

ORDER ON IA.NO.I

The applicants/ appellants have filed IA.No.I U/Sec.5 of Limitation Act, praying to condone delay of one year seven months in filing the said appeal.

2. The application is accompanied with the affidavit duly sworn to by the appellant No.1. In the affidavit he has stated that, they have filed the said appeal against the judgment and decree passed in OS No.43/2018 on the file of Addl.Civil Judge & 2nd Addl. JMFC., Ranebennur, but the said trial court has dismissed the said suit with cost. As against the said judgment, they have filed the present appeal before this Hon'ble court. Now he is suffering from age old ailments like sugar, BP etc. Since 2-3 years his sugar is hiked, he was not in a position to walk. He further stated that, from the date of filing of the suit, he has been appearing before the court and giving information to the Advocate and since his brothers who are the other appellants have no legal knowledge, he was only appearing before the court. He further contended that, when he came to hospital, his counsel met him and informed him about filing of the appeal. Hence he has filed this appeal by collecting appeal expenses. Hence, the delay is not intentional one. He has enough legal opportunities and documents to succeed in the appeal. If the delay is not condoned, they will be put to heavy and irreparable loss. Hence prays to allow the said application by condoning the delay.

3. The respondent Nos.1, 3 and 4 were place exparte and other have not chosen to file objections to the said application.

4. The appellant No.1 has led evidence on IA No.1 by examining himself as PW.1, but no

documents have been produced.

5. Heard both side and perused the records.

6. The points that arise for my consideration are:

1) Whether the appellants have made out sufficient grounds to condone the delay of one year seven months in filing the appeal?

2) What order?

7. My answer to the above points are :

Point No.1: In the Affirmative

*Point No.2: As per final order,
for the following :*

REASONS

8. **Point No.1:-** The appellants have filed the present application to condone the delay of one year seven months in filing the appeal on the ground that, they have filed the suit for injunction in OS No.43/2018 against the defendants on the file of Addl. Civil Judge & 2nd Addl. JMFC., Ranebennur, but the said court has dismissed the said suit with cost. As against the said judgment and decree, they have filed the present appeal before this Hon'ble court. Now the appellant No.1 has contended that, since he was suffering from age old ailments like sugar and BP, he could not filed the appeal within limitation. Since 2-3 years his sugar level is hiked, he was not in a position to walk. He further stated that, from the date of filing the suit, he has been appearing before the court and giving information to the Advocate and since his brothers who are the other appellants have no legal knowledge, he was only appearing before the court. He further contended that, when he came to the hospital, his counsel met him and informed about filing of the appeal. Hence he has filed this appeal by collecting appeal expenses. Hence, there is a delay in filing the said appeal. Therefore, the

delay is not intentional nor deliberate one and they have every opportunities to succeed in the said appeal.

9. In order to satisfy the reasons urged in the affidavit, the appellant No.1 deposed as PW-1 by filing affidavit in lieu of chief examination. In the chief examination affidavit he has reiterated the contention taken in the application. The learned counsel for the respondent No.2(a) has cross examined PW.1 by suggesting that, he has no impediment to file appeal within the period of limitation, but the witness has denied the said suggestion in clear terms.

10. The learned counsel for the appellants has argued that, there is a delay of one year seven months in filing the appeal, but the said delay is not deliberate or intentional one. The 1st appellant was alone looking after the progress of the suit and due to his ill-health, he could not file the appeal well within time against the judgment and decree of the trial court. The appellants have fair opportunity in succeeding this appeal. Therefore, the delay has to be condoned and appeal shall be disposed off on merits.

11. Per contra, the learned counsel for the respondent No.2 has argued that, there is a delay of one year seven months. It is barred by Civil Rules of Practice. He ought to have filed the application U/Order 41 Rule 3(A) of CPC to condonation of delay. But the appellants filed the application U/Sec.5 of Limitation Act which is not maintainable. The record disclose that, the appellants are the resident of Gangajal Tanda, which is very near to the court. There is no any iota of evidence like medical evidence regarding delay. Mere filing the application is not sufficient to condone the delay. The appellants have to explain each and every day delay. Hence, the

application filed by the appellants is not maintainable and prays to dismiss the said application and appeal.

12. In the light of the above contentions of the counsels of the appellants and respondents, I have gone through the material available on record. It is relevant to note that, it is an admitted fact that, the trial court has passed judgment and decree in OS No.43/2018 dtd: 23-12-2021, there is a delay of one year seven months in filing the present appeal. In the judgment reported in **ILR 2007 Kar 1893**, in the case of **State of Karnataka represented by Revenue Secretary V/s H.B. Munivenkatappa**, the **Hon'ble High Court Karnataka**, has condoned the delay of **9 years 7 months** in preferring the regular appeal by observing that, meritorious matters cannot be dismissed on threshold on the ground of delay alone. If the delay is not condoned, the appellants will be put into heavy and irreparable loss. In the present case, looking to the facts and circumstances of the case and the materials produced by the appellants, I am of the considered opinion that, the appellants have made out sufficient and reasonable grounds to condone the delay. No doubt the appellants ought to have filed the application U/O 41 Rule 3(A) of CPC for condonation of delay instead of they filed application U/Sec.5 of Limitation Act. However, it is a settled legal proposition that, mere quoting wrong provision is not a ground to reject the application. Sec. 5 of Limitation Act, is a general provision to condone the delay. Hence, on the said ground alone, the application cannot be rejected. The appellants have satisfactorily explained sufficient cause for not preferring the appeal within prescribed limitation period. Accordingly, I answer the above **Point No.1 in the Affirmative**.

13. **Point No.2:-** For the foregoing reasons, I proceed to pass the following :-

ORDER

IA.No.I filed by the appellants U/Sec.5 of Limitation Act, is hereby allowed and delay of one year seven months in preferring the appeal is condoned.

For arguments on merits by:

2nd Addl. Sr. C.J. & JMFC,
Ranebennur.