HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

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CM(M) no.104/2020
CM no.5270/2020
CM no.5706/2020

Reserved on: 06.05.2022

Pronounced on: 15.09.2022

Bashir Ahmad Bhat and another

…….Petitioner(s)

Through: Mr I. Sofi Advocate

Versus

Ghulam Hassan Bhat

……Respondent(s)

Through: Mr Bhat Fayaz, Advocate

CORAM:

HON'BLE MR JUSTICE VINOD CHATTERJI KOUL, JUDGE

JUDGEMENT

1. Assailed in this petition, preferred under Article 227 of the Constitution of India, is Order dated 25th July 2020, passed by Principal District Judge, Bandipora (for short as "*Appellate Court*") on an Interim Application arising out of an Appeal titled as *Ghulam Hassan Bhat v. Bashir Ahmad Bhat and others*, and setting-aside thereof is prayed for by petitioners. Prayer for dismissal of Appeal as also Application for grant of interim relief filed by respondent before appellate court, is also sought for by petitioners to be granted.
2. Petitioners, as pleaded in petition in hand, filed a suit for permanent injunction before Munsiff Bandipora (for brevity referred to as "*Trial Court*"). Alongside thereto an application for grant of *ad interim* relief

was also filed by petitioners, in which an order dated 10th September 2018 was passed by the Trial Court; operative portion, given the controversy involved in petition on hand, would be profitable to be reproduced hereunder:

> "Considering the above facts and reasons, issue notice to other side for filing of written statement in the suit and objections in the interim application. In the mean-time till objections are filed and same are considered, the non-applicant/defendant is temporarily restrained from causing any sort of interference with the suit property falling under survey number 23 measuring 1 Kanal 05 Marlas in total situated at Papchan Bandipora. The other-side shall be at liberty to approach this Honourable Court at any time for modification, reversal or setting aside of this order……"

3. Against aforesaid order dated 10th September 2018, an appeal respondent directed before the Appellate Court on 25th July 2020. Upon entertaining the appeal preferred by respondent, the Appellate Court passed order dated 25th July 2020, admitted it and kept in abeyance Trial Court order dated 10th September 2018. This is how the parties are before this Court.
4. I have heard learned counsel for parties and considered the matter.
5. Learned counsel for petitioners has vehemently urged that delay in moving appeal was writ large therefrom that was not condonable; even for condoning delay, an independent motion had not come up with memo of appeal on behalf of respondent, which was a must in law. Nonetheless, the Appellate Court, unmindful of Limitation Act providing 90 days' time in preference of appeals and more especially interim order being subject to objections that has been challenged therein, has entertained appeal, passing impugned order. Having no jurisdiction as exhorted by learned counsel for petitioners, the

Appellate Court is stated to have without first condoning delay entertained, diarised and admitted appeal and that such process and exercise undertaken by the Appellate Court is in contravention to provisions of Order XLI Rule 3A (3) because same bars granting order of stay/ interim direction in a time-barred-appeal unless delay is condoned. Two long years' delay, as said by learned counsel for petitioners, has not been talked of by the Appellate Court muchless noticed and/or requisitioned by the Appellate Court while passing impugned order. Judgements rendered in the cases of ***Madhukar Daso Deshpande v. Anant Nilkantha Deshpande and others, AIR 1984 Karnataka 40; S. M. Iqbal v. Firdous Ahmad Shah, SLJ (1995) 299; Smt. Umrao Bai and others v. Sardarilal Khatri, (1997) AIR (MP) 62;*** and ***Lokanath Biswal v. Union of India, (2008) AIR (Orissa) 33***, have been relied upon by learned counsel for petitioners to aver that law qua condonation of delay has been settled as is held in these judgements and apply to the case in hand as well.

Next assertion on behalf of learned counsel for petitioners is that challenge thrown in the appeal by respondent was to an Order dated 10th September 2018, passed by the Trial Court, which was not a final order but an *ad interim* order; even open to variation, modification and vacation on motion and, as such, Appellate Court was required to ask respondent to approach the Trial Court with appropriate application seeking variation, modification or vacation of Order dated 10th September 2018.

6. Law of limitation being a substantive law, the appeals are to be filed within a time limit. Filing an appeal within a period of limitation is the rule and condonation of delay is an exception. Thus, while condoning the delay, the Courts must be cautious and only on genuine reasons, the Courts are empowered to condone the delay. The power of discretion to condone the delay is to be exercised judiciously and by recording reasons. The reasons furnished for condonation of delay must be candid and convincing. So, the condonation of delay cannot be claimed as a matter of right and only on genuine reasons, the delay is to be condoned and not otherwise. In the event of condoning the huge delay in a routine manner, the Courts are not only diluting the law of limitation but unnecessarily encouraging this kind of lapses. Therefore, reasons which are all acceptable alone must be a ground for condonation of delay, and flimsy, false and casual reasons cannot be taken for the purpose of condoning the huge delay.

7. Law is settled that an appeal, barred by time, cannot be entertained by a Court without condoning delay. Order XLI Rule 3-A CPC relates to application for condonation of delay and, thus, it would be beneficial to have it reproduced hereunder:

> "3-A. Application fur condonation of delay. –
> (1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.
> (2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.
> (3) Where an application has been made under sub-rule (1), the Court shall not make an order for the stay of execution of the

> decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal."

8. If an appeal is not accompanied by an application as mentioned in Subrule (1) of Rule 3-A, what would be consequence thereof. It must be noted that the Code indicates in Rule 3 (1) of Order XLI that where an appeal is not drawn up in the manner prescribed, it may be rejected or returned to appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there. It is to be noted that there is no such rule prescribing for rejection of an appeal in a case where the appeal is not accompanied by an application for condoning delay. If an appeal is filed without accompanying the 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 appellant subsequently files an application to condone delay before the appeal is rejected, the same should be taken up along with the already filed appeal. Only then the court can treat the appeal as lawfully presented. There is nothing wrong if the court returns the 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. The Supreme Court in *State of M.P. and another v. Pradeep Kumar and another, (200) 7 SCC 372*, has said that non-accompanying of application for condonation of delay does not prevent appellant to rectify mistake either on his own or being pointed out by the court. Relevant portion of the said judgement is reproduced hereunder:

> "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 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 1o 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 accompanying the 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.
>
> 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 case 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 appellant. It can happen that due to some mistake or lapse an appellant may omit to file the application (explaining the delay) along with the appeal It is true that the pristine maxim "*Vigilantibus Non Dormientiobus 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."

9. An unintentional lapse from a litigant should not usually cause doors of the judicature permanently closed before him. The effort of the Court should not be one of finding means to pull down 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. The Supreme Court further held in Pradeep Kumar (supra):

> "The object of enacting Rule 3-A in Order 41 of the Code seems to be two- fold. 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 of Order 41 of the Code."

10. From the above it is evident that deficiency of not accompanying application for condonation of delay is curable defect and if required such an application can be filed subsequently and the appeal can be treated as presented in accordance with the requirement contained in Rule 3-A of Order XLI CPC.

In the present case, application for condonation of delay has not been filed with the appeal, which is a lapse on the part of respondent. However, at the same time, the first Appellate Court was required to detect and point out such a lapse, which it has not while passing order impugned. In such circumstances, impugned order warrants interference.

11. For the reasons discussed above, the instant petition is ***partly allowed***. Order dated 25th July 2020, passed by Principal District Judge,

Bandipora, on an Interim Application arising out of an Appeal titled as *Ghulam Hassan Bhat v. Bashir Ahmad Bhat and others*, is ***set-aside***. However, respondent is given liberty to move an application for condonation of delay in filing the appeal before the court of Principal District Judge, Bandipora, by or before 24th September 2022, on which date both the parties shall appear before the court of Principal District Judge, Bandipora. In the event application for condonation of delay is filed by respondent within above prescribed time, the same shall be decided within one month. It is made clear that in the event respondent fails to move an application for condonation of delay within above time limit, the court of Principal District Judge, Bandipora, shall be free to pass appropriate orders taking into account all that has been observed hereinabove.

12. **Disposed of**.
13. Copy be sent down.

(Vinod Chatterji Koul)
Judge

Srinagar
15.09.2022
Ajaz Ahmad, PS

Whether approved for reporting? Yes

HIGH COURT
JAMMU & KASHMIR AND LADAKH