

GAHC010099412021



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

Case No. : I.A.(Civil)/1934/2021

CHINMOY BARUAH AND 4 ORS.
S/O LATE ANANTA BARUAH, ALL ARE R/O BARODA PHUKAN ROAD,
RAAMOIDAN, JORHAT TOWN, DIST- JORHAT(ASSAM)

2: SRI MRINMOY BARUAH
S/O LATE ANANTA BARUAH
R/O BARODA PHUKAN ROAD
RAAMOIDAN
JORHAT TOWN
DIST- JORHAT(ASSAM)

3: SMTI JITA BARUAH
D/O LATE ANANTA BARUAH
R/O BARODA PHUKAN ROAD
RAAMOIDAN
JORHAT TOWN
DIST- JORHAT(ASSAM)

4: SMTI JULEMONI BARUAH
D/O LATE ANANTA BARUAH
R/O BARODA PHUKAN ROAD
RAAMOIDAN
JORHAT TOWN
DIST- JORHAT(ASSAM)

5: SMTI JUMJUMI BARUAH
D/O LATE ANANTA BARUAH
R/O BARODA PHUKAN ROAD
RAAMOIDAN
JORHAT TOWN
DIST- JORHAT(ASSAM)

VERSUS

NILA KAMAL SARMA AND 5 ORS.
S/O LATE HARA NATH DEVA SARMA, R/O KRISHNA NAGAR,
SARBAIBANDAH SARUCHARAI MOUZA, DIST- JORHAT, ASSAM

2:SRI BINOY BARUAH
S/O LATE NILA KANTA BARUAH
R/O MALOW ALI
JORHAT TOWN
DIST- JORHAT

3:SHRI MADAN BARUAH
S/O LATE ATUL BARUAH
R.O DARANGI CHUWK
JORHAT TOWN
DIST- JORHAT

4:SHRI PRASANTA BARUAH
S/O LATE ATUL BARUAH
R.O DARANGI CHUWK
JORHAT TOWN
DIST- JORHAT

5:SHRI DIGANTA BARUAH
S/O LATE ATUL BARUAH
R.O DARANGI CHUWK
JORHAT TOWN
DIST- JORHAT

6:SMTI ANU BARUAH
W/O LATE ATUL BARUAH
R.O DARANGI CHUWK
JORHAT TOWN
DIST- JORHA

Advocate for the applicants(s) : Mr. PS Deka
Ms. P Bhattacharjya

Advocate for the respondent(s): Mr. H Buragohain

B E F O R E
HON'BLE MR. JUSTICE DEVASHIS BARUAH

ORDER

14.05.2024

Heard Mr. PS Deka, the learned senior counsel assisted by Ms. P Bhattacharjya, the learned counsel for the applicants. I have also heard Mr. H Buragohain, the learned counsel appearing on behalf of the opposite parties.

2. This is an application under Section 5 of the Limitation Act, 1963 for condoning the delay of 3978 days in filing the restoration application for restoration of the accompanying second appeal being RSA No.42/2005, which was dismissed for default. For the purpose of deciding the application, this Court finds it relevant to take note of the records pertaining to the accompanying second appeal.

3. From a perusal of the records of RSA No.42/2005, it reveals that on 13.04.2005, this Court admitted the said regular second appeal by formulating two substantial questions of law which reads as under:

(i) Whether the learned Court erred in law in decreeing the counter claim of the suit which is beyond the pecuniary jurisdiction of the Court?

(ii) Whether the findings of the Courts below are vitiated by perversity as regards the findings on adverse possession?

4. Pursuant thereto on the basis of an order passed in Misc. Case No.2701/2008, wherein the appellant sought for an early disposal of the second appeal, this Court vide order dated 26.11.2008 directed the accompanying second appeal to be listed for hearing expeditiously. Simultaneously, in the second appeal, on the same date, an order was passed directing listing of the Second Appeal for hearing by the end of January, 2009. It was not known as to whether the said appeal was listed in the month of January, 2009, but when the matter was listed on 24.03.2009, as none had appeared, the Appeal was dismissed for default.

5. After almost 12 years, the instant application has been filed for condoning the delay of 3978 days along with an application for restoration under Order XLI Rule 19 which has been registered as IA(C)No.1931/2021. The explanation so put forth is that the applicants were under the impression that the regular second appeal was pending and they were not informed about the dismissal of the Appeal by their counsel. It was only on 26.02.2021, when two officials alongwith the respondent No.1 went to the residence of the applicants and tried to take possession of the suit land on the basis of a possessory warrant issued by the learned Munsiff No.1 Jorhat, thereafter, the applicants made enquiries and came to learn that the regular second appeal being RSA No.42/2005 was dismissed for default vide order dated 24.03.2009.

6. The sole blame put in the instant application is upon a lawyer on the ground that the said lawyer, one RP Dhar (since deceased) did not inform the applicants.

7. Before proceeding further, this Court finds it relevant to take note of a judgment of the Supreme Court in the case of *Pathapati Subba Reddy (Died) by LRs and others Vs. Special Deputy Collector (LA)* reported in *2024 SCC OnLine SC 513*, wherein the Supreme Court after making a copious detail of all the well settled precedents had summarized the principles for condoning the delay. Paragraph 26 of the said judgment being relevant is quoted hereinbelow:

“26. On a harmonious consideration of the provisions of the law, as aforesaid, and the law laid down by this Court, it is evident that:

i) Law of limitation is based upon public policy that there should be an end to litigation by forfeiting the right to remedy rather than the right itself;

(ii) A right or the remedy that has not been exercised or availed of for a long time must come to an end or cease to exist after a fixed period of time;

(iii) The provisions of the Limitation Act have to be construed differently, such as Section 3 has to be construed in a strict sense whereas Section 5 has to be construed liberally;

(iv) In order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind, but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act;

(v) Courts are empowered to exercise discretion to condone the delay if sufficient cause had been explained, but that exercise of power is discretionary in nature and may not be exercised even if sufficient cause is established for various factors such as, where there is inordinate delay, negligence and want of due diligence;

(vi) Merely some persons obtained relief in similar matter, it does not mean that others are also entitled to the same benefit if the court is not satisfied with the cause shown for the delay in filing the appeal;

(vii) Merits of the case are not required to be considered in condoning the delay; and

(viii) Delay condonation application has to be decided on the parameters laid down for condoning the delay and condoning the delay for the reason that the conditions have been imposed, tantamounts to disregarding the statutory provision."

8. From a perusal of the above quoted paragraph 26 of the said judgment, it would be seen that the Supreme Court categorically observed that the provisions of Limitation Act, 1963 have to be construed differently *inasmuch as* Section 3 of the said Act has to be construed in a strict sense, whereas Section 5 is to be construed liberally. It was further observed that in order to advance substantial justice, though liberal approach, justice-oriented approach or cause of substantial justice may be kept in mind, but the same cannot be used to defeat the substantial law of limitation contained in Section 3 of the Limitation Act, 1963. It was further observed that even when sufficient cause has been established, but when there is inordinate delay, negligence and want of due diligence, the discretionary power to condone the delay should not be exercised.

9. In the backdrop of the above, if this Court takes note of the facts as stated hereinabove, it would be seen that on one hand the applicants shows an urgency in the disposal of the appeal by filing Misc. Case No.2701/2008 stating, *inter alia*, that the matter requires an early disposal on the ground that the dispute has been pending since 1998 and on the basis of which this Court passes an order dated 26.11.2008 directing the Registry to list the matter in the month of January, 2009. Thereupon, the applicant does not appear, when the matter is listed. It may be that for some circumstances, the counsel for the

applicants may not have been able to appear, but the question arises as to whether the applicants at all were diligent enough taking into account that on one hand they were seeking an early disposal of the regular second appeal and on the other hand, were sleeping for almost 12 years. The said explanation in the opinion of this Court does not seem to be at all *bona fide*.

10. In addition to that, this Court also takes note of as to whether the substantial questions of law so formulated by this Court on 13.04.2005 at all are involved in the instant appeal. Although, it is not the requirement to do so, while deciding an application for condonation of delay, but taking into account that there has been an allegation made against a lawyer, which this Court does not encourage, taking into account that the legal profession is a noble profession, the said substantial questions of law are looked into as to whether the same are at all involved in the instant appeal.

11. The first substantial question of law is as to whether the learned Court erred in law in decreeing the counter claim of the suit, which is beyond the pecuniary jurisdiction of the Court? The counter claim has been valued @Rs.21000/- and the pecuniary jurisdiction of the said Court was upto Rs.25000/-. Under such circumstances, the said substantial question of law does not at all arise.

12. The second substantial question of law is as to whether the findings of the Courts below are vitiated by perversity as regards the findings on adverse possession? This Court had taken note of that the said suit was filed by the

plaintiff by claiming right, title and interest on the basis of adverse possession.

13. At this stage, this Court finds it very pertinent to observe that in a recent judgment of the Supreme Court in the case of *M. Radheshyamlal Vs. V Sandhya and Anr.*, reported in *2024 SCC OnLine SC 318*, wherein the Supreme Court had observed as to how a plea of adverse possession can be proved. It was observed by the Supreme Court in the said judgment that a party by pleading adverse possession, seeks to defeat the rights of the true owner, and therefore, there is no equity in his favour. After all, the plea is based on continuous wrongful possession for a period of more than 12 years. Therefore, the facts constituting the ingredients of adverse possession must be pleaded and proved by the plaintiff. What is required to be pleaded and proved has been enumerated in paragraph 12 of the said judgment, which is reproduced hereinunder:

12. Therefore, to prove the plea of adverse possession :- (a) The plaintiff must plead and prove that he was claiming possession adverse to the true owner; (b) The plaintiff must plead and establish that the factum of his long and continuous possession was known to the true owner; (c) The plaintiff must also plead and establish when he came into possession; and (d) The plaintiff must establish that his possession was open and undisturbed.

It is a settled law that by pleading adverse possession, a party seeks to defeat the rights of the true owner, and therefore, there is no equity in his favour. After all, the plea is based on continuous wrongful possession for a period of more than 12 years. Therefore, the facts constituting the ingredients of adverse possession must be pleaded and proved by the plaintiff.

14. In the backdrop of the above, if the principles stated above are applied to

the facts of the instant case, it would be seen that it was only in the month of December 1997, the defendants had approached the plaintiffs to vacate the suit land and thereupon, after making enquiry, the plaintiffs could come to learn that the defendants had purchased the suit land on the basis of a deed of sale bearing Deed No.882 dated 04.03.1977. It was only on the basis that the plaintiffs have been in long continuous possession, the plaintiffs have filed the suit for declaration of right, title and interest on the basis of adverse possession. On the basis of the pleadings made in the plaint itself, there is no case made out by the plaintiff for adverse possession.

15. The learned Trial Court as well as the learned First Appellate Court have duly taken note of the said aspect of the matter, including the evidence on record. Under such circumstances, the second substantial question of law is also not involved.

16. Considering the above, the delay in filing the application for restoration being on the face of it a conduct which suffers from negligence, lack of diligence and do not seem to be *bona fide*, this Court is not inclined to condone the delay of 3978 days in preferring the accompanying application for restoration of the appeal.

17. In view of the above, the instant application stands rejected.

18. Interlocutory application accordingly stands disposed of.

JUDGE

Comparing Assistant