

GAHC010212542021



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

Case No. : I.A.(Civil)/2154/2021
In RSA No. 11187/2021

JAIRAJ BIKRAM SINGH
S/O LATE JOGENDRALAL SINGH CHETRY, R/O KUTUBUDDIN AHMED
PATH, FOUZDARIPATTY, NAGAON, MOUZA AND P.S.-SADAR NAGAON,
DIST- NAGAON, ASSAM, PRESENT ADD- LAL SINGH MANSION, A.T. ROAD,
GUWAHATI, ASSAM

VERSUS

JOGJEET SINGH CHETRY
S/O LATE JOGSISH CHETRY, FOUZDARIPATTY, NAGAON, MOUZA AND P.S.-
SADAR NAGAON, DIST- NAGAON, ASSAM

Advocate for the Petitioner : MR. S CHAMARIA
Advocate for the Respondent : MR. S D PURKAYASTHA

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

ORDER

21-07-2023

Heard Shri S. Chamaria, learned counsel for the applicant whereas Shri S. D. Purkayastha, learned counsel has appeared for the sole respondent.

2. The instant application has been filed for condonation of delay in preferring the second appeal against a judgment and order dated 30.04.2013 passed by the learned First Appellate Court in Title Appeal No. 14/2011. By the aforesaid judgment, the appeal was dismissed and the judgment and decree dated 03.03.2011 passed by the learned Munsiff No. 2, Nagaon in TS No. 96/2004 was affirmed.

3. Shri Chamaria, the learned counsel for the applicant has submitted that though the delay appears to be an in ordinate one, there are cogent reasons which were beyond the control of the applicant from filing the appeal within time and therefore the delay has been caused. By referring to the documents annexed, the learned counsel submits that there was wrong advice in continuing with the litigation after dismissal of the First Appeal vide the order dated 30.04.2013. It is submitted that instead of an advice to file a regular Second Appeal, a review was advised to be filed which was ultimately done and the review was also dismissed on 31.03.2016. Thereafter, a revision was preferred in this Court which was also dismissed on withdrawal vide order dated 18.12.2018 and it was only thereafter that the present appeal has been preferred. In the meantime, there has been the delay. The learned counsel submits that the suit was filed for a declaration that the defendant was not the adopted son of the brother of the plaintiff. It is further submitted that only recently when an issue arose regarding application of a Legal Heir Certificate, the effects of the said decree was reflected and thereafter the present appeal has been filed.

4. The learned counsel has specifically submitted that at no point of time, any suggestion was given to file the present appeal after the withdrawal of the revision. It is also submitted that the applicant did not have the legal knowledge regarding the availability to prefer a second appeal and only after certain exercise of due diligence, the present advice has been given. It is also submitted that there are good grounds of appeal and the same should be heard on merits after condoning the delay.

5. In support of his submission, Shri Chamaria, the learned counsel for the applicant has relied upon the following decisions:-

1. Judgment dated 13.07.2023 of the Hon'ble Supreme Court in Civil Appeal No. 4335/2023 (Delhi Development Authority Vs Jagan Singh & Ors).

2. *N. Balakrishnan Vs M. Krishnamurthy* reported in (1998) 7 SCC 123.

3. *Usha Roy Vs Pinku Roy & Ors.* reported in 2022 (1) GLT 707.

6. The Hon'ble Supreme Court in the case of ***Delhi Development Authority*** (supra) has laid down that a liberal and justice-oriented approach needs to be adopted in the matters of condonation of delay so that the substantive rights of the parties are not defeated only on the ground of delay. It has further been laid down that there cannot be any hard and fast rule to decide whether sufficient cause exists and everything depends on the facts and circumstances of each individual case.

7. In the case of ***N. Balakrishnan*** (supra), the Hon'ble Supreme Court while reiterating the aforesaid proposition has also provided the option to compensate the opposite party for the loss in the event such delay is condoned.

8. In the case of ***Usha Roy*** (supra), this Court in paragraph 18 has broadly laid down certain factors which are to be taken into consideration while considering an application for condonation of delay. The aforesaid paragraph is extracted herein below:-

“18. On a reading of the case laws governing the field, the following principles (not exhaustive) can be taken as guidelines for deciding a petition for setting aside abatement as well as for condonation of delay -

i. The power vested upon a Court to exercise such jurisdiction is essentially a discretionary one. The natural corollary is that there has to be an application of a judicious mind by taking into consideration all the relevant factors.

ii. The relevant factors which are required to be taken into consideration would include the conduct of the party as discretion can be exercised only by balancing the equities.

iii. The length / duration of delay and the explanation put forward are both relevant considerations for exercise of such discretion.

iv. The Court would generally proceed with a liberal, pragmatic and justice-oriented approach with such petition as substantial justice should not be allowed to be defeated by mere technicalities.

v. At the same time, the Court would also not lose sight of the fact that a valuable right has accrued on the other party and such right should not be interfered with lightly. Therefore,

though there may not be a requirement to seek a day-to-day explanation, the explanation for the delay should be a reasonable one which is acceptable to a man of ordinary prudence."

9. The learned counsel for the petitioner accordingly submits that the delay may be condoned and the appeal be considered on merits.

10. *Per contra*, Shri S. D. Purkayastha, the learned counsel for the respondent submits that the length of the delay itself which is 2475 days in a proceeding which is *inter parte* is sufficient to dismiss the present case without even going into any of the details. He submits that at each and every step, there has been delay which demonstrates utter negligence on the part of the petitioner in pursuing legal remedies. It is submitted that the review against the order dated 30.04.2013 passed by the First Appellate Court was filed on 28.05.2014 which was itself delayed by about 393 days and accordingly an application under Section 5 of the Limitation Act was filed for condonation of the said delay. In which, evidence was adduced by the petitioner.

11. Shri Purkayastha, the learned counsel submits that the depositions which were made would be very relevant for adjudication of the present case as the same would reflect the inconsistent stand of the petitioner. Attention of this Court has been drawn to the affidavit-in-opposition filed by the respondent on 23.05.2022 in which the evidence on affidavit of the petitioner as well as the cross-examination have been annexed. In paragraph 7 of the chief examination which was filed on 06.05.2015, it has been categorically stated that the petitioner was informed about the scope of the second appeal which however was stated to be limited. Reference has also been made to the cross-examination of the petitioner dated 29.07.2015 in which the following statement has been made:-

"I have consulted with the Advocate Pinak Deka, High Court, Dohiram Bora, Nagaon Court and he suggested me to file a Second appeal in High Court. Pinak Deka told me there are limited scope for appeal."

12. As regards, the arguments advanced on the applicability of Section 14 of the

Limitation Act, Shri Purkayastha, the learned counsel submits that there is no automatic application of Section 14 as the exclusion of time would be allowed only when a proceeding has been instituted *bona fide* in a Court without jurisdiction. He submits that neither the review application filed against the judgment dated 30.04.2013 of the First Appellate Court was without jurisdiction nor was the subsequent Revision filed in this Court against the order passed in the review. He, accordingly, submits that the conditions precedent in Section 14 being apparently absent, the petitioner shall not get any benefit of the said Section.

13. It is further submitted that the present RSA has been presented alongwith the delay condonation application only on 01.12.2021 and there is no explanation, whatsoever from the date of withdrawal of the revision petition which was on 18.12.2018 till the date of filing this appeal.

14. In support of his submission, Shri Purkayastha, the learned counsel for the respondent has placed reliance upon the following case laws:-

1. *Oriental Aroma Chemical Industries Ltd. Vs Gujarat Industrial Development Corporation and Another reported in (2010) 5 SCC 459.*

2. *Aarifaben Yunusbhai Patel and Ors. Vs Mukul Thakorebhai Amin & Ors. reported in (2020) 5 SCC 449.*

15. In the case of ***Oriental Aroma Chemical Industries*** (supra) the Hon'ble Supreme Court in paragraph 15 has held that when the delay is inordinate, a stricter approach is required.

16. In the case of ***Aarifaben Yunusbhai Patel*** (supra), the Hon'ble Supreme Court has explained under what conditions the benefit of Section 14 of the Limitation Act would be applicable.

17. The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been carefully examined.

18. The suit was instituted in the year 2004 and the judgment was passed in the year 2011. The judgment by the First Appellate Court was also rendered in the year 2013. The petitioner thereafter chose to file a review petition against the judgment of the First Appellate Court which is permissible under the law and the said review was dismissed on 31.03.2016. Against the order passed in the Review Petition, a revision was filed in this Court which was also dismissed on withdrawal on 18.12.2018. Both the aforesaid filing of review petition and the revision petition cannot be said to have been filed in a Court without jurisdiction and therefore this Court is of the opinion that the pre-conditions for applicability of Section 14 of the Limitation Act shall not be applicable.

19. This Court is therefore required to examine this matter from the point of view of the delay. The delay in this case is admittedly of 2475 days. There is no manner of doubt that the delay is an inordinate one and therefore it is natural that the explanation to condone this delay has to be genuine, *bona fide* and sufficient so as to convince this Court to condone the same. The grounds projected were mainly two folds. Firstly, that no suggestion was given to file appeal after the revision was withdrawn and secondly, lack of legal knowledge to prefer the second appeal. The learned counsel for the applicant has also strenuously argued that the liberal approach be taken and so that substantial justice can be done between the parties.

20. Both the aforesaid grounds appear to be clearly inconsistent. This Court, as recorded above, has gone through the examination-in-chief as well as the cross-examination of the petitioner in the review proceedings before the First Appellate Court which was in the year 2015 and there is a clear statement that the petitioner

was aware of the provision of filing a second appeal. It is a different matter that the opinion of the Advocate was also recorded regarding the limited scope of such appeal. The scope of an appeal being limited cannot mean that the petitioner was debarred to prefer such appeal and in fact the present appeal has ultimately been preferred by filing the same on 01.12.2021.

21. This Court in the aforesaid case of ***Usha Roy*** (supra) has broadly laid down the conditions and factors to be taken into consideration while adjudicating an application for condonation of delay. The discretionary powers to be exercised by a Court to condone delay has to be supported by the conduct of the petitioner who has prayed for such condonation. Such conduct has to be free from lack of due diligence and is necessarily required to be *bone fide*.

22. In the instant case, the delay of 2475 days is itself inordinate and would not support the case of the petitioner that there was a *bona fide* approach. The explanation given, as recorded above are wholly insufficient. This Court also cannot be oblivious of the fact that by dismissal of the appeal whereby the decree of the Trial Court has been affirmed, a valuable right has accrued upon the plaintiff and that right cannot be taken away in a perfunctory manner.

23. This Court has already held that the benefits of Section 14 would not be applicable to the petitioner in the instant case.

24. Under those facts and circumstances, this Court is of the considered opinion that no case for condonation of delay is made out and accordingly the same is rejected.

JUDGE

Comparing Assistant