

Party Name : CHANDAN DATTA Vs BIJIT NAGAR CHOUDHURY

HONBLE THE CHIEF JUSTICE DEEPAK GUPTA THE HONBLE MR. JUSTICE S.C.DAS

This is an application for condonation of 404(four hundred four) days delay in filing an appeal. However, the facts which have emerged clearly show that the explanation given for condonation of delay is not a true explanation. According to appellant he was misadvised to file a civil suit and realising that the civil suit did not lie he has now approached this Court by way of appeal.

Initially we were also inclined to hold that if a party has been misled by the advice given by the counsel he should not suffer. However, the facts of this case reveal a totally different state of affairs. The appellant, hereinafter referred to as the plaintiff, filed a suit for specific performance of contract which was valued at Rs.35,00,000/-. The suit of the plaintiff was heard and disposed of by judgement dated 20th July, 2013 by the Civil Judge, Sr. Division, Court No. 2, West Tripura, Agartala. The suit was dismissed on contest but in regard to Issue No.1 the trial Court held that the plaintiff had advanced a sum of Rs.12,99,000/- to the defendant. However, no decree for re-payment of this amount was passed and the suit was dismissed. The plaintiff-appellant did not care to file an appeal against the judgment and decree which clearly held that he was not entitled to the specific performance of the contract.

Taking benefit of the finding given on Issue No.1 the plaintiff filed a suit for recovery of Rs.12,99,000/- along with interest @12% per annum. In the plaint in paragraph-11 it was stated that the Issue No.1 had been rightly decided by the Civil Judge who disposed of the main suit. With regard to Issue No.2 whereby the claim of the plaintiff had been rejected, the averments made in para-12 of the plaint in the Money Suit No.52 of 2013 read as follows:

"12. That the Issue No.II- "Is there any valid and enforceable agreement exist between the plaintiff and the defendant"? This issue has been wrongly decided in the negative and the suit has been dismissed illegally. The plaintiff reserves his right to challenge the dismissal of the suit on the finding of Issue No.II."

This suit was filed in September-2013 whereas the judgment had been passed on 20th July, 2013. The money suit was withdrawn on 10.12.2014 after the defendant had appeared and contested the suit and had prayed that the suit is not within limitation. The suit was dismissed as withdrawn. The learned trial Court rightly did not grant any leave to file a fresh suit because there was no technical defect in the suit. Thereafter, the present appeal has been filed challenging the decree by which judgment and decree dated 13th August, 2013 whereby the first suit filed by the plaintiff for specific performance of the contract was dismissed. The explanation given for condonation of delay is that the plaintiff was misadvised by his counsel to file the suit and he should have been advised to file the appeal.

We are not at all in agreement with this contention made by Sri D.R. Choudhury because of the following factors:

(i) In the money suit, as pointed out above, in para-12 the plaintiff-appellant had himself clearly stated that the finding on Issue No.2 was against him and he reserved his right to file appeal. Therefore, the plaintiff knew fully well that he has the remedy of filing an appeal against the finding given on Issue No.2 dismissing his suit for specific performance of the contract. It has been contended by Mr. D. R. Choudhury that the money suit and the appeal could not have been filed together because if money suit is filed for recovery of the amount then obviously the plaintiff is admitting that he does not want specific performance of the contract. We are in agreement with Mr. Choudhury as far as this contention is concerned. However, a reading of the plaint itself shows that even the plaintiff was aware of this fact. His counsel had clearly stated that with regard to Issue No.2 right was reserved to file an appeal. The limitation for filing an appeal is 90(ninety) days and no appeal was filed within that period. In fact even after the written statement was filed, no appeal was filed and it was only after the suit was withdrawn that the appeal was filed.

(ii) Another reason for disagreeing with the contention of the plaintiff is that the plaintiff in para-13 of the money suit has clearly stated that after the judgment and decree dated 13th August, 2013 was passed, dismissing his suit for specific performance of the contract, he sent a notice dated 18.09.2013 to the defendant in which he again offered to pay the balance amount and in the alternative prayed that the money which he had advanced be returned to him. The suit of the plaintiff had been dismissed. He knew that the Court had refused to grant a decree for specific performance in his favour. He still sent a notice offering to pay the balance amount knowing fully well that a person who has contested a suit and won the same would not accept the amount. After the said offer was rejected he filed the suit only for recovery of the money. This clearly indicates that the plaintiff was not interested in challenging the decree on Issue No.2 but was only interested in getting the sum of Rs.12,99,000/- back.

In view of the false explanation given by the plaintiff and in view of his conduct in filing a civil suit which he has now voluntarily withdrawn, we feel that there is no ground for condonation of delay and accordingly, the application for condonation of delay is dismissed.