

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RSA 61/1988**

**Date of Decision: 1<sup>st</sup> July, 2010**

HUKUM CHAND ..... Appellant  
Through: Mr. G.K. Srivastava, Advocate

**VERSUS**

SHAKUNTLA @ SHEELA ..... Respondent  
Through: Mr. R.K.Uppal, Advocate

% **CORAM:**  
**HON'BLE MS. JUSTICE ARUNA SURESH**

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest? Yes

**J U D G M E N T**

**ARUNA SURESH, J.**

**CM APPL Nos.16468/2007 (delay) and 16467/2007 (Restoration) in RSA 61/1988**

1. Vide this order I shall dispose of the applications filed by legal representative of Bhulan Singh, deceased appellant for restoration of the appeal and for condonation of delay in filing the application for restoration of appeal.
2. Hukum Chand, predecessor-in-interest of the appellants filed this appeal challenging the judgment and decree of the First Appellate

Court dated 04.08.1987. During the pendency of the appeal, he died on 14.11.1991. After his death, Bhulan Singh being his son and legal representative was substituted as appellant on 10.02.1992.

3. Appeal came up for final hearing on 27<sup>th</sup> November, 2003. Since none was present on that day, the appeal was dismissed in default on the ground of non prosecution. This application has been filed by Bhulan Singh on 19<sup>th</sup> November, 2007 i.e. after about four years of the dismissal of the appeal.
4. During the pendency of this appeal Bhulan Singh also died. Thereafter, his legal representatives have been brought on record in the array of applicants vide order dated 17<sup>th</sup> July, 2009 by the Registrar.
5. Mr. G.K. Srivastava, counsel for the applicant has submitted that appellant's Advocate, Mr. D.L. Malhotra died, but appellant was not aware of the death of his counsel and he was not able to get any copy of the appeal or proceedings because, the record was with Mr. D.L. Malhotra and therefore he could not know the next date of hearing fixed in the case. It is further submitted that applicant Bhulan Singh was a cardiac patient and suffered from paralytic attack on left side in March, 2003 and he was completely paralysed since May, 2005. It was only in the second week of September, 2007, when he came to

know that Respondent was trying to sell the property, he sent his son to the residence of Mr. D.L. Malhotra and thereafter engaged his services. He inspected the record and thereafter filed the application.

6. It is argued that there is sufficient cause for the appellant in not prosecuting his appeal and filing this much delayed application with a request to restore the appeal by condoning the delay.
7. Mr. R.K. Uppal appearing for the Respondent has submitted that besides Mr. D.L.Malhotra, who died in 2003 appellant was being represented by Mr. Sunil Malhotra and Mr. S.K.Sharma, Advocates which fact was very well in the knowledge of the applicant, therefore, applicant's plea that he could not come to know about fate of the appeal till 1997 is his made up story with a malafide motive to get condonation of delay in filing the application for restoration of the appeal. He has emphasized that these applications have been filed only when appellant feared that the property might be sold away by the Respondent.
8. It is pointed out by counsel for the Respondent that Bhulan Singh had been appearing in the criminal complaint filed by him in the court of Metropolitan Magistrate against the predecessor in-interest of the Respondent Makhan Singh and others. The complaint was dismissed on 12.09.2006 i.e. much after the dismissal of the appeal

in default for non prosecution. According to him, applicant knew throughout that this appeal has been dismissed for non prosecution and therefore no sufficient grounds are made out for condonation of delay as well as for restoration of the appeal.

9. Perusal of the record indicates that even Hukam Chand during his life time had lost interest in the appeal. Order dated 31.07.1991 is relevant for that purpose. It reads:-

“..... This regular second appeal has been sent to Court by the office because of non-prosecution on the part of the appellant. It is stated on behalf of Mr. Sunil Malhotra, counsel for the appellant, that the appellant is not taking any interest in the appeal and that even a registered letter was sent by Mr. Sunil Malhotra on 19<sup>th</sup> August, 1990 and that A.D. card received showed that the letter was received by the appellant. Even then he has not contacted the counsel.

Mr. Malhotra is supposed to move an application for leave to withdraw from the case. Let this application be filed within a week and the matter be listed on 23<sup>rd</sup> August, 1991.....”

10. As is obvious from the order, on that day Mr. Sunil Malhotra one of the counsel for the appellant had informed the court that appellant was not taking any interest in the appeal despite his having sent a registered letter which was duly received by the appellant. Despite that appellant did not contact his counsel.

11. On 23.08.1991, it was ordered that name of Mr. D.L.Malhotra and Mr. Sunil Malhotra be shown in the cause list for the next date as counsel for the appellant.
12. On 31.07.1991, Mr. Sudhir Sharma had appeared as proxy counsel for the appellant. He continued to represent the appellant as proxy counsel even thereafter. His attendance is recorded on 22.10.1991, 25.11.1991, 9.12.1991.
13. On 10.01.1992, Mr. Sudhir Sharma Advocate appeared as counsel for the appellant, Bhulan Singh who had filed an application under order 22 Rule 3 CPC for bringing him on record as LR of deceased appellant, Hukum Chand. On 09.03.1992, Mr. Sunil Malhotra appeared for the appellant. Thereafter on 16.7.1992, Mr. Sudhir Sharma appeared and he continued to appear as counsel for the appellant on 24.09.1992. Suddenly, none appeared on behalf of the appellant on 27.11.2003 when the appeal was dismissed in default for non prosecution.
14. True that Hukam Chand was being represented by Mr. D.L. Malhotra and Mr. Sunil Malhotra Advocates. Therefore, besides Mr. D.L. Malhotra, Hukam Chand had engaged the services of another lawyer, Mr. Sunil Malhotra operating from the same chamber. After the death of Hukam Chand, Bhulan Singh engaged the services of Mr.

D.L. Malhotra and Mr. Sunil Malhotra as well as that of Mr. Sudhir Kumar Sharma for filing an application under Order 22 Rule 3 CPC and for prosecuting the appeal. He executed vakalatnama in their favour on 15.12.1991. Vakalatnama is signed by Mr. Sunil Malhotra and Mr. Sudhir Kumar Sharma Advocate. It does not bear the signatures of Mr. D.L. Malhotra. It seems that even before the death of Hukum Chand, Mr. D.L. Malhotra stopped appearing in this case for and on behalf of the appellant.

15. Thus, it is clear that Advocates engaged by Mr. Bhulan Singh to represent his case were Sunil Malhotra and Sudhir Kumar Sharma, though name of Mr. D.L. Malhotra is typed on the vakalatnama. It is pertinent that actual date of death of Mr.D.L.Malhora is not known. Possibly, Mr. D.L.Malhotra expired before the death of Hukum Chand and precisely that must be the reason that he did not sign the vakalatnama. This also demolishes the case of the appellant that he had no information about the death of Mr. D.L.Malhotra and therefore did not know the date of hearing fixed in the case after the last order of the Deputy Registrar dated 24.09.1992.
16. On 24.09.1992, the Deputy Registrar had noted that since counsel for the Respondent had also appeared and he had filed his Power of Attorney on record, the service was complete and no further orders

were called for. Obviously, the matter was to be listed before the court for hearing. That was so done on 27.11.2003.

17. Appeal was admitted for hearing on 10<sup>th</sup> May, 1989, namely the very first day it was listed for hearing before the court. Admitted appeal is listed for hearing on its own turn in the list of regular matters. Appellant duly assisted by his advocate knew that the appeal would come on its own turn to be listed for hearing. Even if, it is presumed that Mr. D.L.Malhotra was one of the counsel for the appellant/applicant, appellant had every opportunity to contact with Mr. Sunil Malhotra and Sudhir Kumar Sharma his other advocates to find out the fate of the appeal or the next date of hearing, which might have been fixed by the Court.

18. Admittedly, he never tried to contact any of the said two lawyers for over a period of about four years. Undisputedly, he has been prosecuting his complaint under Section 380/448/34 IPC in the court of Metropolitan Magistrate till 12.09.2006. This complaint pertains to property in suit only. Since parties to the criminal complaint were same, obviously, the applicant must have come to know of the fate of the appeal. It cannot be believed that over a period of three years while contesting the criminal case, the applicant remained ignorant about the fate of the appeal or did not try to find out the progress of

the appeal from his counsel.

19. It is pertinent that the applications are not accompanied by affidavit of any of the said two lawyers to indicate that they were not representing him in the appeal. The fact that complaint was dismissed for non appearance of the complainant also indicates that applicant was not interested in prosecuting his case.
20. Period of limitation for filing an application to restore the appeal dismissed for want of prosecution is 30 days from the date of the dismissal. This period can be condoned by the Court if sufficient cause is shown. Court has to liberally construe 'sufficient cause' appearing in Section 5 of the limitation Act read with Order 41 Rule 19 CPC. But then court has to see the circumstances which restrained the appellant from appearing in the court or moving an application seeking restoration of the appeal dismissed for non prosecution after the expiry of period of limitation for filing such application.
21. Appellant has tried to state that he suffered paralytic attack on left side in March, 2003 and there was complete paralysis since May, 2005. However, he has not placed any medical record to support his averments contained in para 4 of the application. In the absence of any supportive evidence, it is difficult for the Court to appreciate that applicant was suffering from paralytic attack in March, 2003 and was

completely on bed in May, 2005 i.e. after about 1½ years of dismissal of the appeal.

22. Applicant engaged the services of Mr. G.K. Tiwari Advocate somewhere in September, 2007. Mr. Tiwari took a month's time to inspect the record which according to the appellant was inspected by him on 10.10.2007. Despite knowing the urgency, he applied for the certified copies of the order dated 27.11.2003 on 22.10.2007. He obtained the copy on 29.10.2007 but filed the present application only on 19.11.2007. Even if plea of the applicant that court was closed for Diwali vacation from 8.11.2007 to 11.11.2007 is accepted, the application was filed a week thereafter. Why counsel took such a long time in filing these applications also goes unexplained. He has tried to take advantage of the fact that in between October, 2007 till 19.11.2007 when the applications were filed, the court remained closed for three days after he obtained the certified copy of the order on 29.10.2007. He had sufficient time in the interregnum period to file these applications.

23. Be that as it may, the applicant has failed to explain sufficient reasons for condonation of delay in filing the application for restoration of the appeal as well as the reason for non appearance on the date when the appeal was dismissed though, he had assistance of

two lawyers.

24. In view of my discussion as above, I find no merit in the applications, the same are accordingly dismissed.

**ARUNA SURESH  
(JUDGE)**

**JULY 01, 2010**  
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