

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH  
AT SRINAGAR**

**CM (M) 240/2023 CM (5873/2023)**

**Ghulam Din Bhat and another**

... Petitioner/Appellant(s)

Through: Mr. J. H. Reshi, Advocate

V/s

**Mst. Jana**

... Respondent(s)

**CORAM: HON'BLE MR. JUSTICE JAVED IQBAL WANI, JUDGE**

**ORDER**  
**20-09-2023**

**Oral**

1. The petitioners in the instant petition have invoked supervisory jurisdiction of this court enshrined in Article 227 of the Constitution seeking setting aside of order dated 10.6.2023 (for short impugned order) passed by the court of Additional District Judge (Fast Track) Budgam (for short the appellate court), in appeal titled as "*Ghulam Din Bhat and another versus Mst. Jana*".
2. The facts emanating from the petition would reveal that the plaintiff respondent herein filed a suit for injunction against the defendants petitioners herein before the court of Sub Judge/Special Mobile Magistrate Budgam along with an application for interim relief which application came to be disposed of by the trial court on 19.9.2022 confirming the order

of temporary injunction granted earlier in favour of the plaintiff respondent herein and against the defendants petitioners herein.

3. Aggrieved of the order of the trial court dated 19.9.2022 supra the petitioners herein preferred a Misc. Appeal on 20.9.2022 before the appellate court which appeal came to be initially entertained after having been transferred by the Principal District Judge Budgam to the appellate court and the appeal was accompanied by an uncertified copy of the impugned order and an independent motion seeking leave of the appellate court to file the appeal as such, and to produce a certified copy of the impugned order as and when same is made available.
4. The appellate court upon entertaining the appeal and passing an interim order therein simultaneously directed the (appellants) petitioners herein to submit the certified copy of the impugned order which however, came to be submitted by the counsel for the appellants on 3.6.2023 along with an application for placing the same on record stating therein the application that the certified copy was initially accompanied with the appeal, however got misplaced upon its presentation before the court of Principal District Judge Budgam though before the appellate court the counsel for the appellants had sought time to furnish certified copy of the order upon being made available.
5. The appellate court after hearing the counsel for the parties on the question of entertaining the application filed by the (appellants) petitioners herein for filing the certified copy of the

impugned order dismissed the appeal holding that the certified copy of the impugned order was not filed within the time provided by the (appellants) petitioners herein and that since the appeal had been preferred without filing of the certified copy of the order, as such, the appeal being not an appeal in the eyes of law.

**Heard learned counsel for the petitioner and perused the record.**

6. It is pertinent to mention here that the expression “appeal” has not been defined in the Civil Procedure Code (for short the CPC) however, as per the dictionary meaning an appeal has been meant to be an application to higher authority for reconsideration of a decision of lower authority or a subordinate court of law. As per the Hon’ble Supreme Court decision rendered in **Sita Ram and others versus State of U.P. reported in (1979) 2 SCC 745** an appeal has been held to be one in which the question is, whether the order of the court from which the appeal is brought was right on the materials which that court had before it.

It is also worthwhile to mention here that the CPC expressly confers a right of appeal, be it appeals from the original decree or appeals from orders as contained in Section 96 and Order 43 of the CPC respectively, and every such appeal has to be heard by a court authorised to hear appeals from the decisions of the court having passed such decrees or orders.

The Apex Court in case titled as **Collector of Central Excise versus Flock (India) Private Limited reported in (2000) 6 SCC 650** held that a right of appeal is not a natural or an inherent right, but the right of appeal is the creature of the statute meaning thereby that there is no right to file an appeal unless it is given clearly and in express terms by the legislation. The same view had also been expressed by the Apex Court earlier as well in case titled as **M. Ramnarain Private Limited and another versus State Trading Corporation of India Limited reported in (1983) 3 SCC 75** holding that right to prefer an appeal is a right created by statute and that no party can file an appeal against any judgment, decree or order as a matter of course in absence of any specific provision in the law conferring on the party concerned the right to file appeal against any such judgment, decree or order.

It is also significant to note here that the Apex Court has also held in a series of judgments including in case titled as **Dilip vs. Mohd. Azizul Haq reported in (2000) 3 SCC 607** that an appeal is the continuation of the suit meaning thereby that the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and to be regarded as one legal proceeding holding further that once decree/order passed by the court of original jurisdiction has been appealed against, the matter becomes *sub judice* and the appellate court is seized of the

matter with a court of appeal to have same powers and to perform as nearly as may be the same duties as conferred and imposed on courts of original jurisdiction, in essence meaning thereby that the hearing of an appeal is the hearing of the suit or original proceeding.

7. Under Order 41 of CPC, an appeal has to be validly presented with the following requirements to be complied with namely:

- (i) The appeal must be in the form of memorandum setting forth the grounds of objections to the decree/order appealed from.
- (ii) It must be signed by the appellant or his reader.
- (iii) It must be presented to the court or to such officer appointed.
- (iv) It must be accompanied by a certified copy of the judgment/order.

8. Keeping in mind the aforesaid position of law and coming back to the case in hand, indisputably the appeal filed by the (appellants) petitioners herein has not been decided by the appellate court on merits, but, dismissed on account of non-filing of the certified copy of the order appealed against and on account of such failure the said right of appeal being a substantive right, can be lost by a party or else denied thereof by an appellate court is an issue which begs consideration of this court in the instant petition.

The losing of a right of appeal has been dealt with by the Apex Court in case titled as **Dajisaheb Mane and others versus Shankar Rao Vithal reported in AIR 1959 SC 29** wherein it came to be held by the Apex Court that the right of appeal being a substantive right carries with it all the rights through it, though

subject to two conditions: 'firstly', when by a competent enactment such right of appeal is taken away expressly or impliedly with retrospective effect and 'secondly' when the court to which an appeal lies at the commencement of the suit, stands abolished.

What emerges from the aforesaid principles of law is that the statutory substantive right of appeal vested in a party cannot remain illusory or nugatory by giving undue importance to procedural law and that the breach of the procedural rule cannot be said to take away a litigants' right to file appeal when a statute confers such a right specifically.

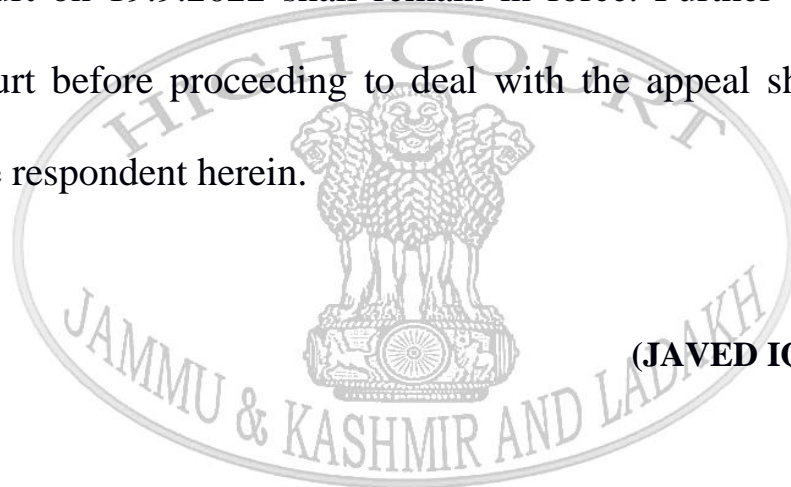
It is also appropriate and advantageous to note here that the consistent view of the courts of law has been that the object of the courts is to decide the rights of the parties and not to punish them for the mistakes which are made in the conduct of the cases. It has been also the consistent position of law that courts do not exist for the sake of the discipline but for the sake of deciding matters in controversy on merits effectually and conclusively.

9. In the instant case, the appellate court ought not to have dismissed the appeal of the (appellants) petitioners herein merely on account of late submission of certified copy of the order appealed against as by doing so the appellate court has non-suited the (appellants) petitioners herein on one hand and on the other declined to decide the appeal on merits. The appellate

Court manifestly has caused failure of justice in the matter which cannot be countenanced in law.

10. Viewed thus, what has been considered, observed and analysed hereinabove, the impugned order is not legally sustainable. Accordingly, the petition is allowed and impugned order is set-aside. The appeal preferred by the (appellants) petitioners herein before the appellate court is restored on the files of the appellate court and the appellate court consequently is directed to decide the same in accordance with law. Till the appeal is decided as directed above, the initial interim order passed by the appellate court on 19.9.2022 shall remain in force. Further the appellate court before proceeding to deal with the appeal shall summon the respondent herein.

11.



**(JAVED IQBAL WANI)  
JUDGE**

Srinagar  
20-09-2023  
N Ahmad

*Whether the order is reportable: Yes*