

GAHC010268692022



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

Case No. : RSA/31/2023

MUSTAFA SHAHIDUL ISLAM
S/O LATE HAJI AMSAR ALI MUKHTAR,
RESIDENT OF CHRISTIAN BASTI, GS ROAD , GUWAHATI 781005, KAMRUP
M ASSAM

VERSUS

MUSSTT. MANJULA HOQUE ISLAM AND ANR.
W/O MUSTAFA SHAHIDUL ISLAM, RESIDENT OF FLAT NO. 202,
PANORAMA APARTMENT, OPP. COMMERCE COLLEGE, CHANDMARI,
GUWAHATI 781003, KAMRUP M ASSAM

2:KANAKESWAR GOGOI
S/O BADURAM GOGOI
VILLAGE LALUK PO LALUK
DIST LAKHIMPUR
ASSAM 787160
ASSA

Advocate for the Petitioner : MR P K KALITA

Advocate for the Respondent : MR K K MAHANTA (Sr. Advocate) (r-1)

BEFORE
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocate for the petitioner : Shri PK Kalita, Senior Counsel
Shri KR Baruah

Advocate for the respondents : Shri KK Mahanta, Senior Counsel
Ms. N. Begum

Date of hearing : **07.06.2024**

Date of Judgment : **07.06.2024**

JUDGMENT & ORDER

The instant appeal has been preferred under Section 100 of the Code of Civil Procedure against an order dated 04.11.2022 whereby the learned Civil Judge No.2, Kamrup (M) had rejected the Misc.(J) Case No. 187/2018 which was filed under Section 5 of the Limitation Act for condonation of delay.

2. The facts in brief which transpire from the materials on record is that the present appellant was the defendant in a suit instituted for declaration of right, title and interest which was registered as T.S. No. 437/2007. It is contended that during the pendency of the suit, the records thereof were transferred to another Court. Though the appellant, as defendant had initially contested the suit, subsequently, the appellant was not aware of the return of the records. The appellant has also cited that due to medical reasons, the appellant had to undergo treatment outside the State including AIIMS, New Delhi and other places. The appellant was not aware of the disposal of the suit on 17.05.2017 and after coming to know about the same had preferred Title Appeal No. 17/2018 along with an application under Section 5 of the Limitation Act which was registered as Misc.(J) Case No. 187/2018. The learned Court vide the impugned order dated 04.11.2022 had rejected the said Misc.(J) case and consequently, the title appeal was also dismissed.

3. I have heard Shri PK Kalita, learned Senior Counsel assisted by Shri K.R. Baruah, learned counsel for the appellant. I have also heard Shri KK Mahanta, learned Senior Counsel assisted by Ms. N. Begum, learned counsel for the

respondent no. 1.

4. The learned Senior Counsel for the appellant has submitted that the approach of the learned Court below in adjudicating an application under Section 5 of the Limitation Act is not in accordance with the settled principles of law. It is submitted that though proper reasons were cited, the learned Court below took a hyper technical approach whereby the substantive right of the appellant has been defeated. He further submits that the appellant, by the impugned order is sought to be deprived of an effective opportunity to defend his case in the appellate stage which is a right created by the statute.

5. *Per contra*, Shri Mahanta, learned Senior Counsel for the respondent no. 1 has submitted that Section 5 of the Limitation Act has to be construed in terms of the reasons assigned in such an application and not in a mechanical manner. By referring to the impugned order dated 04.11.2022, the learned Senior Counsel for the respondent has submitted that the learned Civil Judge had considered all the aspects sought to be projected by the appellant / applicant in the application under Section 5 of the Limitation Act and after assigning cogent and acceptable reasons has dismissed the said application. It is submitted that though a lenient approach may be taken by the Court, such leniency should not be to the extent to give undue advantage to a party which is not diligent to pursue his remedies. It is further submitted that the rights accrued to his client is a substantive right upon pronouncement of the decree and such right cannot be taken away in a trivial manner.

6. The rival submissions advanced have been duly considered.

7. The substantial question which would arise for determination in the second appeal may be framed in the following manner:

Whether the approach of the learned Civil Judge No. 2, Kamrup (M) in dismissing the application filed under Section 5 of the Limitation Act was correct and whether the reasons assigned for such condonation were properly appreciated.

A perusal of the impugned order dated 04.11.2022 would show that the reasons cited in the applications were indeed taken into consideration. The order reflects that the ailment of the appellant and his treatment in the AIIMS or Apollo Hospital in New Delhi were also taken into consideration. However, the learned Court had also noted that no proper medical documents were annexed in support of such reasons.

8. *Prima facie*, the order passed by the learned Court below cannot be faulted with as reasons have been assigned which appears to be acceptable.

9. Having said that, this Court is however also required to look into the manner of an adjudication of an application for condonation of delay.

10. It is a settled position of law that a pragmatic and justice oriented approach is required in adjudication of such an application. In a recent case of ***Esha Bhattacharjee Vs Managing Committee of Raghunathpur Nafar Academy and Ors.*** reported in **(2013) 12 SCC 649** the Hon'ble Supreme Court has laid down certain principles to be followed in deciding a delay condonation application which are extracted herein below:-

“21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) *The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.*

21.3. (iii) *Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.*

21.4. (iv) *No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.*

21.5. (v) *Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.*

21.6. (vi) *It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.*

21.7. (vii) *The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.*

21.8. (viii) *There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.*

21.9. (ix) *The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.*

21.10. (x) *If the explanation offered is concocted or the grounds urged in*

the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12. (xii) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude."

11. The Hon'ble Supreme Court in the landmark case of ***Collector, Land Acquisition, Anantnag v. Katiji*** reported in ***(1987) 2 SCC 107*** has laid down that there is no strict requirement of explaining each day's delay.

12. The Hon'ble Supreme Court in the case of ***Shyam Sundar Sarma Vs Pannalal Jaiswal & Ors.*** reported in ***(2005) 1 SCC 436*** has clarified that dismissal of an application under Section 5 of the Limitation Act accompanying of an appeal would also mean dismissal of the appeal and therefore there is no dispute in the Bar regarding the maintainability of the present second appeal.

13. Considering the facts and circumstances, this Court is of the opinion that the interest of justice would demand that substantial question of law, as recorded above, be answered in favour of the appellant by observing that the application for condonation of delay is to be allowed. The aforesaid direction is however subject to payment of cost of Rs.5,000/- (Rupees Five Thousand).

14. The matter is accordingly remanded back to the Court of learned Civil Judge No. 2, Kamrup (M) Guwahati for adjudication of the Title Appeal No. 17/2018 according to law and on its own merits.

15. Since the contested parties are before this Court, they are directed to appear before the learned Court of the Civil Judge No. 2, Kamrup (M) Guwahati on 25.06.2024, from which date the learned Court will take charge of the proceeding.

16. The appeal accordingly stands allowed.

JUDGE

Comparing Assistant