

\* **HIGH COURT OF DELHI : NEW DELHI**

**CM Nos.11062-63/2009 in FAO. No.135/1985**

% Judgment reserved on: 11<sup>th</sup> November, 2009

Judgment delivered on: 13<sup>th</sup> November, 2009

1. Shri Sham Lal,  
Son of Shri Gokal Chand,  
R/o. 4031, Naya Bazar,  
Delhi-110006.
2. Shri Ashwani Kumar,  
S/o. Shri Sham Lal,  
Partners: M/s. Harish Brothers,  
4031, Naya Bazar,  
Delhi-110006. ....Appellants.

Through: Mr. A.K. Gautam, Adv.

Versus

1. Shri Raj Kumar,  
Son of Shri Charanji Lal,
2. Smt. Krishna Devi,  
W/o. Shri Charanji Lal,  
Partners M/s. Harish Brothers,  
4031, Naya Bazar,  
Delhi-110006 ...Respondents.

Through: Nemo.

Coram:

**HON'BLE MR. JUSTICE V.B. GUPTA**

1. Whether the Reporters of local papers may  
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported  
in the Digest? Yes

**V.B.Gupta, J.**

Applicant Urvashi Walia has filed applications for restoration of appeal under Order IX Rule 4 of Code of Civil Procedure (for short as 'Code') as well as under Section 5 of Limitation Act for condonation of delay.

2. In these applications, it is stated that appellants being the father and son, filed the above appeal against order dated 22<sup>nd</sup> July, 1985 passed by Additional District Judge, Delhi, vide which the award passed by the Arbitrator has been set aside.

3. During pendency of the appeal, appellant No.1 died on 23<sup>rd</sup> March, 1989 leaving behind following legal heirs;

- a. Mrs. Prakash Kaur, Widow
- b. Mrs. Usha Rani, Daughter
- c. Mr. Ashwini Ahluwalia, Son
- d. Mrs. Urvashi Walia, Daughter

4. Appellant No.2 also expired on 10<sup>th</sup> October, 1990 leaving behind his widow and one minor son.

5. Mrs. Prakash Kaur, Widow of appellant No.1 also expired on 1<sup>st</sup> August, 2003.

The present status of the surviving legal heirs after death of both appellants is as follows;

- a. Mrs. Urvashi Walia, daughter of late Shri Sham Lal
- b. Mrs. Usha Rani, daughter of late Shri Sham Lal
- c. Mrs. Asha Ahluwalia, wife of late Shri Ashwani Ahluwalia;
- d. Abhishek Ahluwalia, minor son of late Shri Ashwani Ahluwalia.

6. After death of appellants, their legal heirs were disturbed and taking advantage thereof, respondent created hurdles in the family and in June, 2009, he started removing the dividing wall between the properties of both the parties, which is the subject matter of this appeal. The concerned advocate engaged by appellants in this appeal, after the death of appellants, never contacted the applicants nor dropped any letter in writing in order to enable them the status of this appeal nor the applicants are aware about the name and telephone number of the said advocate, which resulted in dismissal of this appeal on account of non-prosecution.

7. Appellants ultimately instructed Dr. A.K. Gautam, advocate for making inspection of the file, who advised the applicants that the appeal has been dismissed on 6<sup>th</sup> May, 2004 on account of non-prosecution. The delay of 10 years in moving application for restoration is not intentional but for the bona fide reasons as stated above.

8. It is contended by learned counsel for applicants that both appellants in this case have died and applicants were not aware of the proceedings of this appeal. The previous advocate did not inform the applicants about the pendency of this appeal. Thus, there are sufficient grounds for condonation of delay as well as for restoration of this appeal.

9. This appeal was admitted on 29<sup>th</sup> August, 1985. On 2<sup>nd</sup> January, 2003, the matter was listed for the first time in the court after 28<sup>th</sup> February, 1986. Notice for actual date was ordered to be issued to the parties through counsel for 20<sup>th</sup> February, 2003. On that day, Ms. Meera Kapoor appeared on behalf of appellant and stated that Mr. Rakesh Luthra, who was representing the appellant earlier had died and she would seek instructions from appellant for appearance.

10. On 31<sup>st</sup> July, 2003, the matter was listed for service of counsel for respondents but none appeared on that date. On subsequent hearings, even none appeared for the appellant. On 6<sup>th</sup> April, 2004, matter was listed before Registrar, who passed the following order;

“No steps have been taken by the appellant to serve the respondent. Nobody is appearing for the appellant. The matter be listed before Hon’ble Court for non prosecution on 6<sup>th</sup> May, 2004.

-sd-  
Registrar”

11. On 6<sup>th</sup> May, 2004, again none appeared. In view of the order passed on 6<sup>th</sup> April, 2004, the appeal was dismissed for non-prosecution.

12. Present applications have been filed after more than five years, after dismissal of the appeal. These applications are ex facie not maintainable. As per averments made in the applications, appellant No.1 died on 23<sup>rd</sup> March, 1989, while appellant No.2 died on 10<sup>th</sup> October, 1990. Till date no application for substitution of their legal heirs has been brought on record. Moreover, as per averments made in the applications, there are four surviving legal heirs as on date, after death of the appellants. However, present applications have been filed and signed by only one of the applicants namely Urvashi Walia. There is no application on behalf of remaining legal heirs at all.

13. Since no application for substitution of legal heirs have been filed on behalf of legal heirs of the appellants, within the prescribed period of limitation, the appeal stands abated. These applications for restoration of the appeal as well for condonation of

delay, are ill conceived and legally not maintainable as none of these applications, have been signed by the remaining legal heirs.

14. Under these circumstances, present applications are not legally maintainable and have been filed just to waste the time of this court. Accordingly, these applications are dismissed with costs of Rs.10,000/-. Applicant is directed to deposit the costs with Registrar General of this Court, within one month from today, failing which Registrar General shall recover the same in accordance with law.

15. List for compliance on 15<sup>th</sup> December, 2009.

13<sup>th</sup> November, 2009  
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**V.B.GUPTA, J.**