 1987 SC 1353) has observed as follows:

“3. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the


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message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in 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."

7B. Keeping in view the aforesaid, let me examine if the petitioners have been able to show sufficient cause in not preferring the appeal within the prescribed period. What constitutes "sufficient cause" depends upon the facts and circumstances peculiar to each case. No two cases can be






treated alike. Each case has to be considered on its own facts and circumstances. While considering this question pragmatic approach and not pedantic one has to be adopted keeping in view the realities of life. It is the submission of learned counsel for the petitioners that the principal reason which disabled them to file the appeal within time, was the absence of petitioner no. 2 from Gangtok who had gone to Rajasthan to see his ailing maternal aunt. It is asserted that he came back to Gangtok on 5.10.2002 and the following day being Sunday the appeal was filed on 7.10.2002. That is how there was delay of three days. The above facts have been averred in paragraph 6 of the application filed under section 5 of the Act and the same have been affirmed in the affidavit sworn to by petitioner no. 2. In absence of any material to the contrary, I am inclined to hold that because of the absence of petitioner no. 2 the appeal could not be presented on 4.10.2002 resulting in delay of three days. It cannot be visualized as to how the petitioners could have benefited by resorting to intentional delay. The above ground in my opinion constitutes sufficient cause for condonation of delay.

8. Point no. 4 :

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The learned District Judge has acted illegally with material irregularity in exercise of his jurisdiction in rejecting the prayer for condonation of delay in as much as



he did not consider the relevant facts in the light of law relating to the provision of section 5 of the Act causing thereby miscarriage of justice. Therefore the impugned order is liable to be revised by this court in exercise of its jurisdiction under section 115 C.P.C.

9. In view of what has been stated above, the impugned order dated 28.11.2003 is hereby set aside. The petitioners' application for condonation of delay stands allowed subject to payment of costs of Rs.300/- by the petitioners to the respondent by 31st May, 2004. On production of proof of payment of costs within the time frame indicated, the learned District Judge shall admit the appeal and dispose of the same according to law as expeditiously as possible preferably by the end of August, 2004.

10. In the result, the revision is allowed. No costs.


(**R.K. Patra**)
Chief Justice
11.05.2004

Dictation taken
&
Typed by me
Tshering Dolkar