

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Jurisdiction Case No.4753 of 2014

In
First Appeal No. 510 of 1999

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Hema Kumari @ Hema Sinha & Ors.

.... Petitioner/s

Versus

Renu Sinha & Ors.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Md. Waliur Rahman

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

3 21-07-2015 The learned counsel for the petitioners submitted that two interlocutory applications have been filed in connection with removal of defect no.2 and same thing has been mentioned in his note against defect no.2.

2. So far limitation is concerned, according to the learned counsel in view of the Division Bench decision of the Patna High Court, **A.I.R. 1949 Patna 112 (Mrs. Minnie Lal Vs. Mahadeo Lall Marwari and others)** limitation is not applicable in the present case because the petitioners are praying for recall of the peremptory order dated 14.05.2010 whereby the appellant was directed to file necessary requisites for issuance of notice in substitution matter and also to recall order dated 08.04.2011 whereby order was passed to the effect that the appeal has abated because of the fact the substitution application of the sole

deceased appellant had already been dismissed and there was no appellant to prosecute the appeal.

3. Perused the decision relied upon by the learned counsel for the petitioners i.e. A.I.R. 1949 Patna 112. In that case the appeal was dismissed for non-compliance of the peremptory order by which the appellant of that first appeal was directed to file the printing cost of Rs.288.12 by terms of order dated 11.10.1947. Because of non-compliance of the said order, the appeal was dismissed in November, 1947. It further appears that till December, 1947 the petitioner was unaware of the peremptory order and dismissal of the appeal. An application for restoration was filed just after December, 1947. In view of the facts the restoration application was filed for recall of peremptory order as the appeal was dismissed for non-compliance of the said peremptory order. Further the delay was of very short duration or it can be said that it was few days only. In the present case, the peremptory order was passed on 14.05.2010. Since it was not complied with within 21st July, 2010, the application was dismissed as far back as on 22nd July, 2010. The sole appellant died, therefore, there was no substitution application. It is not the fact that because of non-compliance of peremptory order this first appeal was dismissed. After dismissal of the substitution



application the heirs of sole appellant, who had filed substitution application, never prayed for any relief under Section 151 C.P.C. or any other provision for setting aside that order or recall of that order. Thereafter in 2011 the matter was placed before the Bench and this court passed order holding that the substitution application has already been dismissed, which was filed for substitution of the deceased sole appellant and some of the respondents. Now, since the substitution application had already been dismissed, the appeal had abated automatically in view of the provision as contained in Order 22 Rule 3(2) as well as Order 22 Rule 4(3) C.P.C. Consequence thereupon the appeal had been dismissed. Therefore, the fact of the Division Bench decision relied upon by the learned counsel for the petitioners is different than the fact of the present case. Further application for restoration/recall of peremptory order has been filed in 2014 i.e. on 15.12.2014.

4. According to the learned counsel, limitation will not apply in this case as the application has been filed under Section 151 C.P.C. The question is merely by levelling an application under Section 151 C.P.C. can it be said that the application for recall or restoration of the first appeal will not be barred by law of limitation? Article 121 and Article 122 of the Limitation Act



provide 60 days and 30 days from the date of abatement and from the date of dismissal respectively. According to the learned counsel for the petitioners, none of the Articles will apply because the petitioners are praying for exercise of inherent jurisdiction under Section 151 C.P.C. So far this submission is concerned, in my opinion, this appeal has not been dismissed for non-compliance of peremptory order rather the appeal has been dismissed as abated, therefore, Article 121 will apply. Article 122 also provides that if the appeal is dismissed for failure to pay costs for service of process then also the application has to be filed within 30 days. Admittedly in the present case the petitioners did not file the cost of service of process according to the order whereby notices were directed to be issued on the legal representatives of the respondents. Further even if the argument of the learned counsel for the petitioners is accepted that Article 121 and Article 122 of the Limitation Act will not apply then also Article 137 of the Limitation Act will come into play. Here, the delay is not of short duration or of few days but it is 3 years 5 months 27 days and this period is counted from the dismissal of the appeal as abated and not from the date of dismissal of the substitution application.

5. So far this inordinate delay is concerned, the only



explanation given by the petitioners is that the counsel did not inform the petitioners. Whether this can be considered to be the sufficient cause for not moving the court within the limitation period? Learned counsel next submitted that for the fault on the part of the advocate the client should not suffer. So far this submission is concerned, it also depends on the facts of each case. Here, in the first appeal another advocate was appearing, who is still practising in the High Court. The direct allegation is made against the advocate without giving copy to him. Now, therefore, the question is whether in fact it is fault on the part of the advocate or it is the fault on the part of the petitioners is again a disputed question of fact. Merely because the petitioners are saying before the Court that they were not informed, can it be relied upon? I am of the view that these statements regarding the explanation for delay are only formal in nature and on the basis of these statements the petitioners are invoking the inherent jurisdiction of the Court under Section 151 C.P.C.

6. The Hon'ble Supreme Court in the case of **Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Ors., 2014 (1) P.L.J.R. 290 (SC)** has laid down some broad principles to be considered while dealing with the limitation matter vide paragraph 15, which is quoted herein

below:-

15.From the aforesaid authorities the principles that can broadly be culled out are:-

- (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.
- (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.
- (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.
- (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.
- (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.
- (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.
- (vii) The concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.
- (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.
- (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.

- (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.
- (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.
- (xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.
- (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

7. Now, therefore, in view of the above settled propositions of law the explanation given in the restoration application and the submission of the learned counsel for the petitioners that in fact the limitation will not apply cannot be accepted. From the above facts it is further clear that there is lack of bona fides on the part of the petitioners. The conduct, behaviour and attitude of the petitioners show that the petitioners were inactive to prosecute their appeal. Here, the delay is not a short duration delay rather it is about 1272 days and the explanation given in the M.J.C. application appears to be fanciful. The

Hon'ble Supreme Court in the case of **B. Madhuri Goud Vs. B. Damodar Reddy, (2012) 12 Supreme Court Cases 693** rejected the explanation for delay of 1236 days holding that the explanation given was fanciful. Here also the explanation is to the effect that it is the fault on the part of advocate or advocate clerk.

8. No doubt, the Court should take liberal view for condoning the delay but at the same time the party, who is guilty of negligence himself, cannot be allowed to take undue advantage of liberal approach of the Court so as to override the specific provision of law. Further it is also settled principle of law that for substantial justice, technical consideration should not be given undue emphasis but in the present case it is not the technical matter. The petitioners did not take any steps since 2010 to 2014 and substantial justice means substantial justice to the parties not to one party.

9. It is also settled principles of law that inherent jurisdiction of the Court to make orders *ex-debito justitiae* is undoubtedly affirmed by section 151 C.P.C. but that jurisdiction cannot be exercised so as to nullify the provisions of Limitation Act and in favour of party who is inactive negligent and the defence or the explanation is fanciful and/or concocted.

10. So far the submission of learned counsel for the

petitioners that Limitation Act will not apply is concerned, I am of the opinion that Limitation Act will apply. The office pointed out that this application is barred by 3 years 5 months 27 days.

11. Even if the argument of the learned counsel for the petitioners is accepted that limitation will not apply then also this is not a fit case in view of the discussion made above where the Court will exercise inherent jurisdiction under Section 151 C.P.C. Accordingly, on both accounts the petitioners are not entitled to any relief in this M.J.C. application.

12. In view of my above discussion I find that this M.J.C. application is devoid of merit and also it is barred by law of limitation, as such it is dismissed.

(Mungeshwar Sahoo, J)

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