

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CMPMO No. 353 of 2012-F.
Decided on: March 28, 2013.

Sh. Desh Raj Versus State of H.P. & another.

Coram

The Hon'ble Mr. Justice Kuldip Singh, J.

Whether approved for reporting?¹ No.

For the petitioner : Mr. O.P. Negi, Advocate.

For the Respondents : Mr. Virender Kumar Verma, Addl. AG with
Mr. Mohan Lal Chauhan, Addl. AG & Mr.
Tarun Pathak, Dy. AG, for respondent No.
1.
Mr. Vivek Thakur, Advocate, for
respondent No. 2.

Kuldip Singh, J. (Oral)

This petition is directed against the order dated 7.8.2012 passed by the learned District Judge, Hamirpur in Miscellaneous Application No. 361 of 2011 wherein he declined to condone the delay in filing the appeal against the order dated 8.3.2011 passed by the learned Civil Judge (Senior Division), Nadaun in CMA No. 455 of 2010 in C.S. No. 219 of 2010.

2. The facts in brief are that the petitioner has filed a suit for declaration that he is having bartandari, easementary rights over the land more specifically described in the plaint. The entry in the column of possession of respondent No. 2 over Khasra No. 563 is wrong as respondent No. 2 has never been in possession over this land. The petitioner is owner of the adjoining land, which has also been described in the plaint. The Education department has encroached 10/13 share

¹ ***Whether the reporters of the local papers may be allowed to see the Judgment?***
Yes.

of the land through boundary wall and rest of the land 3/13 share is open vacant land and over that land beyond boundary wall of Education Department the petitioner is having bartandari, easementary rights of grazing cattle, cutting grass and taking soil for the repair of Kachha house. The petitioner has also planted fodder trees since time immemorial. The respondent No. 2 is taking benefit of wrong entries and has started digging the land for raising construction and cutting trees.

3. The respondent No. 2 has contested the suit by filing written statement and took preliminary objections of maintainability, cause of action, estoppel, limitation, jurisdiction and non-joinder of necessary parties. On merits, the claim of the petitioner has been denied. The respondent No. 1 has also contested the suit and denied the stand of the petitioner. The petitioner has filed an application under Order 39 rules 1 & 2 CPC for interim injunction, which was dismissed by the trial Court on 8.3.2011. The petitioner filed an appeal against the order dated 8.3.2011 along with an application under Section 5 of the Limitation Act for condonation of delay, which was dismissed by the learned District Judge on 7.8.2012 vide which the learned District Judge has refused to condone the delay. The order dated 7.8.2012 has been assailed in the present petition.

4. Heard and perused the record. In the application for condonation of delay the petitioner has stated that order was announced on 8.3.2011, copy was applied on 14.3.2011 which was prepared on 22.3.2011 and was obtained by the Clerk of the counsel on 30.3.2011. The appeal along with the application was filed on 14.9.2011. It has also been stated in the application that applicant is serving at Shimla, he requested his counsel to inform him after obtaining the copy. The Clerk

of the counsel after receipt of the copy of the order could not inform the petitioner in time due to rush of work and appeal could not be filed within the time. The application for condonation of delay was opposed.

5. The Learned District Judge framed the issues and allowed the parties to lead the evidence. AW.1 Desh Raj has stated that he asked his counsel for obtaining copy on 14.3.2011. He requested his counsel that after obtaining the copy inform him, but no information was given by his counsel. In September, 2011 when the opposite party started digging, he went to the house of Clerk of his counsel and inquired him about his case. Thereafter, he filed the appeal. AW.2 Suneet Chand has stated that he obtained the copy on 30.3.2011. He could not inform Desh Raj as the copy was misplaced. On 11.9.2011 Desh Raj visited his house and he handed over the copy after search. This is the entire evidence led by the petitioner.

6. In the application the petitioner has stated that clerk and his counsel engaged by him in the trial Court could not inform him about the copy due to rush of work but in the evidence a twist has been given. AW.2 Suneet Chand has stated that he obtained the copy on 30.3.2011 but it was misplaced. He handed over the copy to Desh Raj on his visit to his house on 11.9.2011 after search. AW.2 has not stated that the copy was misplaced in the office of the counsel. It is very strange that he allegedly handed over the copy to the petitioner after searching his own house. There is variance between the case pleaded in the condonation of delay application and evidence led by the petitioner.

7. The condonation of delay application is to be considered liberally in a given situation but the delay cannot be condoned if the application is based upon falsehood. It has come on record that the petitioner has taken a false stand for condonation of delay in filing the

appeal. The learned District Judge has rightly considered the material on record and declined to condone the delay. There is no error in the judgment nor there any error of jurisdiction. The petition is accordingly dismissed.

March 28, 2013.
(vs)

**(Kuldip Singh),
Judge.**

