HIGH COURT OF JAMMU & KASHMIR AND LADAKH

Bench: Justice Wasim Sadiq Nargal

Date of Decision: May 7, 2024

CIVIL MISCELLANEOUS JURISDICTION

CM(M) No. 81/2024

CM No. 2239/2024

Cav No. 615/2024

GULSHAN KUMAR …PETITIONER(S)/APPELLANT(S)

VERSUS

1. U.T. OF JAMMU & KASHMIR …RESPONDENT(S)

2. REGISTRAR COOPERATIVE SOCIETIES …RESPONDENT(S)

3. DEPUTY REGISTRAR, COOPERATIVE SOCIETIES

…RESPONDENT(S)

4. ASSISTANT REGISTRAR, COOPERATIVE SOCIETIES

…RESPONDENT(S)

5. HARSH VARDHAN SINGH, CHAIRMAN, JAMMU TEHSIL

COOPERATIVE MARKETING SOCIETY …RESPONDENT(S)

Legislation:

Article 227 of the Constitution of India

Order 41, Rule 3A of the Civil Procedure Code (CPC)

SRO 233 of 1988

Circular dated 11.07.2020, Govt. of Jammu & Kashmir through Registrar Cooperative Societies

Subject: Civil Miscellaneous Petition challenging the order passed by the Principal Sessions Judge, Jammu, setting aside the status quo order regarding the service status of the petitioner as Managing Director of Jammu Tehsil Cooperative Marketing Society Ltd., based on a resolution that allegedly extended his tenure beyond statutory limits.

Headnotes:

Civil Procedure – Appeal and Delay Condonation – Article 227 – Order 41 Rule 3A CPC – Non-joinder of Necessary Party - Appeal Process – Challenge against the appellate court's order overruling objections related to the maintainability of an appeal filed without a condonation of delay application – High Court upheld appellate court's decision to grant leave for appeal despite procedural objections raised by the petitioner – Court found substantial issues regarding whether the trial court's order was justifiable based on the material presented and existing legal precedents [Paras 1-6, 24-45].

Non-Joinder of Necessary Party – Petitioner's failure to include a necessary party in the initial suit resulted in procedural and substantive complications – The petitioner filed a caveat against the excluded party, contradicting his own argument of non-necessity – Court emphasized the importance of including all affected parties to avoid procedural defects and ensure just adjudication [Paras 3-5, 25-28, 45].

Legal Analysis – Application of Order 41 Rule 3-A CPC - Condonation of Delay – Court ruled that in the given circumstances, the requirement for a delay condonation application was not applicable as the respondent learned of the trial court’s order through a caveat and acted promptly – Deficiency in filing delay condonation application can be a curable defect, which was not relevant in this case as the appeal was filed within the limitation period from the date of knowledge [Paras 18-20, 38-43].

Suppression of Material Facts – High Court found that the petitioner suppressed material facts and misled the trial court by excluding a necessary party, thereby obtaining an interim order through misrepresentation – Such conduct was deemed as playing fraud with the court, warranting dismissal of the petition and imposition of costs [Paras 29-32, 50-52].

Decision – Dismissal of Petition – Held – The writ petition was dismissed in limine for lacking merit and being based on suppressed facts and misrepresentation – Costs imposed on the petitioner for attempting to mislead the court and abusing the judicial process – Emphasized the need for clean hands and full disclosure in seeking equitable reliefs [Paras 52-53].

Referred Cases:

- Smt. Jatan Kumar Golcha v. Golcha Properties Private Limited (1970) 3 SCC 573
- State of Punjab & Ors. V. Amar Singh & Ors. (1974) 2 SCC 70
- Subash Babu v. State of Andhra Pradesh (2011) 7 SCC 616
- Altaf Ahmad Bhat v. Vice Chairman, SDA (2020) 1 J&K CK 0017
- Bashir Ahmad Bhat and another v. Ghuam Hassan Bhat CM(M) No. 104/2020
- Mohd Maqbool Bhat & Ors. V. UT of J&K & Ors WP© No. 78 of 2020
- Prestige Lights Ltd. V. State Bank of India (2007) 8 SCC 449
- Udyami Evam Khadi Gramdyog Welfare Sanstha v. State of Uttar Pradesh (2008) 1 SCC 560
- Shrisht Dhawan v. Shah Brothers AIR 1992 SC 1555
- S. P. Chengalvaraya Naidu v. Jagannath AIR 1994 SC 853
- Ramrameshwari Devi & Ors. V. Nirmala Devi & Ors.

Representing Advocates:

Mr. Jang Bahadur Singh Jamwal for the petitioner
Mr. K.D.S Kotwal, Dy. AG for respondents 1 to 4
M/s Parvesh Singh Salaria & Satinder Gupta for respondent no. 5/caveator

JUDGMENT

Per- WASIM SADIQ NARGAR, J:

1. The petitioner through the medium of the instant petition has called in question the order passed by learned Principal Sessions Judge, Jammu (for short „appellate court") dated 30.03.2024 by invoking the powers of this court under Article 227 of the Constitution of India; with the further prayer that the order passed by learned Sub Judge (Chief Judicial Magistrate) Jammu dated 02.01.2024 be restored.

FACTUAL MATRIX:

2. Briefly stating the facts in the instant petition are that a civil miscellaneous appeal came to be preferred against the order dated 02.01.2024 passed by learned Sub Judge (CJM), Jammu, whereby and where-under, the status quo has been directed to be maintained with respect to the service status of the petitioner herein (respondent No.1 therein) with the prayer for setting aside the same. The leave application arises out of a civil miscellaneous appeal which has been filed by the respondent no.5 herein against the order dated 02.01.2024 passed by the learned Sub Judge, Jammu, whereby the said court has proceeded to pass orders of status quo as regards functioning of the plaintiff (petitioner herein) as Managing Director of Jammu Tehsil, Cooperative Marketing Society Ltd. Government undertaking who had since completed his service tenure on 15.07.2020 in terms of the Resolution dated 16.07.2020.

3. A suit came to be preferred by the plaintiff (petitioner herein) before the court of learned CJM, Jammu on 14.12.2023 restraining the defendants from terminating the services of the plaintiff or interfering into the working of the plaintiff as Managing Director of Jammu Tehsil Cooperative Marketing Society Ltd on the strength of a resolution adopted on 16.07.2020. The plaintiff did not array the respondent no.5 as a party in the suit before the Trial Court and obtained *exparte* order, whereas, the fact remains that the respondent no.5 happens to be a proper and necessary party to the proceeding as directly affected by the order impugned dated 02.01.2024.

4. The petitioner herein filed a suit for permanent prohibitory injunction restraining defendants from terminating the services of the plaintiff or interfering into the working of the plaintiff claiming to be the Managing Director of Jammu Tehsil Cooperative Marketing Society Ltd in view of the resolution adopted in general body meeting.

5. The Trial Court vide order dated 02.01.2024 directed the parties to maintain status quo with respect to the service status of the plaintiff till next date of hearing and feeling aggrieved of the aforesaid order, an appeal came to be preferred by the respondent no.5 before the appellate court.

6. The appellant (respondent no.5 herein) claimed to be Chairman of the Jammu Tehsil Cooperative Marketing Society Ltd was aggrieved of the order impugned and sought leave of the Court to file the appeal on the ground that the plaintiff had proceeded to file suit without arraying the appellant as a necessary party in the suit and obtained ex parte order which if allowed to

sustain, the plaintiff would perpetuate his stay in the organization, when the fact remains that the same was not legally permissible on any count and thus, the appellant was directly affected by the said order dated 02.01.2024 and hence leave was sought to file an appeal.

7. The specific objection was taken before the appellate court by the petitioner that the appeal was time barred because the order which was impugned in the appeal was passed on 02.01.2024, whereas, appeal along with application for leave to appeal was filed on 23.02.2024, which was barred by limitation.

8. It was the specific case of the petitioner herein before the appellate court that unless and until the appeal is accompanied by separate application for condonation of delay, there can be no appeal, which, therefore was hit by Order 41 Rule-3A of Civil Procedure Code, which specifically provides for condonation of delay. In the aforesaid backdrop, it was specifically urged before the appellate court that the appeal was required to be returned because filing of the application suffers from legal lacuna.

9. It was the specific case of the petitioner before the appellate court that in absence of any condonation of delay application accompanying the appeal, the appeal could not have been entertained by the appellate court, besides, objecting the authority of the Chairman of the Society to interfere in the service condition of the petitioner as the role of the Chairman was to preside over the meeting of the Board of Directors who send his approval with regard to any amendment in the service conditions of the petitioner to the Government. Thus, according to the petitioner, filing of the application for condonation of delay was mandatory.

10. Per contra, the learned counsel appearing for the appellant before the appellant court contended that the appeal was within time and since the appellant was deliberately omitted from the array of the respondents to the suit by the plaintiff by projecting that if the appellant had nothing to do with the functioning of the Society, then there was no occasion for the respondent no.1 (petitioner herein) to have filed Caveat before the appellate court on 07.02.2024 seeking opportunity of being heard before granting any relief to the appellant.

11. It was specifically urged by the appellant that, it was only when the appellant received copy of the Caveat, he came to know of passing of the order of the Trial Court and pursuant thereto, immediately approached and obtained copy of the order on 23.02.2024 and on the same day, the appeal was preferred.

12. Thus, as per the appellant, 30 days period of filing the appeal would run from the date of the active knowledge and not from the date the aforesaid order came to be passed by the Trial Court in the knowledge of the appellant because the appellant was not made as a party deliberately before the Trial Court by the petitioner herein.

13. It was the specific case of the appellant that the respondent therein has by misrepresentation proceeded to obtain the trial court order which was impugned before the appellate court in the light of the fact that in terms of the SRO 233, the services of the employees of the Cooperative Societies shall not exceed 58 years and they shall retire on attaining the age of 58 years. Admittedly, in the instant case, the petitioner stood retired on 15.07.2020 whereas a suit was filed in the year 2024 by seeking an injunction for his continuation in the service, when in terms of the statues, he deemed to have been retired and there could be no extension of service against the statue.

14. It was the specific case of the appellant before the appellate court that SRO 233 of 1988 as already upheld by the Co-ordinate Bench of this court in case tilted ***Mohd Maqbool Bhat & Ors. V. UT of J&K and Ors (WP(C) No.78 of 2020)*** decided on 26.04.2023 that the employees of the Cooperative Societies cannot seek parity in their service condition at par with the service condition of the Govt. employees unless approved by the Government. This Court in the aforesaid case has further held that since the Board of Directors have yet to approve any such extension and in terms of circular dated 11.07.2020, all cooperative societies have been directed not to take unilateral action for enhancement of retirement age of the employees of the Cooperative Societies beyond 58 years which is, *ultra vires*, to the statutory provisions and thus, the aforesaid act being an illegal act. It has also been held that the Cooperative Societies are autonomous institutions governed by its own rules and regulations and the employees of the Cooperative Societies cannot seek parity in service conditions with the employees of the government unless approved by the Board of Directors and for the foregoing reasons the writ petition filed by the petitioners therein was dismissed accordingly.

ARGUMENTS ON BEHALF OF THE PETITIONER.

15. Mr. Jang Bahadur Singh Jamwal, learned counsel appearing on behalf of the petitioner has vehemently argued that the Principal District Judge Jammu while passing the order impugned dated 30.03.2024 has completely ignored the mandatory provisions contained in the Code of Civil Procedure and the learned counsel has placed reliance on Order 41 Rule 3-A of the CPC. For the facility of reference, the same is reproduced as under:

"3-A. Application for condonation of delay.-

(1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.

(3) Where an application has been made under sub-rule(1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal."

16. The learned counsel has further argued that the appellate court not have passed the order impugned in the embrace of the bar contained in Order 41 Rule 3-A(3) of CPC as the appellant was under a legal obligation to have filed the appeal accompanying the permission to file appeal and application for seeking condonation of delay. It has been urged that granting of the interim order by virtue of order impugned by the appellate court has finally decided the entire case, though the main suit was pending before the trial court.

17. The learned counsel further submits that the respondent no.5 if aggrieved of the order of the trial court should have knocked the doors of the said court instead of coming directly before the appellant court and that too within the time prescribed under the Limitation Act, which is 30 days only.

18. Learned counsel placing reliance on Sub Rule (3A) of Order 41 submits that the appellate court could not have passed the order impugned unless the appeal is accompanied along with the application seeking condonation of delay as the appeal which has been filed was beyond the limitation period.

The appeal must have been accompanied by an application setting forth the facts on which the appellant relies to satisfy the court that he had sufficient cause for not preferring the said appeal within the limitation period and the order could be passed by the appellate court only in the eventuality, if the condonation of delay application is allowed. Lastly, the learned counsel has submitted that the appellate court has decided the entire suit vide order impugned. In support of his submissions, learned counsel appearing on behalf of the petitioner has relied upon the judgments passed by this court in the case of **Altaf Ahmad Bhat v. Vice Chairman, SDA and Others**, reported at **(2020) 1 J&K CK 0017** decided on 28.01.2020 and in the case titled **Bashir Ahmad Bhat and another v. Ghuam Hassan Bhat** passed on 15.09.2022 in CM(M) No. 104/2020.

ARGUMENTS ON BEHALF OF RESPONDENT NO.5/CAVEATOR

19. Per contra, M/s Parvesh Singh Salaria and Satinder Gupta, Advocates appearing on behalf of respondent no.5/Caveator have vehemently argued that the petitioner has deliberately omitted respondent no.5 from the array of respondents before the trial court and if the respondent no.5 has nothing to do with the functioning of the Society then, there was no occasion for the petitioner to have filed a Caveat before the appellate court, seeking opportunity of being heard before granting any relief to the appellant therein. The very filing of the Caveat leaves no manner of doubt that the respondent no.5 was a necessary party and yet, the petitioner omitted him from the array of respondents with a view to mislead the court and to get the interim order. It has been urged by the learned counsel appearing on behalf of the caveator that the order has been obtained by the petitioner from the trial court by playing mischief by not arraying the affected party to the suit, which has been preferred seeking continuation of service once, he stood retired on 15.07.2020 and that too, after a period of four years from the date of his retirement.

20. It has also been argued that the petitioner has not approached the trial court with clean hands and has suppressed the material facts by way of misrepresentation and playing fraud on the court by deliberately omitting the affected party from the array of the respondents.

21. Learned counsel further argued that had the respondent no.5 being arrayed as party respondent before the Trial Court, then perhaps there was no occasion for the court below to have passed the interim order in his favour and after having got the said order by playing mischief before the court below, the petitioner has filed the instant petition by invoking the powers of this court under Article 227 of the Constitution of India, which is not maintainable and liable to be dismissed as the petitioner has not approached this court with clean hands.

22. The learned counsel further submits that the petitioner even otherwise also cannot be granted any extension in his service after his retirement in the light of law laid by the Coordinate Bench of this court in the case ***Mohd Maqbool Bhat (supra)*** and passing of the interim direction by the trial court even otherwise also was in contravention to the law laid down by the Coordinate Bench of this court and thus, the writ petition which is devoid of any merit deserves dismissal.

LEGAL ANALYSIS:

23. Heard learned counsel for the parties at length and perused the record. Caveat No. 615/2024 shall stand discharged.

24. I have given my thoughtful consideration to the submissions made at bar by the learned counsels appearing on behalf of the parties. I have also gone through the order passed by the learned Principal District and Sessions Judge, Jammu which is impugned in the present petition by invoking the powers under Article 227 of the Constitution of India.

25. From the pleadings, it has come to fore that the respondent no.5 has not been made a party to the proceedings initiated by petitioner before the trial court and in case, if the argument of the learned counsel appearing on behalf of the petitioner is accepted that the respondent no.5 was not a necessary party, then what prompted the petitioner to file a caveat against the respondent no.5 before the appellate court is not forthcoming from the record.

26. The petitioner was confronted with the aforesaid act and was asked to explain about the factum of filing of a caveat against the respondent no.5, but the learned counsel appearing on behalf of the petitioner could not give any satisfactory reply.

27. Had the respondent no.5 not being a necessary party, then what prompted the petitioner to file the caveat against him is not forthcoming from the record.

Thus the petitioner, who was trying to play mischief with the Court was caught in his own web.

28. The very filing of the caveat by the petitioner against respondent no.5 leads to an irresistible conclusion that the petitioner has not approached the trial court with clean hands and by way of misrepresentation by playing fraud with the court has got the interim direction, which even otherwise also was not permissible under law in the light of the law laid down by the Coordinate Bench of this court in the case ***Mohd Maqbool Bhat (supra)*** and also in the light of the circular issued by the Govt. of Jammu & Kashmir through Registrar Cooperative Societies dated 11.07.2020, a perusal whereof reveals, that there was no ambiguity with regard to the applicability of SRO 233 dated 08.07.1988 to the employees of the Cooperative Societies so far as retirement age of 58 years is concerned. The Circular further reiterates that any action taken unilaterally by an incompetent authority for enhancement of the retirement age of the employees of the Cooperative Societies beyond 58 years will be *ultra vires* to the statutory provisions and the amount so drawn on this count by any employee or employees of the Cooperative Societies will be patently illegal and liable to be recovered along with interest besides imposition of punitive action under law.

29. For facility of reference, the operative part of the judgment in the case of ***Mohd Maqbool Bhat (supra)*** is reproduced as under:

"11. Rule 13(1) of the Rules provides that the employees of Cooperative Societies shall superannuate at the age of 58 years. Any amendment or alteration in any of the aforesaid Service Rules including Rule 13(1) has to be carried out by the Government in exercise of its powers under Section 176 of the J&K Cooperative Societies Act. There is no other mode or method known to law whereby amendment can be carried out to the Service Rules notified vide SRO 233 of 1998.

12. The petitioners have invoked writ jurisdiction of this Court and sought a direction upon the respondents to amend Rule 13(1) of the Rules on the basis and on the strength of recommendation of the Committee constituted by the Government. It is an admitted position that the said recommendation has not been accepted by the Government/competent authority as on date. Unless the said

recommendation is accepted by the Government and consequent changes are made in the Rules, the right to seek a direction against the respondents would not mature in favour of the petitioners. A mere recommendation by a Committee which has not been accepted by the competent authority does not give a right to the petitioners to seek a mandamus upon the respondents to amend the rules. The petitioners cannot, merely on the basis of recommendation of the Committee, seek parity in their service conditions with the service conditions of Government employees. It is a settled law that the Cooperative Societies are autonomous institutions governed its own rules and regulations. The employees of the Cooperative Societies cannot seek parity in service conditions with the employees of the Government, unless approved by the Board of Directors.

13. For the foregoing reasons, I do not find any merit in contentions raised by the petitioners. The petition lacks merit and is dismissed accordingly. Notwithstanding dismissal of this writ petition, the respondents shall be liberty to take a decision on the recommendations made by the Committee constituted by the Government and make appropriate amendments to the Rules notified vide SRO 233 of 1998."

30. The record further reveals that the petitioner has filed a suit for permanent prohibitory injunction restraining the defendants therein from terminating the services of the petitioner or interfering into his working, who alleged to have been posted as Managing Director of Jammu Tehsil Cooperative Marketing Society in the light of the resolution adopted by the General Body Meeting dated 16.07.2020, when admittedly, the petitioner stood superannuated wayback on 15.07.2020 and on the other hand, has filed the aforesaid suit in the year 2024 for his continuation of service, when in terms of the statue he has since retired and there was no extension of service against the statue.

31. Thus, a person who was already been terminated from service has sought injunction against the defendants from terminating his services which has already happened on 15.07.2020, which order was gladly and voluntarily accepted by the petitioner without any grouse for four long years. After having

accepted the said order for four long years, it appears that the petitioner has arisen from a deep slumber and has filed the suit before the trial court on false and flimsy grounds by projecting distorted facts in the year 2024 which was not permissible under law.

32. Had the respondent no.1 being arrayed as a party respondent, then he would have objected to the grant of the interim relief in favour of the petitioner and in that eventuality, there was no occasion for the trial court to have passed the order dated 02.01.2024 which was impugned before the appellate court. Thus, the petitioner even otherwise also was **estopped under law** to have questioned the action of the defendants, more particularly, when the petitioner by his own conduct had gladly and voluntarily accepted his superannuation which happened on 15.07.2020 without any demur and after having accepted the same for four long years, the petitioner is **estopped under law** to question the said action at this belated stage by way of filing a false and frivolous suit before the trial court and the instant petition before this court by invoking Article 227 of the Constitution of India.

33. The judgments cited by the learned counsel appearing on behalf of the petitioner referred hereinabove are not applicable to the facts and circumstances of the present case.

34. The next question which arises for consideration in the instant petition is whether a person, who is seriously prejudiced by an order can file an appeal against the order, even though he was not made a party to the proceedings in which the order was passed deliberately and knowing fully that the said party is a necessary party.

35. Admittedly, in the present case, the respondent no.5 was aggrieved of the order passed by the trial court and thus, had a right to file an appeal before the appellate court and this was precisely the reason that the leave was sought. In Civil Procedure Code, it does not in-terms lays down as to who can be a party to the appeal. But, only a party against whom a decision is given has a right to prefer an appeal. If a person is not a party to the suit, he/she may prefer an appeal if he/she is affected by the order of the trial court provided he/she obtained leave from the court for appeal and hence, whereas the party to the suit had a right of appeal, a person who was not party to the suit had no such right, but the court of appeal may in its discretion allow him to prefer an appeal. Thus, this court is of the considered view that "**Technicalities should never be permitted to override substantial justice"**, which has been laid down in the earliest case of **The Province of**

Bombay v. Western India Automobile Association, AIR (36) 1949 Bombay Page 141 by the Division Bench of Chief Justice Chagla & Justice Bhagwati.

36. Thus, in the view of this court, the private respondent was an aggrieved party and has direct interest in the subject matter has rightly sought to apply for leave to appeal on merit and has also shown how he is aggrieved by projecting detail facts. This Court is of the view that leave to appeal was rightly granted by the appellate court. The courts are required to strike a balance between the legitimate rights and interest of the respective parties.

37. It is well settled that a person, who is not a party to the suit may prefer an appeal with a leave of the appellate court and such leave should be granted, if he would be prejudicially affected by the order or judgment. It is settled legal proposition that a stranger cannot be permitted to file an appeal in any proceedings, unless he satisfies the court that he falls within the category of aggrieved persons. It is only when order prejudicially affects a person, who is not a party to the proceedings, he can appeal with a leave of the appellate court. This principle of law was laid down by the Apex Court in case titled **Smt. Jatan Kumar Golcha v.Golcha Properties Private Limited,** reported in *(1970) 3 SCC 573,* and in case titled **State of Punjab & Ors. V. Amar Singh & Ors.,** reported in *(1974) 2 SCC 70.* The Apex Court in **Subash Babu v. State of Andhra Pradesh**, reported in *(2011) 7 SCC 616* has held that the expression „aggrieved person" denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition, its scope and meaning depends on diverse, variable factors, such as the content and intent of the statue of which the contravention is alleged, the specific circumstances of the case, the nature and the extent of the complainant"s interest, and the nature and extent of the prejudice or injury suffered by the complainant."

38. The next question which requires consideration of this court is whether the said leave application can be considered in absence of there being any application seeking condonation of delay in filing the appeal. There is no quarrel with regard to proposition of law that in case the appeal is time barred, the same should be accompanied with the application for condonation of delay. A perusal of Order 41 Rule 3-A of Civil Procedure Code makes it mandatory that the appeal if time barred must accompany with the application for seeking of condonation of delay and a duty is cast upon the appellate court

to first decide the issue of condonation of delay before advancing to decide the main appeal.

39. The ground urged by the petitioner in the instant petition that the appellate court, without first condoning the delay, entertained, diarized and admitted the appeal by passing the order impugned and such process undertaken by the appellate court is in contravention of Order 41 Rule 3-A CPC which bars granting of stay/interim direction in a time barred appeal unless delay is condoned. However, this court is of the view that in the given case, the appellant was not required to file such application, when admittedly he was not made as a party before trial court. Thus, the plea of the petitioner that the appeal filed by the respondent no.5 should have been accompanied with application for condonation of delay lacks substance and liable to be rejected, more particularly, when the order has been obtained by the petitioner from the trial court by playing mischief and deliberately not arraying the affected party to the suit knowing fully well that the said defendant was an aggrieved and necessary party.

40. The moot question which arises in the instant petition is whether in the given case, the respondent no.5 was required to file an application for condonation of delay, when admittedly, he was not made party before the trial court and has come to know about the passing of the said order through the medium of the caveat which was preferred by the petitioners.

41. It goes without saying that the law of limitation being a substantive law, the appeals ought to be filed within a time limit. Filing of the appeal within a period of limitation is the rule and condonation of delay is an exception. Ordinarily, if an appeal is not drawn up in the manner prescribed under the Civil Procedure Code, it may be rejected or returned to the party for the purpose of being amended within time to be fixed by the court or to be amended then and there. No doubt, Sub Rule (1) of Rule 3-A has used the word „shall" which would clearly indicate that the requirement is peremptory in tone but such peremptoriness does not foreclose a chance for the party to rectify the mistake either on his own or being pointed out by the court. The word „shall" in the context needs to be interpreted as an obligation on the party. Such defect can be cured by the party concerned and present the appeal without further delay as has been held by the Apex court in **State of M.P. and anr. V. Pradeep Kumar and Anr.** reported at **(2000) 7 SCC 372**. The Apex Court in the aforesaid case has even gone to the extent that effort of the court should not be one of finding means to pull down the shutters of adjudicatory

jurisdiction before a party who seeks justice, on account of any mistake committed by him, but to see whether it is possible to entertain his grievance if it is genuine. Thus, even the Apex Court is of the view that even an unintentional lapse from a litigant should not usually cause doors of judicature permanently closed before him. The Supreme Court has further held in Pradeep Kumar"s case as:

"***The object of enacting Rule 3-A in Order 41 of the Code seems to be two-fold. First is, to inform the appellant himself who filed a time barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the court has to deal with application for condonation of delay as a condition precedent. Barring the above objects, we cannot find out from the rule that it is intended to operate as unremediably or irredeemable fatal against the appellant if the memorandum is not accompanied by any such application at the first instance. In our view, the deficiency is a curable defect, and if the required application is filed subsequently the appeal can be treated as presented in accordance with the requirement contained in Rule 3-A of Order 41 of the Code."***

42. Thus, it can safely be concluded in the light of the law down by the Apex Court that even a deficiency of not accompanying the application for condonation of **delay is curable defect** and if required, such an application can be filed subsequently and the appeal can be treated as presented in accordance with the requirement contained in Rule 3-A of Order 41 CPC.

43. However, applying the facts of the instant case in the light of the law laid down by the Apex Court, there was no requirement of filing of such application in the light of the fact that respondent no.5 received the copy of the caveat through the medium of which he has come to know about passing of the order passed by the learned trial court and obtained the copy of the said order on 23.02.2024 and on the same very day, appeal was preferred. Thus, respondent no.5 without wasting even a single day has approached the appellate court and thus, he cannot be held guilty of not following the procedure as envisaged under Order 41 Rule 3-A CPC because the **appeal was preferred well within time from the date of his active knowledge**

which in the present case is from the date of filing of the caveat by the petitioner i.e. on 07.02.2024 and the appeal was filed well within the limitation period of 30 days i.e. on 23.02.2024.

44. Thus, the plea of the limitation and filing of the application will not be applicable in the instant case and rightly so, the permission has been accorded by the appellate court by entertaining the said appeal.

45. It appears from the record that the petitioner was caught in his own web when he filed the caveat against the respondent no.5 and not against the other defendants against whom the said order was passed. Thus, the very filing of the caveat against the respondent no.5 and that too in the capacity of the Chairman Tehsil Cooperative Society Udheywala Jammu leads to the irresistible conclusion that respondent no.5 was a necessary party before the trial court and yet, the petitioner chose, not to array him as a party defendant but admitting the factum he being a necessary party by the very filing of the caveat. Thus, the plea of the petitioner that the appeal filed by the appellant should have been accompanied with the application of condonation of delay has no legal force and required to be rejected in the light of what has been discussed herein above.

46. Although, it is a general practice to make a formal application under the Limitation Act in order to enable the courts to weigh the sufficiency of cause for the inability of a party to approach the court within the time prescribed by limitation, there is no bar to exercise the discretion by the court to condone the delay in absence of a formal application provided a satisfaction is drawn by the court that the party had sufficient cause for not making the application or preferring the appeal within the time prescribed. This principle of law has been laid down by the Apex Court in case tilted **Sesh Nath Singh & Anr. V. Baidyabati Sheoraphuli co-operative Bank Ltd. & Anr**. reported at **(2021) 7 SCC 313**. For the facility of reference, Para-63 has been reproduced as under:

"63. Section 5 of the Limitation Act, 1963 does not speak of any application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to

approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone delay, in the absence of a formal application. ”

47. Thus, the finding which has been recorded by the learned appellate court by holding that the **petitioner is guilty of playing mischief** by deliberately not arraying the affected party to the suit cannot be faulted and I concur with the observations of the learned Principal District and Sessions Judge, Jammu.

48. Although, this court while deciding the limited question whether the appeal could have been entertained in absence of the application seeking condonation of delay in the light of the bar imposed under Order 41 Rule 3-A Code of Civil Procedure, could not have touched the merits of the case, yet with a view to establish the conduct of a petitioner, this court cannot lose sight of the fact that the petitioner has filed a false and frivolous suit seeking permanent prohibitory injunction restraining the defendants from terminating the services of the petitioner being Managing Director of Jammu Tehsil Cooperative Society in 2024, when admittedly, he has already superannuated wayback in the year 2020, which order he has gladly and voluntarily accepted for four long years without any demur.

49. Having accepted his superannuation in 2020, without raising any grouse, the suit was not maintainable and this aspect of the matter has not been gone into by the trial court while granting interim injunction in his favour and that too at the behest of a party, who has deliberately omitted the necessary party from the array of respondents. It is not so even the Trial Court could not have entertained the said suit in the light of the law already settled by a Co-ordinate Bench of this court in the case ***Mohd Maqbool Bhat (supra),*** wherein, it has been held that the employees of the Cooperative Societies cannot seek parity in the service condition at par with service conditions of govt. employees unless approved by the Government. Besides, in terms of Circular dated 11.07.2020 issued by the Govt. of Jammu & Kashmir through Registrar Cooperative Societies Jammu specifically mentioned that the persons appointed to the Cooperative Societies shall retire on attaining age of 58 years, therefore, there services could not be continued.

50. Since the petitioner has not come to the court with clean hands and has played mischief before the trial court, wherein, the petitioner was aware that the respondent no.5 was a necessary party and yet deliberately omitted him

from the array of respondents and obtained interim direction against him but the petitioner by his own conduct has fallen in his own web by filing a caveat against the respondent no.5, whom he deliberately omitted from the array of defendants in the suit knowing fully well that he was a necessary party. Thus, the act of the petitioner falls within the realm of playing fraud with the court and such unscrupulous litigants, who play mischief with the court cannot go scot-free.

51. On the aspect of suppression, equity, clean hands and playing mischief/fraud with the court, the law is well settled in the followings decisions:-

a. In Prestige Lights Ltd. v. State Bank of India [(2007) 8 SCC 449], at paragraphs 33, 34 and 35, the Hon"ble Supreme Court held as follows:

33. It is thus clear that though the appellant- Company had approached the High Court under Article 226 of the Constitution, it had not candidly stated all the facts to the Court. The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a Court of Law is also a Court of Equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the Writ Court may refuse to entertain the petition and dismiss it without entering into merits of the matter.

34. The object underlying the above principle has been succinctly stated by Scrutton, L.J., in R v. Kensington Income Tax Commissioners, [(1917) 1 KB 486 : 86 LJ KB 257 : 116 LT 136], in the following words:

"It has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should made a full and fair disclosure of all the material facts, not law. He must not misstate the law if he can help itthe Court is supposed to know the law. But it knows

nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside, any action which it has taken on the faith of the imperfect statement".

34. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

b. In **Udyami Evam Khadi Gramdyog Welfare Sanstha and another v. State of Uttar Pradesh** *[(2008) 1 SCC 560],* at paragraphs 16 and 17, the Hon"ble Apex Court, held as follows:

16. A writ remedy is an equitable one. A person approaching a superior court must come with a pair of clean hands. It not only should not suppress any material fact, but also should not take recourse to the legal proceedings over and over again which amounts to abuse of the process of law. In Advocate General, State of Bihar v. M/s. Madhya Pradesh Khair Industries and Another [(1980) 3 SCC 311], this Court was of the opinion that such a repeated filing of writ petitions amounts to criminal contempt.

17. For the reasons aforementioned, there is not merit in this appeal which is dismissed accordingly with costs. Counsel's fee quantified at Rs. 50,000/-

c. In **Shrisht Dhawan v. M/s Shah Brothers (AIR 1992 SC 1555)** at paragraph 20, the Hon‟ble Apex Court, held as follows: “***20. Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct….”***

d. In **S. P. Chengalvaraya Naidu v. Jagannath (AIR 1994 SC 853)** at paragraph 8, the Hon‟ble Apex Court, held as follows:

8. ….. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another’s loss. It is a cheating intended to get an advantage……. .

e. Lastly, in the case of Ramrameshwari Devi & Ors. V. Nirmala

Devi & Ors., the Hon‟ble Apex Court emphasized upon the need for curbing unscrupulous litigation. At paragraphs 43, 54 and 55, the Hon‟ble Apex Court, held as follows:

43. We have carefully examined the written submissions of the learned amicus curiae and the learned counsel for the parties. We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled litigation. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court’s otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.

54. While imposing costs we have to take into consideration pragmatic realities and be realistic as to what the defendants or the respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter-affidavit, miscellaneous charges towards typing, photocopying, court fee, etc.

55. The other facts which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years.

52. Thus, from the aforementioned pronouncements, the law has been settled that suppression of any material fact amounts to abuse of the process of law and amounts to fraud and would deprive an unscrupulous litigant from availing equitable or discretionary remedies. In the present case, the petitioner has not approached the trial court with clean hands and has suppressed the material facts by way of misrepresentation and playing fraud on the court by deliberately omitting the affected party from the array of the respondents knowing fully well that he is the aggrieved party and the issue stands already clinched by this court.

Conclusion:

53. For what has been stated hereinabove and in the light of the settled legal position:-

I. Since the appellant has raised substantial issue that whether the trial court could have passed such order having regard to the nature of the material placed by the respondent and also in the light of the law laid down by a coordinate bench of this court and the circular issued by the Government governing the said policy, the appellate court has rightly overruled the objection raised by the petitioner herein in granting leave to file appeal. Thus, the order of the appellate court, which is impugned in the present petition, wherein, various issues of legal as well as factual importance have been raised, cannot be faulted and the same is accordingly upheld.

II. As a necessary corollary, the challenge thrown by the petitioner to the same by invoking the powers of this court under Article 227 of the Constitution of India is ill founded and thus, the writ petition deserves dismissal being devoid of any merit and accordingly, the same is dismissed *in limine* for the reasons stated hereinabove.

III. The petitioner has not come to this court with clean hands by playing mischief before the Trial Court, wherein, the petitioner was aware that respondent no.5 was a necessary party and yet, deliberately omitted him from the array of respondents and obtained interim direction against him. Thus, the act of petitioner falls within the realm of playing fraud with the court and such unscrupulous litigants, who play mischief with the court, cannot go scot-free and thus, this court deems it proper to burden the petitioner with costs to the tune of Rs.20,000/- to deprecate such practice of suppression of material facts and playing mischief with the court, which shall be payable by the petitioner to the Advocates" Welfare Fund within a period of four weeks from today.

IV. Accordingly, the present petition stands dismissed *in limine*.