

**Chief Justice's Court**

**Case :-** SPECIAL APPEAL DEFECTIVE No. - 115 of 2024

**Appellant :-** Rani Rewati Devi Ravi Pratap Nyas And Another

**Respondent :-** Administrator General ,Uttar Pradesh And 22 Others

**Counsel for Appellant :-** Anoop Trivedi, Sr. Advocate,Atul Kumar Shahi

**Counsel for Respondent :-** Anil Kumar Rai,Narendra Mohan,Om Prakash Pandey,Sudhir Mehrotra

**Hon'ble Arun Bhansali,Chief Justice**

**Hon'ble Vikas Budhwar,J.**

**Order on Delay Condonation Application:**

1. This appeal is directed against the order dated 31.07.2023 passed in Testamentary Suit No. 4 of 1985 whereby the application filed by appellant No. 2 Dr. Madhu Dixit seeking transposition as plaintiff in place of Administrator General has been dismissed.

2. The office has reported that the appeal is barred by 105 days. Initially, an application was filed under Section 5 of the Limitation Act on 18.12.2023 along with affidavit of the appellant Dr. Madhu Dixit with the submissions that the certified copy of the order dated 31.07.2023 was applied on 03.08.2023 and the same was prepared by the Registry on 25.08.2023. It was claimed that the appeal was prepared on 31.08.2023, however, on account of the call given by the Bar Council of Uttar Pradesh to abstain from work, the counsel for the appellant-applicant went to his village on 02.09.2023 to attend his ailing relative from where he returned on 28.10.2023; it was claimed that it slipped from the mind of the counsel that the appeal prepared was yet to be filed by him. It was then claimed that while going through the files in his office on 14.12.2023, the counsel came across the papers relating to the present special appeal and the same was, therefore, filed in the Registry of the Court on 15.12.2023. It was indicated that on the office making a report regarding the appeal being barred by limitation, the counsel informed the appellant-applicant who

came to Allahabad on 17.12.2023 for swearing the affidavit and signing the application under Section 5 of the Limitation Act, which was being filed. It was claimed that there was no negligence on the part of the appellant and only on account of the fact that the counsel went to his village, non-filing slipped from his mind, the appeal could not be filed in time. It is prayed that the delay of 105 days in filing the appeal be condoned. The affidavit sworn in support of the application and the averments contained therein were indicated to be based on the information received from the counsel. A perusal of the affidavit indicates that the same bears photo verification as required for filing affidavit before this Court dated 30.08.2023.

3. Counter affidavit to the application seeking condonation of delay was filed by Defendant No. 25 in the testamentary case wherein the averments made in the application seeking condonation of delay in relation to non-availability of the counsel on account of illness of the relative was seriously contested. It was submitted that the averments made in this regard were factually incorrect and that the appellant has not approached this Court with clean hands. Along with the counter affidavit few orders passed by this Court specifically indicating the presence of the counsel during the period it was claimed that he was at his village due to illness of his relative were annexed.

4. Counter affidavit was also filed on behalf of respondent Nos. 2 & 3 in the present appeal and in the said response also, similar allegations were made regarding the fact of the counsel being not available for a certain period on account of illness of his relative being incorrect. Along with the counter affidavit, orders indicating the presence of the counsel passed by this Court during the period in question in other matters were annexed.

5. When the matter came up before the Court and submissions were made based on the application filed under Section 5 of the Limitation Act as well as the counter affidavits seeking to question

the veracity of the averments contained therein, counsel for the appellant made submissions that the appellant cannot be made to suffer on account of the conduct of the counsel in not filing the appeal in time though the same was prepared in time, time was granted to file further affidavit.

6. Another affidavit dated 01.04.2024 has been filed, inter alia, indicating that after passing of the order dated 31.07.2023, the appellant was called by her counsel for completing the formalities for filing special appeal, accordingly, she came to Prayagraj and got her photo verification done on 16.08.2023 and went back. After preparation of special appeal she was again called for completing other formalities and on 30.08.2023, again photo verification was got done. She signed the special appeal on 31.08.2023 and the affidavit was also sworn on 31.08.2023 itself.

7. It is indicated that she was told that the appeal is now ready and the same would be filed, however, apparently the appeal was not filed and when attempts made to contact the counsel failed, the appellant contacted the present counsel who informed that the appeal was not traceable in the Registry. When the deponent required a copy of the memo of appeal from the counsel, it was disclosed that the appeal could not be filed and that the copy would be provided on 17.12.2023. When the appellant met the counsel on 17.12.2023, she was told that the appeal has been filed on 16.12.2023. The application seeking condonation of delay was prepared on 18.12.2023 and was sworn by her on the same day and got filed. It is submitted that the appellant is not at fault in filing the delayed appeal as she got it prepared in time and the prayer seeking condonation of delay was reiterated.

8. A counter to the affidavit dated 01.04.2024 has been filed on behalf of respondent Nos. 2 and 3, inter alia, indicating that the deponent was using two Aadhar Cards with two different addresses as per her convenience. Further submissions were made that the relation

between advocate and client is that of agent and principal and the principal cannot escape from the consequences on account of the act of her agent.

9. Submissions have been made that wrong facts in the initial affidavit by the counsel were made for the benefit of the appellant. Submissions have also been made that the appellant is an educated lady and it was not expected of her to leave Allahabad without completing the work of filing special appeal, it is prayed that the application be dismissed.

10. A rejoinder affidavit has been filed by the appellant, inter alia, reiterating the averments made in the application filed on 01.04.2024. It was clarified that the new Aadhar Card has been got prepared on account of change of residence from Padrauna to Varanasi and no mala fides are involved in this regard. The fact of appellant being punished for the wrong committed by the counsel was also reiterated and it was prayed that the delay be condoned.

11. Learned counsel for the appellant made submissions that from the material available on record, it is apparent that the appellant had visited Allahabad on 16.08.2023 and 30.08.2023, the appeal filed is dated 31.08.2023, which clearly reflects that the same was ready on 31.08.2023, affidavit supporting the application is also dated 31.08.2023 and therefore, only on account of the fact that the initial application which was filed by the previous counsel contained factually incorrect reasons, meant for concealing the inaction on the part of the counsel in not filing the appeal in time, cannot be used against the appellant who has done everything possible to get the appeal filed within time and therefore, the application seeking condonation of delay deserves to be allowed. It was submitted that for the wrong/inaction of the counsel, the litigant cannot be punished and therefore, also the application deserves to be allowed. Reliance was placed on **Rafiq And Another Vs. Munshilal And Another: (1981) 2**

**SCC 788, Smt. Lachi Tewari And Others Vs. Director of Land Records And Others: 1984 Suppl. SCC 431, the Secretary Department of Horticulture, Chandigarh And Another Vs. Raghu Raj: (2008) 13 SCC 395, Ram Kumar Gupta And Others Vs. Har Prasad And Another: (2010) 1 SCC 391, Ashok Kumar Vs. New India Assurance Co. Ltd.: 2023 Live Law (SC) 587** besides few High Court Judgements.

12. Learned counsel appearing for the respondents vehemently opposed the submissions. It was submitted that the appellant has not approached this Court with clean hands. The sworn affidavit dated 18.12.2023 contains false averments which aspect is fortified from the copies of the orders clearly indicating that the counsel was available and the plea raised regarding his absence from Allahabad during the said period is factually incorrect. The credentials of the appellant were sought to be questioned based on use of two Aadhar Cards with different addresses. Further submissions have been made that no rejoinder affidavit has been filed to the response filed to the earlier affidavit and as such the appellant is not entitled to any relief. It was submitted that looking to the credentials of the appellant wherein she is a well educated lady, the reliance placed on judgments regarding client cannot be made to suffer for the mistake of the counsel has no application. It was prayed that the application be dismissed. Reliance was placed on **Salil Dutta Vs. T.M. and M.C. Private Ltd.: (1993) 2 SCC 185, Ram Nath Sao @ Ram Nath Sahu & Ors. Vs. Gobardhan Sao & Ors.: (2002) 3 SCC 195 and Panchugopal Barua & Ors. Vs. Umesh Chandra Goswami & Ors.: (1997) 4 SCC 713.**

13. Learned counsel for the Administrator General made submissions that he has been supplied with two copies of the memo of appeals both are different in contents.

14. We have considered the submissions made by learned counsel for the parties and have perused the material available on record.

15. A bare perusal of memo of special appeal reveals that the same apparently has been prepared on 31.08.2023 as in the Index the dates of various parts of the special appeal like Synopsis, Application for Leave to file Special Appeal on behalf of Rani Rewati Devi Ravi Pratap Nyas, Affidavit of Dr. Madhu Dixit, Form 18-A for service of Notice of Application, Memorandum of Special Appeal, Form 18-A for service of Notice of Special Appeal, Affidavit in support of service of notice of Special Appeal and Stay Application are dated 31.08.2023. The fact that the photo verification of the appellant also has been done on 30.08.2023 gives credence to the contentions raised by the appellant regarding the appeal being ready on 31.08.2023. It is also a fact that the appeal was not presented on 31.08.2023 and in the affidavit sworn on 18.12.2023 through the previous counsel, apparently a story has been made up regarding the illness of relative of the appellant's counsel and that the filing of appeal slipped from the mind of the counsel and he suddenly found the appeal in other papers and immediately filed the same. It is significant that the affidavit contains specific averments that the contents of the paragraphs pertaining to the illness etc. of the relative of the counsel are based on the information given by the counsel. The said story regarding illness of the relative of the counsel and his absence from Allahabad on account of such illness is factually incorrect as it is evident from the orders placed on record by the counsel for the respondents that during the period in question, counsel has repeatedly appeared before various Benches of this Court.

16. The appellant apparently believing the story of the counsel filed the affidavit in support of application seeking condonation of delay, however, when on account of filing of the counter affidavit to the application seeking condonation of delay, she became aware of the

true facts, another affidavit has been filed indicating the facts as noticed herein before regarding non filing of the appeal by the counsel and getting filed an incorrect affidavit.

17. From the above facts, it is more than apparent that insofar as the appellant is concerned, she has acted as a prudent person in approaching the counsel, getting the appeal prepared in time and in relying on the counsel that needful regarding the filing for which her presence is not necessary would be done by the counsel. As the counsel for whatever reason chose not to file the same and/or genuinely forgot to file the appeal, the litigant cannot be made to suffer on account of conduct/inaction of the counsel. The allegations made regarding filing of incorrect affidavit cannot be used against the appellant inasmuch as even in believing the version of the counsel for the delay in filing the appeal, the appellant had acted as a prudent person, however, once the inaction came to light, she has taken a stand, changed the counsel and has filed affidavit disclosing the facts as noticed herein before, in these circumstances, it cannot be said that the appellant has approached this Court with unclean hands.

18. In so far as the indication made in the affidavits/Aadhar Cards of two different addresses, one at Padrauna and the other is at Varanasi is concerned, the same by itself does not lead to anything. Though an explanation has been given that due to change in place of residence, a fresh Aadhar card has been got prepared indicating Varanasi as the place of residence.

19. So far as the judgements cited by the learned counsel for the parties are concerned, the principles laid down therein are well settled wherein while a client cannot be punished for the wrong doing/inaction of the counsel, in case it is found that the client himself was not diligent, he cannot take advantage in the name of client-Advocate relationship. However, as in the present case, it has been established as a fact that the memo of appeal was ready on 31.08.2023

and the counsel got prepared the affidavit seeking condonation of delay with incorrect facts essentially to cover up the lapses on his part in not filing the appeal in time, it cannot be said that the appellant was in any manner negligent so as to disentitle her to seek condonation of delay.

20. In view of above discussion, the application filed under Section 5 of the Limitation Act seeking condonation of delay in filing the appeal is allowed. Delay of 105 days in filing the appeal is condoned.

21. List the appeal along with application filed on behalf of Rani Rewati Devi Ravi Pratap Nyas for leave to file appeal on **23.07.2023**.

**Order Date :- 03.07.2024**

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(Vikas Budhwar, J) (Arun Bhansali, CJ)