

GAHC010009922014



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RSA/156/2014

SAYED ALI and 3 ORS.

2: MD. MALEK ALI

3: MD. ABDUL KHALEQUE

4: MD. RASHID ZAMAL
ALL ARE THE SONS OF LT. ASHAN ALI
R/O VILL. MASHANER ALGA SUAPATA PT. 1
P.O. CHIRAKUTA
P.S. CHAPOR
DIST. DHUBRI
ASSAM

VERSUS

MANIR ALI HAZI and 8 ORS.

2:JAMER ALI MUNSHI

3:SAMER ALI MUNSHI

4:MORTUZ ALI

5:IMAN ALI

ALL ARE THE SONS OF LT. BIDU MONDAL

6:SAHERA KHATUN

D/O LT. BIDU MONDAL

7:SALEHA KHATUN

D/O LT. BIDU MONDAL

8:PINJIRA KHATUN

D/O LT. BIDU MONDAL

9:MONIRAM BEWA

W/O LT. BIDU MONDAL

ALL ARE THE R/O VILL. MASHANER ALGA

P.O. CHIRAKUTA

P.S. CHAPOR

DIST. DHUBRI

ASSAM

Advocate for the Petitioner : MR.M U MAHMUD

Advocate for the Respondent : MR. F RAHMAN

BEFORE

THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellants :Mr. M U Mahmud, Advocate

For the Respondents : Mr. N Ahmed, Advocate

Date of Hearing : 17.02.2023, 21.02.2023

Date of Judgement : 21.02.2023

JUDGEMENT & ORDER (ORAL)

Heard Mr. MU Mahmud, learned counsel for the appellants. Also heard Mr. N Ahmed, learned counsel for the respondents.

2. The present appeal is filed assailing the judgement and order dated 21.02.2014, passed by the learned First Appellate Court in TA No. 66/2013, whereby the learned Appellate Court had dismissed the appeal by refusing to condone the delay of 39 days thereby dismissing an application under Section 5 of the Limitation Act, 1963 on the ground that the appellant has failed to show sufficient cause which prevented the appellant from filing the appeal within the prescribed period of time.
3. The present appeal was admitted by this court on the following substantial question of law:

“(i) Whether on the basis of Exhibit 1 and Exhibit 2 sale deed, the learned courts below ought to have declared the title of the plaintiff over the suit land?

(ii) Whether the learned first appellate court committed error in refusing to condone the delay in exercise of power under Section 5 of the Limitation Act read with Order XLI Rule 3A of the Code of Civil Procedure. The appellant is permitted to raise any other substantial question of law at the time of hearing.”

4. For consideration of the aforesaid substantial question of law, now, let this court to look into the background fact of the present litigation, which are as follows:

(i) The appellant as plaintiff preferred a suit being TS No. 39/2010

before the learned court of Munsiff at Bilasipara seeking declaration of right, title and interest and correction of record and permanent injunction. Such declaration was sought over the B schedule land. Such declaration was sought on the basis of a sale deed being Deed No. 5026 dated 15.09.1975 and a declaration was also sought for that the said deed is valid and having force in law.

(ii) The defendants contested the suit by filing written statement and denied the execution of sale deed by their predecessor in interest and also contested that the predecessor in interest of the defendants had never handed over possession of the schedule land. Both parties led evidence and exhibited documents.

(iii) Thereafter, the learned trial court below dismissed the suit basically on the ground that the plaintiffs could not produce original sale deed Ext. 2 without proper explanation and that the name of the defendants were recorded in the revenue record long back.

(iv) Thereafter, being aggrieved, the plaintiffs preferred an appeal under Section 96 of the CPC before the learned Civil Judge, Dhubri. As there was delay of 39 days in preferring the aforesaid appeal, the appellants along with the appeal preferred an application under Section 5 of the Limitation Act praying for condonation of the delay for filing the connected appeal, which was registered as petition No. 760 dated 17.08.2013.

(v) In the aforesaid petition, the appellants pleaded the following to explain the delay that had prevented the appellant from filing the appeal within the prescribed period of limitation:

- (A) That the plaintiffs/ appellants requested his engaged Advocate to obtain a certified copy of the judgment and sought advice for filing an appeal who in turn advised that three months are the prescribed period to file a first appeal. Therefore, there was some delay in applying certified copy.
- (B) The appellant No. 1 who used to look after the case and used to take steps suddenly felt ill and was bed ridden from 13.06.2013 to 14.08.2013 and could not move.
- (C) After being recovered, he contacted the Advocate at Dhubri on 14.08.2013 requesting him to file an appeal. In the meantime certified copy was received on 14.06.2013.
- (D) Therefore, the counsel informed that the period for filing an appeal is one month and not three months.
- (E) Accordingly, it was contended that due to wrong advice and prolong illness, the appeal could not be filed within the time prescribed.

- 5. Though, no formal objection was filed against the aforesaid application, however the respondents participated in the said proceeding. The learned appellate court after hearing the parties declined to condone such delay and resultantly dismissed both the applications filed under Section 5 of the Limitation Act, 1963 and Title Appeal.
- 6. The reasons for such dismissal as are discernable from the impugned

order dated 21.12.2014, can be summarized as follows:

- (i) No cogent reason has been put forward in respect of the illness.
- (ii) The conduct of the appellants as well as submission of proper documents as to his illness is not satisfactory.
- (iii) The certificate submitted is not from any specialist.
- (iv) The appellants were not diligent and the fact of suffering from illness and the state of bed ridden condition is not convincing.
- (v) The Judgment relied by the counsel of the plaintiffs reported in 2010 4 GLJ 541 is distinguishable and not applicable in the present context of the case.
- (vi) There was deliberate negligence and mistake has not been bonafide on the part of the appellants.

7. Mr. Mahmud, learned counsel for the appellants submits that the decision of the appellate court is perverse inasmuch as the same has been passed in total ignorance and derogation of settled proposition of law and the learned Appellate Court below failed to construe Section 5 of the Limitation Act, 1963 in proper prospective. Therefore, this court should set aside the impugned judgment dated 21.12.2014.
8. Mr. Mahmud further contends that so far relating to the judgment of the learned trial court the appellants should be given a chance to test the same before the first appellate court inasmuch as the first appellate court is the last court of fact and law and inasmuch as right to appeal under Section 96 is a valuable right. Therefore, he contends that the matter may be remanded back to the learned Appellate Court for hearing the appeal

preferred by the appellants on merit.

9. Per contra, Mr. Ahmed submits that no substantial question of law is involved in the present case inasmuch as the finding of the learned appellate court relating to the factual aspect that the plaintiffs were negligent and could not produce any vital documents has attained finality. At the second appellate stage such finding of fact should not be entertained. The learned counsel further contends that whether there are sufficient causes preventing a litigant approaching the appellate court within the prescribed period of limitation is decided on given fact of the each case and such determination is a determination of fact and not any question of law not to say any substantial question of law. Therefore, the present appeal should be dismissed being devoid of any merit.
10. This court has given anxious consideration to the submission advanced by the parties. It is not in dispute that the first appellate court has dismissed the petition No. 760 dated 17.08.2013 filed under Section 5 of the Limitation Act.
11. In the given fact of the present case the plaintiff, whose suit is dismissed and who wants to prefer an appeal will not be benefited by filing an appeal belated inasmuch as it is his urgency that his suit has been dismissed and he wants to correct, it through the first appellate court. It is by now well settled that until and unless it is found that an appeal is preferred beyond the period of limitation with an object to defeat justice that has been granted to the other party to the suit or in a case where the delay is very inordinate and the person who is seeking condonation of delay was not prevented by sufficient cause, this court generally will not entertain such prayer for condonation of delay. It is also well settled that

the Section 96 of the CPC provides a valuable right to prefer an appeal. Such valuable right shall not be curtailed usually, more particularly in a situation like the present one when the appeal is preferred by a litigant whose suit has been dismissed.

12. The Hon'ble Apex Court in the case of ***Collector, Land Acquisition Ananta Nag Vs Musst Katiji and Ors. reported in AIR 1987 SC 1353*** held at paragraph 3 that the legislature has conferred the power to condone delay by enacting [Section 5](#) of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice- that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been taking a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-In the Collector (supra), the Hon'ble Apex Court further held in paragraph 6 that it must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. It was also held at paragraph 4 that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.
13. The Hon'ble Apex Court in the case of ***Deepal Girishbhai Soni And Ors***

vs United India Insurance Co. Ltd. reported in ***(2004) 5 SCC 385***

held that right to question the correctness of a decree in first appeal is a statutory right and such right shall not be curtail casually.

14. This court is also of the view that the appeal under Section 96 CPC is a valuable statutory right and therefore, generally delay in preferring appeal are required to be condoned in the interest of justice, where there is no gross negligence or deliberate inaction or lack of bonafide is imputable to the plaintiff/ appellant in seeking condonation of delay. In the aforesaid backdrop, now, let us test the impugned judgment dated 21.12.2014.
15. This is an admitted position that the delay was a very short period of 39 days inasmuch as the appellant has filed an application on oath regarding his illness and wrong advice by the counsel. Such statement of oath has not been disputed by the respondent/ defendants in the appellant court. Further, the learned court below in the considered opinion of this court has committed a perversity by ignoring the medical certificate issued in favour of the appellant on the ground that the same is not from a specialist. The learned court below has come into a conclusion that the appellant was not diligent and his story that he was suffering from illness is not convincing, however, the learned court below has not given any reason why the court has come to the conclusion that the appellant was not diligent inasmuch as he has preferred an appeal when his suit has been dismissed.
16. The learned court further came to a conclusion that it is a deliberate negligence and the mistake has not been bonafide on the part of the appellant, however, nothing is discernable on the basis of which material the learned appellate court has come to such a conclusion. Thus, in the

considered opinion of this court the learned appellate court below has committed perversity in dismissing the application for condonation of delay by ignoring the settled proposition of law and by failing to construe Section 5 of the Limitation Act in proper prospective. Accordingly, the substantial question of law No. 2 is answered.

17. Coming to the challenge to the judgment of the first appellate court, this court is also of the considered opinion that the right under Section 96 (2) CPC is a valuable right and the first appellate court is the last court to decide both the questions of fact and law. Therefore, as the appeal was not decided on merit, ends of justice would be met if the matter is remanded back to the first appellate court to decide the appeal afresh on its own merit. Ordered accordingly.
18. With the aforesaid term, this second appeal stands allowed. Parties to bear their own costs.

JUDGE

Comparing Assistant