whims and fancies of the officer concerned. If the benefit is allowed to one person, the same cannot be denied to the other person, who is similarly situated, unless the denial is supported by cogent reasons which can withstand the test of judicial scrutiny. In the instant case, we find that Gurmeet Kaur, who was similarly siutated as the allottees were, was given the benefit of Rule 21-B of the Rules, whereas the allottees have been denied the similar benefit. No plausible explanation has been given for such denial and the reasons which have been put forward for rejecting the prayer of the allottees were also applicable in the case of Gurmeet Kaur. We, thus, find that the action of the official respondents suffers from the vice of discrimination and has to be quashed.

(13) Accordingly, this writ petition is accepted and the official respondents are directed to re-transfer the site in question to the allottees in the same terms as has been done in the case of Gurmeet Kaur. The needful be done within a period of three months from the date of receipt of a copy of this order.

R.N.R.

Before Parmod Kohli, J.

ROSHAN LAL AND OTHERS,—*Appellants/Defendants/Applicants*

versus

KEWAL SINGH AND OTHERS,—*Respondents*

C.M. No. 10766-C of 2006

In RSA No. 4141 of 2006

5th October, 2007

Code of Civil Procedure, 1908- O. 41 Rl. 14(3)—Defendants proceeded ex parte in trial Court -Dismissal of suit by trial Court- Ist Appellate Court finding that defendants were already proceeded ex parte before lower Court and ordering their service is not required to be effected in appeal—Provisions of O. 41 Rl. 14 do not confer an absolute discretion to Appellate Court to dispense with service upon respondents who were absent before lower Court- Decision of

lower Appellate Court in not serving respondents is blatantly illegal— Delay of 635 days in filing appeal-Non-service of notice by lower Appellate Court itself constitutes sufficient cause to condone delay irrespective of length of period- Appeal allowed.

Held, that it was otherwise obligatory upon the first Appellate Court to have served the respondents (appellants herein). It is the admitted fact that the suit filed by respondent No. 1 was dismissed by the trial Court even though, the defendants were proceeded *ex parte.* Assuming that the defendants had the knowledge of the suit having been served, but with the dismissal of the suit, they are presumed to be happy and were not required to follow the appeal as the decision of the trial court was in their favour. There was every reason for them to be complacent. Under this scenario, the decision of the lower Appellate Court not to serve the respondents cannot be termed anything, but a blatant and patent illegality. It was statutory obligation of the lower Appellate Court to have ordered service of the respondents by publication in the newspaper or any other permissible mode, if service in the ordinary course was sought to be dispensed with on the ground that they were absent before the trial Court. Non-service of notice by the lower Appellate Court, itself constitutes sufficient cause to condone the delay in filing the appeal.

(Para 18)

Rameshwar Malik, Advocate, *for the applicants/appellants.*

Arun Jain, Advocate, *for the respondents.*

JUDGMENT

PERMOD KOHLI, J.

(1) Delay of 635 days in filing this Regular Second Appeal, is sought to be condoned through medium of this application filed on behalf of the defendants/applicants. The admitted factual position relevant for purposes of the present application in noticed below:—

(2) Respondent No. 1 herein filed a Civil Suit No. 85 of 2002, against the applicants and respondent Nos. 2 to 5 in the Court of Additional

Civil Judge (Senior Division), Gohana, claiming declaration with consequential relief of permanent injunction. The defendants were proceeded ex parte in the trial Court and consequently, the suit came to be decided,—vide judgment and decree dated September 25, 2004. The trial Court, however, dismissed the suit of the plaintiff. The circumstances where-under the applicants and respondent Nos. 2 to 5 herein (defendants in the suit), were proceeded ex parte are not evident from the judgment of the trial Court. The trial Court simply made following observations in para 3 thereof:—

> "Defendants were proceeded ex parte after they failed to put up appearance in the Court".

(3) The plaintiff/respondent No. 1 herein, preferred an appeal being Civil Appeal No. 138 of 2004, in the Court of Additional District Judge, Sonepat against the ex parte judgment and decree (dismissal of suit). The first Appellate Court also proceeded ex parte against respondent Nos. 1 to 4 and 9 in the appeal before it (defendants in the suit), who are the applicants herein this application. The lower Appellate Court, however, noticed the circumstances where under the trial Court had proceeded ex parte against the defendants, the applicants/appellants herein. It has been mentioned that the registered letters sent to defendant Nos. 1,2,3 and 5,6 and 9 were received back with the report of "refusal" and they were proceeded ex parte,—vide order dated 14th August, 2002. It is further noticed that the service on defendant Nos. 4, 7 and 8 has been effected through munadi and they were proceeded ex parte,—vide order dated 31st January, 2004. The lower Appellate Court after recording these observations proceeded to decide the appeal and allowed the same,—vide its judgment and decree dated 2nd March, 2005, whereby the judgment and decree of the lower Court was set aside and the suit filed by respondents decreed.

(4) The applicants who were respondent Nos. 9 and 1 to 4 before the lower Appellate Court have preferred the present appeal along-with an application for condoning the period of delay, whereas respondent Nos. 5 to 8 have been arrayed as pro-forma respondent Nos. 2 to 5 herein.

(5) In the judgment impugned, there is no mention whether the respondents were served or not. The applicants have quoted interlocutory order dated 21st October, 2004, passed by the lower Appellate Court, which reads as under ;—

"Appeal received by assignment. It be checked. Heard. There are many arguable points so, the same is admitted. It be registered. But at this stage appellant counsel has pointed out that defendants were already proceeded ex parte before the lower court, so their service is not required to be effected in appeal. As such, the learned lower Court record be summoned for 2nd December, 2004."

(6) From the above interlocutory order, it is apparent that the Appellate Court never put the respondents to notice in the appeal before it and proceeded to decide the appeal. The applicants have, accordingly, sought condonation of delay under the above circumstances. They have also taken an additional plea that the addresses given by the plaintiffs in the suit/ appeal are incorrect. It is stated that the applicants were never resided at the addresses given and thus, there was no question of their refusal. Summons were never sought to be served upon them and the plaintiffs have defrauded not only the applicants but also the Hon'ble Court. In the memo of appeal, it is specifically mentioned that appellant No. 1 Roshan Lal, his wife Smt. Veena-appellant No. 2 and appellant No. 3 Smt. Pushpa, reside at A-96, Vishal, Enclave, Rajouri Garden, New Delhi, whereas the addresses given in the plaint and the appeal are only 96, Vishal Enclave Rajouri Garden, New Delhi, a different cluster. Similarly, it is stated that Smt. Prem is shown to be resident of 131 Vishal Enclave, Rajouri Garden, New Delhi, whereas she is resident of A-131, which is in different cluster. From the judgment of the trial Court and that of the lower Appellate Court, it appears that the addresses of these respondents are given as residents of 96 Vishal Enclave, Rajouri Garden, New Delhi and 131 Vishal Enclave Rajouri Garden, New Delhi. Assuming that the defendants/ respondents were duly served in the suit and they were rightly proceeded ex parte, but the suit filed by the plaintiff/respondent No. 1 came to be dismissed. He filed an appeal and the first Appellate Court without summoning them proceeded to decide the appeal. It is under these circumstances, the present appeal has been filed after a long delay of 635 days. The applicants have stated that they acquired

knowledge of the impugned judgment and decree only when they approached the revenue officials for a copy of jamabandi.

(7) This application has been strongly opposed by respondent No. 1 (plaintiff), who has also filed a disclaimer stating therein that the applicants (defendants in the suit), were duly served before the trial Court, through registered post, but they refused the same and some of them were duly served through substituted service i.e. munadi. According to the respondents, the applicatns have failed to explain the delay of each and every day and also sufficient cause. Hence, the application deserves outright dismissal.

(8) Mr. Arun Jain, learned counsel appearing for the respondents has strenuously argued that such a long delay is un-pardonable and there is no sufficient cause for condoning the delay. He has referred to **Pawan Kumar** versus **Harinder Singh(1), Bhairo Parshad** versus **Karam Chand(2), New India Assurance Co. Ltd.** versus **Hanil Era Textiles Ltd.(3) and P.K. Ramachandran** *versus* **State of Kerala(4).**

(9) The sum and substance of all these judgments is that delay cannot be condoned without sufficient cause and law of limitation has to be applied with all its rigor when statute so prescribes and the Courts have no power to extend the period of limitation on equitable grounds.

(10) There is no dispute as far as proposition of law enunciated in the above judgments is concerned. The question which needs consideration is whether the defendants/respondents had the knowledge of the impugned decree of the Appellate Court; whether delay in filing the appeal can be condoned when they (applicants) have no knowledge of pendency of proceedings and the consequential judgment/decree and does it constitute sufficient cause. It is admitted position that lower Appellate Court never summoned the appellants and others who were respondents before it, nor they appeared on their own.

(11) Mr. Jain, has defended the judgment impugned and interlocutory order dated 21st October, 2004, whereby the lower Appellate Court

(1) 2004 (3) P.L.R. 613
(2) 2000 (4) R.C.R. (Civil) 519
(3) 2003 (4) RCR (Civil) 67
(4) AIR 1968 S.C. 2276

decided not to sumon the respondents in the appeal on the ground that they were ex-parte before the trial Court, taking recourse under the provisions of order 41 Rule 14(3) of Code of Civil Procedure as inserted for the Punjab, Haryana and Chandigarh. With a view to appreciate his contention, it is necessary to examine relevant provisions. Sub Rule 3 of Rule 14 of Order 41 of C.P.C. reads thus :—

"Punjab, Haryana and Chandigarh_____(i) Add the following as sub-rule (3) :

"(3) it shall be in the discretion of the appellate Court to make an order, at any stage of the appeal whether on the application of any party or on its own motion, dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree is complained of, or at any proceedings subsequent to the decree of that Court, or on the legal representatives of any such respondent :

Provided that—

(a) that Court may require notice of the appeal to be published in any newspapers or in such other manner as it may direct;

(b) no such order shall preclude any such respondent or any representative from appearing to contest the appeal".

(12) It has been, accordingly, urged that this amendment provides a valid ground for not sumoning the respondents in the case. It is further submitted that since the respondents/defendants on being duly served in the trial Court, chose not to contest the suit, the Appellate Court's wisdom in not summoning them cannot be questioned or faulted with and, thus, knowledge of the appeal and the judgment of the lower Appellate Court, is to be attributed to the respondents in the appeal i.e. applicants/appellants before me.

(13) Mr. Jain, has further referred to a Full bench Judgment of this Court reported in **Mohan Masih** *versus* **Smt. Bashiro and others(5),**

(5) (1988-2) PLR 138

wherein the Hon'ble Full Bench while deciding an appeal, dispensed with the service of notice upon the respondents and proceeded to decide the appeal. The Hon'ble Full Bench made the following observations :—

> "Notices could not be served on the parties as it is reported that they are not living on the addresses given earlier in the petition. However, we do not think it necessary to delay this matter any further as the respondent was ex parte in the Court below and there was no need for actually serving the respondent again. Accordingly, the service of the notices is dispensed with".

(14) He has further referred to another judgment of this Court reported in **Gian Singh** versus **Joginder Singh and others(6),** wherein this Court made the following observations :—

> "Mr. Sarin, learned counsel for the appellant, has raised an objection that before ordering amendment of the plaint and the decree sheet it is necessary that all the respondent-mortgagees should be served. I do not agree with the learned counsel for the appellant. In order 41 Rule 14, C.P.C. this High Court added an amendment wherein it was provided that it shall be in the discretion of the appellant Court to make an order, at any stage, of the appeal whether on the application of any party or on its own motion, dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree is complained of, or at any proceedings subsequent to the decree of that Court;
>
> In the present case, it is not disputed that only Gian Singh, appellant, contested the suit and no other defendant appeared in the trial Court or in the first appellate Court or in this Court. In the circumstances, I do not think, that service on them is necessary. I consequently dispense with their service for the decision of this petition".

(15) No doubt, the Full Bench of this Court proceeded to decide the appeal by dispensing with the service of notice upon the respondents

(6) 1978 PLR 298

and in the later case referred to above, a learned Single Judge of this Court also decided to dispense with the service of notice upon the respondents in view of the provisions of Order 41 Rule 14 of Civil Procedure Code but this was under the facts of those cases. In none of these cases, any proposition of law has been laid down which may constitute a binding precedent.

(16) Apart to dispense with the service in a particular case is one thing but to attribute and impute knowledge of proceedings and decree to the party, who has not been served in another thing. Even Sub Rule 3 of Rule 14 of Order 41 Civil Procedure Code, provides that to dispense with the service upon a party, who did not appear before the lower Court, is in the discretion of the Appellate Court. This discretion is further circumscribed by the proviso to the Rule, which inter-alia requires notice of appeal to be published in any news paper or in such other manner as the Court may direct before discretion to dispense with the notice is exercised under the given circumstances. Thus, the Rule does not confer an absolute discretion to the Appellate Court to dispense with the service upon the respondents, who were absent before the lower Court but given an option to the Appellate Court to dispense with service by prescribed modes provided they are put to notice though publication in news paper or any other means as may be deemed proper by the Court. This rule does not envisage total non-service or dispensing with service completely upon the respondents, as this itself will be unlawful and unconstitutional and violative of the very Doctrine of "Audi Altram Partem" and also other statutory provisions contained in the Code of Civil Procedure, which require the parties to the lis to be put to notice and provided an opportunity for contesting any claim against them. Introduction of this Rule was never intended to provide absolute discretion to the Court to serve a party or not to serve. Such a situation would be ante-thesis to the very rule of law, judicial propriety and judicial wisdom and above all justice delivery itself.

(17) The interpretation sought to be placed by Mr. Jain to the provisions of Order 41 Rule 14 (3) of Civil Procedure Court is just not acceptable and does not appeal to my judicial conscience. Even Clause (b) of Sub Rule 3 does not create any impediment for the defendants/respondents from appearing to contest the appeal at any later stage. This is unimaginable

that a party who was never put to notice is expected to know the proceedings and decision of the Court.

(18) In view of the peculiar facts of the present case, it was otherwise obligatory upon the first Appellate Court to have served the respondents (appellants herein). It is the admitted fact that the suit filed by respondent No. 1 was dismissed by the trial Court even though, the defendants were proceeded ex parte. Assuming that the defendants had the knowledge of the suit having been served, but with the dismissal of the suit, they are presumed to be happy and were not required to follow the appeal as the decision of the trial Court was in their favour. There was every reason for them to be complacent. Under this scenario, the decision of the lower Appellate Court not to serve the respondents cannot be termed anything, but a blatent and patent illegality. It was statutory obligation of the lower Appellate Court to have ordered service of the respondents by publication in the news paper or any other permissible mode, if service in the ordinary course was sought to be dispensed with on the ground that they were absent before the trial Court. Non-service of notice by the lower Appellate Court, itself constitutes sufficient cause to condone the delay in filing the appeal. It has been held by Hon'ble Supreme Court in **N. Balakrishnan** *versus* **M. Krishnamurthy (7)** that once sufficient cause is shown, the length of period of delay is irrelevant.

(19) In view of the above circumstances and the position of law that emerges, non-service of notice by the lower Appellate Court, is itself sufficient to condone the delay, irrespective of length of period.

(20) This application is, accordingly, allowed. Delay in filling the appeal is hereby condoned.

(21) Let the Regular Second Appeal be listed for consideration for admission on 2nd November, 2007.

R.N.R.

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(7) (1998)7 S.C.C. 123