

# IN THE HIGH COURT OF SIKKIM

*Civil Misc. Application No. 254/2000 in R.F.A. No. 35 of 2000*

Chogyal Miwang Wangchuk Namgyal ..... Applicant.

**Versus**

1. Shri L.B. Chhetri
2. State of Sikkim ..... Respondents.

**Coram:**

**The Hon'ble Mr. Justice Ripusudan Dayal, Chief Justice.**

Present: Mr. T. B. Thapa, Advocate for the applicant,  
Mr. A. Moulik, Advocate for respondent No.1.  
Mr. N. B. Khatiwada, Addl. Advocate General  
with Mr. Karma Gyatso, Advocate for Respondent No.2.

*Date of Decision : March 5, 2001.*

## J U D G M E N T

**Dayal, C.J.**

The applicant has filed this application under section 5 of the Limitation Act for condonation of delay in filing the Civil Appeal (RFA No.35 of 2000) against the rejection of his plaint under Order VII Rule 11 (a)(d) of the Code of Civil Procedure by the District Judge, Special Division, Gangtok.

2. The District Judge, Special Division, rejected the plaint filed by the appellant, on 7.2.2000 on the grounds that the plaint does not disclose cause

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of action and the suit is barred by limitation. The rejection was challenged by the applicant in Civil Revision No. 6/2000 on 8<sup>th</sup> May, 2000. The Revision was dismissed in limine on 20.9.2000 on the ground that the order rejecting the plaint amounts to decree within the meaning of section 2(2) of the Code of Civil Procedure and, therefore, Appeal lies against such order and not the Revision. Thereafter, on 23.10.2000, Regular First Appeal No. 35 of 2000 was filed along with the application for condonation of delay. Along with the memo of appeal, a copy of the judgment dated 7.2.2000 was also filed. Certified copy of the decree was filed on 6.11.2000. The certified copy of the decree discloses that the application for the copy was made on 30.09.2000, the copy was ready for delivery on 3.11.2000 and the same was delivered to the applicant on 4.11.2000.

3. The applicant has stated in his application for condonation of delay that he filed the Civil Revision acting on legal advice and in view of the opinion expressed by this court that Appeal, and not Revision, lies he is filing the appeal by way of "abundant caution". It is further stated that the applicant has been pursuing the matter bona fide to challenge the rejection of the plaint and if there has been any delay in filing the appeal, the same is due to sufficient cause and, therefore, the delay may be condoned. The respondents have, in their respective objections, pleaded that there is no sufficient cause for condonation of delay. Respondent No. 1 has pleaded that the name and particulars of the person who had given the wrong legal advice has not been disclosed and Shri T.B. Thapa who was conducting the Revision is a lawyer of more than twenty years' standing and he could not

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have given the wrong advice. Respondent No.1 has denied that such wrong legal advice was at all given to the applicant and has averred that the Revision was filed deliberately knowing the true legal position. It is further pleaded that the order of rejection of the plaint is itself a decree and it was not necessary to draw a separate decree and, in any case, appeal could be filed treating the last paragraph of the judgment as 'decree'. It is also pleaded that the fact that the application for certified copy was filed after the expiry of the period of limitation is irrelevant to the question of condonation of delay. Similar objections have been filed by respondent No. 2, State of Sikkim.

4. I have heard Shri T.B. Thapa, Advocate on behalf of the applicant, Shri A. Moulik, Advocate for respondent No. 1 and Shri N.B. Khatiwada, Additional Advocate General on behalf of respondent No. 2.

5. Shri Thapa has submitted that the Revision Petition was filed under the wrong belief that a Revision lay and not an Appeal. On the other hand, Shri Khatiwada and Shri Moulik have submitted that the bald statement that the applicant had filed the Revision Petition on wrong legal advice in the absence of any particulars, such as the name the lawyer who allegedly gave wrong advice does not constitute sufficient cause. They have further submitted that even after the dismissal of the Civil Revision on 20.9.2000, the applicant spent a lot of time till 23.10.2000 in filing the appeal. It is further submitted that the fact that the decree was prepared on 29.9.2000 after the expiry of the period of limitation has no relevance, since

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the appeal could be filed treating the last paragraph of the judgment as decree, as he himself did by filing the appeal on 23.10.2000 without the certified copy of the decree which copy was filed on 6.11.2000. It is also submitted that absolutely no explanation has been given for the delay from the date of the dismissal of the Revision on 20.9.2000 till 29.9.2000 the date on which application for the certified copy of the decree was filed. Shri N.B. Khatiwada has referred to Ramlal v. Rewa Coalfields Ltd. AIR 1962 SC 361, Partha Sarathy v. State of A.P. AIR 1966 SC 38 and United Commercial Bank v. M.C. Shaw Bonded Warehouse AIR 1985 Cal. 445 in support of his submission.

6. Ramlal v. Rewa Coalfields Ltd. (Supra) has been cited in support of the submission that the proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved, nothing further has to be done and then the application for condonation of delay has to be dismissed on that ground alone. But if sufficient cause is shown, then the court has to enquire whether in its discretion it should condone the delay. In Partha Sarathy v. State of A.P. (Supra), the Supreme Court held that Section 12(2) of the Limitation Act excludes the time taken in getting the certified copy in the course of computation; it does not add to the period of limitation. It has no concern with any event anterior to the commencement of the period of limitation or posterior to that period. The Supreme Court observed :

“(4). ..... For that reason, in computing the period of limitation the time taken for obtaining a certified copy of the order is excluded. It excludes time in the course

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of computation : it does not add to the period of limitation any period earned earlier. In computing or calculating the period of limitation from a particular point the sub-section enables the exclusion of a time from that period caused by an event that intervened between the commencement and the termination of the said period. It has no concern with any events anterior to the commencement of the period of limitation or posterior to the said period.”

7. In *United Commercial Bank v. M.C. Shaw Bonded Warehouse* (Supra), the Calcutta High Court held that no time limit is fixed for making an application for a certified copy of the order or decree to be appealed against but if an application is made for obtaining a certified copy of the order or decree for the proposed appeal within the period of limitation prescribed for preferring the appeal then the time requisite for obtaining a certified copy of the order or decree shall be excluded in computing the period of limitation for preferring the appeal. If the application for a certified copy is not made before the expiry of the period of limitation prescribed for preferring the appeal then the applicant is not entitled to the benefit of deducting the time requisite for obtaining the certified copy of the order or the decree in the matter of computation of the period of limitation for preferring the appeal against the order or decree. If the appellant has allowed the period for preferring the appeal against the order of decree to run out he is not entitled to the benefit of Section 12 of the Limitation Act.

8. It is well established that the applicant praying for condonation of delay under section 5 must satisfy the court that he had sufficient cause for not preferring the appeal within the period of limitation. If the applicant

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fails to satisfy the Court about the existence of sufficient cause, the application has to be rejected. Further-more, section 12(2) does not extend the period of limitation in respect of the time taken in getting a certified copy. It only permits the exclusion of such time in computing the period of limitation. To claim exclusion, the applicant must have made application for certified copy before the expiry of the period of limitation. The foremost question requiring consideration, therefore, is whether the applicant has been able to satisfy the court that he was prevented by sufficient cause from preferring the appeal within the period of limitation. The applicant has tried to show that he had sufficient cause till 20.9.2000 the date on which the revision was dismissed by submitting that he had been acting bona fide under legal advice. I see merit in the submission made by Shri Khatiwada that the mere bald statement that the petitioner acted under wrong legal advice is not enough in the absence of any particulars as to who tendered such legal advice, to satisfy the court about the averment as to acting bona fide under wrong legal advice. In my view, a bare perusal of the definition of 'decree' in section 2(2) CPC makes it manifest that rejection of plaint amounts to decree with the consequence that an Appeal and not a Revision would lie against such rejection. Further, there is not even a whisper in the entire application to explain the delay from 20.9.2000 to 29.9.2000 when the application for certified copy of decree was made. As such, it is not possible to hold that there was any sufficient cause for not preferring the appeal between this period. The fact that the applicant chose to apply for a certified copy of the decree on 29.9.200 after the expiry of the period of limitation is also of no help to the

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applicant in view of the legal position stated earlier. The fact that the  
 decree was prepared by the learned trial Court on <sup>29.9.2000</sup> ~~29.0.2000~~ has also no  
 relevance.

9. In the result, I hold that the applicant was not prevented by any  
 sufficient cause for not preferring the appeal within the period of limitation.  
 The application for condonation of delay is rejected with costs assessed at  
 Rs. 2000/- payable to each of the respondents. The appeal, being barred by  
 limitation, is also dismissed.

*R. Ripusudan Dayal*  
 5.3.2001  
 (Ripusudan Dayal)  
 Chief Justice  
 05.03.2001