

REVISIONAL CIVIL

Before Bhandari C.J. and Falshaw J.

DURGA PARSHAD,—Petitioner

versus

BIMLA DEVI AND OTHERS,—Respondents

Civil Revision No. 159-D of 1953

1954

Dec., 10th

Code of Civil Procedure (V of 1908) Order 41—Limitation Act (IX of 1908) Section 5—Certified copies of the judgment and decree misplaced by the lawyer's clerk and appeal filed without them—Fresh copies obtained later and filed—Appeal when presented—Appeal filed beyond limitation—Appellate Court whether competent to condone the delay.

Order 41 of the Code of Civil Procedure requires that every memorandum of appeal should be accompanied by a copy of the decree appealed from and of the judgment on which it is founded.

Held, that a memo of appeal which is not accompanied by these two documents cannot be said to be properly presented and if these documents are put in court on a later date the appeal must be deemed to have been properly presented on the later date.

Held also, that it was within the competence of the Senior Sub-Judge in exercise of the powers conferred upon him by section 5 of the Limitation Act to extend the period of Limitation and to condone the delay which had been occasioned.

Petition under Act XIX of 1947, for revision of the order of Shri Mehar Singh Chadda, Senior Sub-Judge,

Delhi, dated the 9th May, 1953, reversing that of Shri P. N. Thukral, Sub-Judge 1st Class, Delhi, dated the 22nd February, 1952, and granting a decree for ejection in favour of plaintiffs-appellants and against the respondent and ordering that the respondent shall vacate the premises within six months and hand over the possession to the plaintiffs.

RADHEY MOHAN LAL, for Petitioner.

G. R. CHOPRA, for Respondent.

JUDGMENT

BHANDARI, C. J. Two points arise for decision Bhandari, C. J. in the present case, viz., (1), whether it was within the competence of the Senior Subordinate Judge to condone the delay which was occasioned in the presentation of the appeal and (2) whether there is sufficient material on the file to justify the conclusion that the plaintiffs are unable to find suitable accommodation for themselves.

The facts of the case are simple and not seriously in dispute. One Ram Kumar, who was the owner of a certain house situate in Delhi, died some time ago, leaving behind him a widow and two sons. On the 10th July, 1951, the widow and her sons brought a suit for the ejection of the tenant but the suit was dismissed on the ground that they did not require the premises for their own use. The Senior Subordinate Judge, however, allowed the appeal and decreed the plaintiffs' suit. The tenant is dissatisfied with the order and has come to this Court in revision.

The first point for decision in the present case is whether the lower appellate Court was justified in extending the period of limitation and entertaining the appeal even though it was presented after the expiry of the period of limitation. The plaintiffs' suit was dismissed on the 22nd February, 1952. They applied for a copy of the decree and of the judgment on which it was based on the 1st March 1952 and the copies were actually supplied to them on the 22nd March, 1952. Unfortunately the lawyer's clerk misplaced the copies and, as the period of limitation was about to expire, presented the memorandum of

Durga Parshad
 v.
 Bimla Devi
 and others
 ———
 Bhandari, C. J.

appeal without those copies on the 4th April 1952. He obtained fresh copies of the documents in question and produced them in Court on the 17th April along with an application under section 5 of the Limitation Act for an extension of the period of limitation. The Senior Subordinate Judge recorded the statements of witnesses and having come to the conclusion that the delay in filing the necessary documents was occasioned by circumstances beyond the plaintiff's control extended the period of limitation and entertained the appeal.

Mr. Radhe Mohan Lal, who appears for the defendant in the present case, contends that it was not within the competence of the Senior Subordinate Judge to entertain a time-barred appeal and cites the case of *Shangara Singh and others v. Imam Din and others*, (1), in support of this contention. In this case, a learned Judge of the Lahore High Court expressed the view that section 5 contemplates an appeal, application for review of judgment or for leave to appeal or any other application to which section 5 may be made applicable and an appeal there means an appeal that is to be instituted for the first time and not an appeal which has already been instituted but is amended later on account of any defect having been noticed in the memorandum of appeal.

I regret I find myself unable to concur in this contention. Order 41 of the Code of Civil Procedure requires that every memorandum of appeal should be accompanied by a copy of the decree appealed from and of the judgment on which it is founded. The memo of appeal which was presented in the present case on the 4th April 1952 was not accompanied by these documents and the appeal cannot therefore be said to have been properly presented. These documents

(1) A.I.R. 1940 Lah. 314

Durga Parshad
 v.
 Bimla Devi
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were put in Court on the 17th April 1952 and the appeal must accordingly be deemed to have been properly presented on that date. It is obvious in the circumstances that although the memorandum of appeal was filed in Court on the 4th April 1952, a proper appeal was presented for the first time after the period of limitation had expired. There can be no manner of doubt that it was within the competence of the Senior Subordinate Judge in exercise of the powers conferred upon him by section 5 of the Limitation Act to extend the period of limitation and to condone the delay which had been occasioned.

Durga Parshad
v.
Bimla Devi
and others
—
Bhandari, C. J.

Mr. Radhe Mohan Lal admits that there is abundant material on the file to justify the conclusion that the plaintiffs require the premises for their own use but he contends that there is nothing on the record to indicate that they have not been able to secure other suitable accommodation for themselves. This contention too appears to me to be wholly untenable. Bimla Devi plaintiff has come into the witness-box to state that after the death of her husband she was unable to live either in the house of her father or in that of her father-in-law as the children in the house were constantly quarrelling with her two children. She stated further that although she endeavoured to look for accommodation for herself, she was unable to find any. Her statement in this behalf is fully corroborated by that of her father who has stated on oath that he looked for a house for her but was unable to find one.

For these reasons, I would uphold the order of the Senior Subordinate Judge and dismiss the petition presented by the tenant. There will be no order as to costs. The petitioner will be allowed a period of one month within which to vacate the premises occupied by him.

. FALSHAW, J. I agree.

Falshaw, J.