

GAHC030006512023



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

Case No. : RSA/7/2023

Smt. Lalropuii
D/o Zakunga, R/o Dawrpui Vengthar, Aizawl, Mizoram

VERSUS

Sh. Laldingsanga
S/o Lalbika (L), R/o Hunthar Veng, Aizawl, Mizoram

Advocate for the Petitioner : Mr. T Lalnunsiamia
Advocate for the Respondent : Ms. Vanlalhriatpuii

BEFORE
HONOURABLE MRS. JUSTICE MARLI VANKUNG
ORDER

Date : 12-08-2024

Heard Mr. T. Lalnunsiamia, learned counsel for the appellant along with Ms. Vanlalhriatpuii, learned counsel for the sole respondent.

This is a Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 against the Judgment & Order dated 18.09.2023 passed by the learned Additional District Judge, Aizawl Judicial District, Aizawl in RFA No. 18/2023.

Brief facts of the case is that the parties got married in the year 1996.

The respondent left the appellant in the year, 2016 by way of 'Nupui Fanau Chhuahsan'. During their marriage, they acquired the property covered by LSC No. AZL 570 of 1974 located at Hunthar Veng, Aizawl. After the purchase of the land, they had not mutated the land in their name till the death of the holder of the LSC Shri. Vanlala. On the death of Shri. Vanlala, since the LSC No. AZL 570 of 1974 was still in the name of the deceased Shri. Vanlala, the appellant applied for an Heirship Certificate in respect of LSC No. AZL 570 of 1974, the same was not objected by any of the blood relatives of late Shri. Vanlala. Accordingly, Heirship Certificate No. 660/2021 was issued to the appellant vide Order dated 28.04.2021. The present respondent, then enquired about the status of the above mentioned LSC through RTI got to know about the Heirship Certificate No. 660/2021 issued to the present appellant, therefore he filed a Civil Suit No. 68/2022 before the Senior Civil Judge, Aizawl in the month of July, 2022, which was later withdrawn by the present respondent, by preferring an appeal before the Court of Additional District Judge, who then passed the impugned Order dated 18.09.2023. The learned 1st Appellate Court had held that the failure to file a separate application for condonation delay was done inadvertently by the learned counsel for the applicant and not due to utter negligence on the part of the appellant. The Court was satisfied to invoke Section 151 CPC and allowed the appeal. Hence, the instant Regular Second Appeal.

The substantial question of law that was formulated in the instant Regular Second Appeal is:-

(i) Whether the First Appellate Court, i.e. the Court of learned Additional

District Judge, Aizawl was correct in allowing the appeal after condoning the delay of more than two years in preferring the first appeal without there being an application for condonation of delay under Order 41 Rule 3A filed by the present respondent and whether the filing of an application under Order 41 Rule 3A of the Code of Civil Procedure is a condition precedent for condoning the delay in such case.

Mr. T. Lalnunsiam, learned counsel for the appellant submits that the learned 1st Appellate Court had erred in coming to such a conclusion whereas, Order 41 Rule 3A of the CPC clearly mentions that, when an appeal is presented after the expiry of their period of limitation, it shall be accompanied by an application to satisfy the Court, that he had sufficient cause for not preferring an appeal within such period. The learned counsel further submits that the appeal was against the Heirship Certificate No. 660/2021 issued on 28.04.2021 and the appellant had preferred the appeal against the said Heirship Certificate belatedly after lapse of more than 2 years, while under Article 116 of the Schedule to the Limitation Act, 1963, such an appeal was to be preferred within 30 days from the date of issuance of Heirship Certificate i.e., 28.04.2021.

The learned counsel further submits that as per Section 3 of the Limitation Act, 1963, every appeal preferred shall be dismissed after the prescribed period although limitation has not been set up as a defence. He submits that in the instant case, the present appellant had raised his objection against the consideration of the appeal petition before the learned 1st Appellate Court, since the appeal was made after a period of more than 2 years, from the date of issuance of the impugned Heirship Certificate. He further submits that

on perusal of the reasoning made by the learned 1st Appellate Court, the learned 1st Appellate Court had not considered the period between the issuance of the Heirship Certificate dated 28.04.2021 and the date when a Civil Suit was filed on 04.07.2022.

The learned counsel thus submits that since there is clear violation of the mandatory procedure laid down under Order 41 Rule 3A of the Civil Procedure Code, the impugned Judgment & Order dated 18.09.2023 is liable to be set aside.

On the other hand, Ms. Vanlalhriatpuii, learned counsel for the respondent submits that the reason for the delay in filing the appeal against the issuance of Heirship Certificate No. 660/2021, is due to the fact that the, Heirship Certificate was issued during the National Lockdown due to the pandemic and therefore, they came to know of the impugned Heirship Certificate only on 11.05.2022 through RTI application. Thereafter, they had taken immediate steps for filing the appeal but had initially approach the wrong forum in filing the Civil Suit, which was later withdrawn and the respondents had then approach the learned 1st Appellate Court. The respondents were diligent and had acted immediately after coming to know of the issuance of the impugned Heirship Certificate dated 28.04.2021. The learned counsel submits that non-compliance of Order 41 Rule 3A of the Code of Civil Procedure is not mandatory and it is not necessary for the Appellate Court to dismiss the appeal out right for the non-compliance of Order 41 Rule 3 by filing a condonation application. In support of her submission, the learned counsel has cited the decision of the Apex Court in ***State of M.P & Anr. Vs. Pradeep Kumar &***

Anr., reported in **2000 7 SCC 372** (para 10, 11, 19 & 20) and the judgment of the High Court of Gujarat in **Naran Anappa Shethi Vs. Jayantilal Chunilal Shah**, reported in **AIR 1987 Gujarat 205** (para 7).

Having heard the submissions made by the learned counsels for both the parties, this Court on perusal of the documents on record finds that the respondents had not filed an application for condonation of delay under Order 41 Rule 3 of the Code of Civil Procedure. The learned 1st Appellate Court had held that:-

*“The failure to file a separate application for condoning delay, it is the considered opinion of the court that it was done inadvertently by the learned counsel of the appellant and not due to utter negligence on the part of the appellant. Also, as held by the Apex Court in **Rafiq and Another vrs Munshilal and Another (1981) 2 SCC 788** the question whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanor of his agent is answered in the negative that the court cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted.”*

This Court however finds that Order 41 Rule 3A of the Code of Civil Procedure provides that:-

“3A. 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 an 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."

And Section 3 of the Limitation Act provides that:-

"3. Bar of limitation.—(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence."

The judgment of the Apex Court in ***State of M.P & Anr. Vs. Pradeep Kumar & Anr. (Supra)***, has also held that "*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 irredeemably 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.*

In the result we allow this appeal and set aside the impugned judgment. The matter shall now go back to the High court for disposal of the application to

condone the delay in filing the second appeal. If the explanation was found satisfactory to the High Court the second appeal will have to be disposed of in accordance with law. This appeal is disposed of accordingly.”

In view of the above, this Court find it appropriate to remand the instant matter back to the 1st Appellate Court with a direction that the present respondent should be given an opportunity to file an application for condonation of delay under Order 41 Rule 3 of Civil Procedure Code by counting the number of days required to be condoned from 28.04.2021 upto the date when the appeal was filed before the learned 1st Appellate Court and thereafter, if in the event the delay is condoned after hearing both the parties, the Court is to consider the appeal against the issuance of Heirship Certificate No. 660/2021 dated 28.04.2021 on merits.

Accordingly, RSA No. 7/2023 stands disposed of with the above directions.

JUDGE

Comparing Assistant