

**HIGH COURT OF TRIPURA
AGARTALA**

**IA 148 OF 2015
IN
RSA 28 OF 2015**

Sri Bijoy Krishna Sarkar,
S/o Lt. Jatindra Ch. Sarkar,
Resident of Chowrangipara,
P.O. Charipara, South Badharghat,
P.S. West Agartala,
District-West Tripura.

...Appellant-petitioner.

- Versus -

1. Sri Binoy Krishna Sarkar,
S/o Lt. Jatindra Ch. Sarkar,
Resident of Chowrangipara,
P.O. Charipara, South Badharghat,
P.S. West Agartala,
District-West Tripura.

Presently residing at:

Ramnagar Road No.8
Ram Krishna Pally,
P.O. Ramnagar, P.S. West Agartala,
District-West Tripura.

2. Sri Mrityunjoy Sarkar,
S/o Lt. Satish Chandra Sarkar,
Resident of Shyamapally,
Badharghat, P.S. West Agartala,
District-West Tripura.

..... Respondents.

**BEFORE
THE HON'BLE MR.JUSTICE S.C. DAS**

For the Appellant- : Ms. S. Deb Gupta, Advocate.
Petitioner

For the Respondent-O.P. : Mr. S. Dutta, Advocate.
No.1

For the respondent- : None.
O.P.No.2

Date of hearing & : **20.11.2015.**
 delivery of judgment
 and Order.

Whether fit for reporting : **YES**

JUDGMENT & ORDER (ORAL)

This is a petition under Section 5 of the Limitation Act seeking condonation of delay of 368 days in presenting connected RSA No.28 of 2015 challenging judgment and degree dated 08.05.2014 passed by learned Addl. District Judge, Court No.2, Agartala in Title Appeal No. 44 of 2013.

2. Heard learned counsel Ms. S. Deb Gupta for the appellant-petitioner and learned counsel Mr. S. Dutta for the respondent O.P. No.1. No representation on behalf of the respondent O.P. No.2.

3. Present petition is filed under Section 5 of the Limitation Act. Whereas, there is special provision prescribed in Order XLI, Rule 3A of CPC for filing application for condonation of delay. Since there is a special provision prescribed in CPC for filing application for condonation of delay, the general provision of Section 5 of Limitation Act shall not apply. Learned counsel Ms. Deb

(Gupta) said sorry for the mistake and prayed for treating the petition as one under Order XLI Rule 3A of CPC. Prayer is allowed.

4. Brief fact is that respondent-O.P.No.1 Binoy Krishna Sarkar instituted Title Suit (Partition) No.90/2011 in the Court of Civil Judge, Sr. Division, Court No.2, Agartala, West Tripura seeking partition of the suit land described in the schedule of the plaint wherein the present appellant-petitioner Bijoy Krishna Sarkar was arrayed as defendant No.1. The suit was decreed and a preliminary decree was passed allowing partition. The appellant-petitioner having felt aggrieved with the decree passed by the trial Court preferred an appeal in the Court of District Judge with a separate petition seeking condonation of delay of 10(ten) days in preferring the appeal. That petition seeking condonation of delay was registered as Civil Misc. Case No.131/2013 and the first appeal was registered as Title Appeal No.44/2013.

5. By order dated 08.05.2014 learned Addl. District Judge, Court No.2, Agartala, dismissed the petition seeking condonation of delay (Civil Misc.131/2013) for non prosecution and consequently by an order passed on the same date the appeal was also dismissed. After dismissal of

the condonation petition and the appeal, on the advice of learned counsel, the appellant-petitioner preferred an application under Order IX, Rule 9 of CPC praying for setting aside of the order of dismissal passed on 08.05.2014 and also made a separate application under Order XLI, Rule 19 of CPC for re-admission of the appeal. Subsequently, the lawyer who was conducting the case in the first appellate Court retired and thereafter learned Advocate Ms. S. Deb Gupta was engaged by the appellant-petitioner and she found that the applications filed under Order IX, Rule 9 of CPC as well as under Order XLI, Rule 19 of CPC were not maintainable and therefore, she prayed for withdrawing those petitions and by order dated 07.08.2015 learned Addl. District Judge, Court No.2 allowed the prayer and thereafter the appellant-petitioner preferred the present second appeal on 11.08.2015 along with the present petition under Section 5 of the Limitation Act seeking condonation of delay of 368 days.

6. It is submitted by learned counsel Ms. S. Deb Gupta that the appellant-petitioner having felt aggrieved, filed the first appeal challenging the preliminary decree but there was a delay of 10(ten) days and so a petition for condonation of delay was filed. On the date fixed for hearing of the condonation petition i.e. on 08.05.2014 learned

counsel Mr. Sankar Bhattacharjee who was representing the appellant-petitioner, though filed a hazira, but was not present when the case was taken up and so, the condonation petition was dismissed for non prosecution and consequently appeal was also dismissed. Thereafter on the wrong advice of the learned counsel, the petitioner preferred application under Order IX, Rule 9 of CPC and Order XLI Rule 19 of CPC but those applications were not maintainable and when she was engaged by the petitioner to conduct his case, she found that those applications were not maintainable and therefore, she prayed for withdrawing those petitions and immediately filed the second appeal along with the present petition seeking condonation of delay. It is submitted that because of choosing a wrong forum on the advice of the learned counsel of the appellant-petitioner the delay of 368 days occasioned which was *bona-fide* and there was no negligence or deliberate inaction on the part of the appellant-petitioner.

7. Respondent-O.P.No.1 filed written objection against the prayer of condonation of delay, *inter alia*, contending that the appellant-petitioner with a view to delay the partition of the suit land taken a dilatory tactics and therefore, the appeals were not filed within the prescribed period of limitation and there was gross negligence and

deliberate inaction on the part of the appellant-petitioner. Wrong or mistaken advice of the lawyer cannot be a ground for condoning the delay and hence, the petition seeking condonation of delay should be dismissed.

8. Mr. Dutta learned counsel for the respondent-O.P.No.1 has submitted that the preliminary decree was passed on 02.04.2013. The defendant-appellant preferred first appeal after a delay of 10(ten) days. The petition for condonation of delay was fixed for hearing on 3 occasions but there was no representation on behalf of the defendant-appellant (appellant-petitioner herein) and therefore, the petition for condonation of delay was dismissed for non prosecution on 08.05.2014 and consequently appeal was also dismissed. Absence of Advocate on the date of hearing cannot be a ground to excuse the appellant-petitioner. According to Mr. Dutta the appellant-petitioner thereafter filed vexatious application under Order IX, Rule 9 of CPC and Order XLI, Rule 19 of CPC and those were not at all *bona fide* and hence the delay of 368 days cannot be condoned.

9. He has referred the decision of this Court in the case of **Palash Chandra Saha Vrs. Minati Samajpati & Ors.** reported in **(2013) 2 TLR 441.**

10. Regarding admissibility of the second appeal, against an order dismissing the first appeal on the ground of dismissal of application under Section 5 of the Limitation Act, I have heard learned counsel of both sides. Referring a decision of this Court in the case of **Maran Chandra Shil & Ors. Vrs. Smt. Laxmi Rani Chowdhury**, reported in **AIR 2014 TRIPURA 36**, learned counsel Ms. Deb Gupta submitted that under such circumstances where an appeal is dismissed because of dismissal of the condonation petition, a second appeal shall be filed and no application under Article 227 of the Constitution is maintainable.

11. Learned counsel Mr. Dutta also fairly concedes that the present second appeal with application for condonation of delay filed by the appellant-petitioner is maintainable.

12. The Single Bench of this Court in the case of **Maran Chandra Shil (supra)** has observed that dismissal of application for condonation of delay and consequent dismissal of appeal is a decree and against such a decree a second appeal lies. In view of the decision of this Court, the present second appeal with the separate application for condonation of delay is found to be maintainable.

13. The first appeal was dismissed on 08.05.2014. The second appeal was filed on 11.08.2015. It is placed on record that after dismissal of the first appeal, consequent to dismissal of the condonation petition, the appellant preferred two applications one under Order IX, Rule 9 of CPC which was registered as Civil Misc. 45 of 2014 and another under Order XLI, Rule 19 of CPC which was registered as Civil Misc. 49/2014. It is the contention of the appellant-petitioner that those applications were filed *bona fide* by the petitioner because of the advice of the learned counsel who was conducting the first appeal. Copies of those applications have been filed in the records of the second appeal. It is the further case of the petitioner that on 07.08.2015 learned Advocate Ms. Deb Gupta was engaged and she submitted application for withdrawing all those misc. cases and thereafter the present second appeal was filed.

14. Section 14 of the Limitation Act prescribes exclusion of time of proceeding in the Court without jurisdiction. The provision reads as follows:-

“14 Exclusion of time of proceeding bona fide in court without jurisdiction. —

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in

issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.— For the purposes of this section,—

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.”

15. It appears the appellant-petitioner prosecuted Civil Misc. Cases No.45/2014 and 49/2014 in the first appellate Court *bona fide* because of wrong advice of the learned counsel who was conducting the case and therefore, the period spent may be condoned as per the provisions as contained in Section 14 of the Limitation Act. It appears that those Misc. Cases were withdrawn on 07.08.2015 and the second appeal with the present application was filed on 11.08.2015 and that time of filing the second appeal seems to be reasonable.

16. In the case of **Palash Chandra Saha (supra)** this Court in Para 12 of the judgment has observed-

“12. In the present case, as it appears, the petitioner approached the Court seeking condonation of delay in a most casual manner. The word ‘sufficient cause’, according to law, is to receive a liberal construction, but, that does not mean that whatever explanation or reason has been assigned has to be accepted. The word ‘sufficient cause’ has not been defined anywhere in the statute. It would depend on the facts of the particular case as to whether the cause assigned satisfy the judicial conscience of understanding, to discern between falsity and truth, between wrong and right, between shadows and substance between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. “Discretion” means, when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself. Judicial discretion must be exercised according to common sense and according to justice. There should not be any miscarriage of justice while exercising judicial discretion.

In the case at hand, exercise of discretion in favour of the petitioner, in my considered opinion, will cause gross miscarriage of justice since the reason assigned for the delay does not at all convince the judicial mind of the Court.”

17. In that reported case no reasonable explanation acceptable to the Court was assigned by the appellant-petitioner and therefore, the prayer for condonation of delay was dismissed. But in the present case, I find the delay has occasioned because of the wrong proceeding initiated *bona fide* on the advice of learned counsel and the law prescribes that time spent in such proceeding *bona fide* may be condoned. Taking into consideration the facts and circumstances, I am of considered opinion that it is a fit case where the delay in filing the second appeal should be condoned for fair ends of justice.

18. Accordingly, the petition seeking condonation of delay is allowed.

19. Delay of 368 days in presenting the condonation petition stands condoned.

20. The Interlocutory Application accordingly stands disposed of.

JUDGE.