

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 295 of 2015**

1. Biselal, S/o Jethu Sonkar;
2. Biharilal, S/o Jethu Sonkar;
3. Birju, S/o Jethu Sonkar (Dead)

Through LR's:

3.a Gaidi Bai, Wd/o Birju Sonkar.

3.b Bhuvaneshwar, S/o Birju Sonkar,

All (Appellants 1 to 3.b), R/o Village Khudmuda, Post Saankra,
Tehsil Patan, District Durg (C.G.)

3.c Sushila, D/o Birju Sonkar, W/o Mahadev Sonkar, R/o
Gunderdehi, Tehsil Gunderdehi, Distt. Bemetara (C.G.)

---- Appellants**Versus**

1. Chamar Rai, S/o Tuman, R/o Village Khudmuda, Post
Saankra, Tehsil Patan, District Durg (C.G.) Plaintiff
2. The State of Chhattisgarh Defendant No.4

---- Respondents

For Appellants : Mr.Sanjay S. Agrawal, Advocate.

For respondent No. 1 : Mr. N.K. Chatterjee, Advocate

For respondent No. 2 : Mrs. Astha Shukla, PL

Hon'ble Shri Justice Sanjay K. Agrawal**Order On Board****17/08/2016**

(1) The substantial question of law formulated and to be answered
by this Court in the defendants' second appeal is as under:-

“Whether finding of the first appellate court that the appeal is barred by time is perverse ?”

[For sake of convenience, the parties would be referred hereinafter as per their status shown in the plaint before the trial Court]

(2) Plaintiff – Chamar Rai has instituted a suit claiming possession, injunction and mesne profits stating inter alia that he purchased the suit land from one Vishal, the brother of defendants No. 1 to 3, under the registered deed of sale dated 2.2.1993. It has been further pleaded that the plaintiff had earlier instituted a suit on the basis of said registered sale deed dated 2.2.1993 against the defendants No. 1 to 3 and their brother Vishal for declaration of title, injunction, possession and mesne profits and for removal of the illegal construction raised by the defendants which was registered as Civil Suit No.95-A/1995 and, in the said suit, it was held by the trial Court by its judgment and decree dated 21.08.1998 that the plaintiff is entitled to claim with regard to the share of his vendor's (Vishal's) interest only and, in consequence, the plaintiff was directed to proceed further before the Revenue Authority under Section 178 of the C.G. Land Revenue Code, 1959 for the partition.

(3) It is pleaded further that the plaintiff's application for partition filed under Section 178 of the Code, 1959 was rejected for want of his appearance, therefore, plaintiff has been constrained in filing the suit in the instant nature, instituted on 03.10.2003.

(4) The defendants have contested the plaintiff's aforesaid claim by submitting inter alia that the suit as framed is not maintainable

and is barred by the principle of res judicata as provided under Section 11 of the Code of Civil Procedure, 1908.

(5) Upon hearing the parties, the trial Court by its judgment and decree dated 14.01.2008 has decreed the suit partly by holding, inter alia: the plaintiff has purchased the suit land admeasuring 0.50 acres under the registered deed of sale dated 2.2.1993; the principles of res judicate is not attracted as the subject matter involved in earlier instituted suit and instant suit is not the same; and the plaintiff would not be entitled to get the vacant possession of 0.03 acres of land which was constructed with a pucca house by the defendants and therefore, in lieu thereof, the defendants will provide the possession of some other land to the plaintiff.

(6) Being aggrieved & dissatisfied with the judgment & decree of the trial Court, the defendant No. 1 to 3 have preferred an appeal on 27.01.2012 along with an application for condonation of delay under Section 5 of the Indian Limitation Act, 1963 and the contents thereof were supported by an affidavit. It is stated in the said judgment and decree dated 14.01.2008 for filing an appeal and, in turn, the said counsel had informed that he had filed the appeal in this regard and had assured them to inform regarding the progress of appeal, when needed. It is stated further in the application that the plaintiff/respondent had also moved an appeal by questioning the said judgment and decree dated 14.01.2008 which was registered as Civil Appeal No.23-A/2009 (re-numbered as Civil Appeal No.24-A/2011) and that upon receiving the summons of that appeal, they have enquired the record through their counsel Shri Rajesh Kumar

Sahu. Upon enquiry it was revealed by the original counsel Shri L.L. Yadu to him that, he has not filed the appeal, then immediately thereafter the appellants have applied for obtaining the certified copy of the said judgment and decree dated 14.01.2008 on 22.11.2011 through his counsel and in pursuance thereof, the said copy was delivered to them on 13.01.2012. It is stated further that, under the assurance given by his original counsel, the appeal could not have been filed in time.

(7) The respondent No.1 has contested the said application by filing its reply. However, the contents made in the said application which was supported by an affidavit was not controverted by the respondent No. 1 by way of his affidavit.

(8) The First Appellate Court, by its impugned judgment & decree dated 23.03.2015 has rejected the said application for condonation of delay in filing the appeal by observing that, the appeal has been filed by inordinate delay of more than four years and the reasons as assigned by the appellants/defendants No. 1 to 3 are not sufficient.

(9) Impugning the legal acceptability and sustainability of the order dated 23.03.2015 passed by the First Appellate Court, the second appeal under Section 100 of the CPD has been preferred by the defendants (appellants herein), which has been admitted for final hearing on the substantial question of law as stated in opening paragraph of this judgment.

(10) Mr. Sanjay S. Agrawal, learned counsel for the appellants/defendants would submit that the first appellate Court is

absolutely unjustified in rejecting the appeal as barred by limitation and, as such, the first appellate Court is only impressed upon the length of delay without considering the sufficient cause in its proper perspective and no enquiry was made and the contents made in the application for condonation of delay, which was supported by an affidavit and the same was not controverted by respondent No.1/plaintiff by filing affidavit.

(11) I have heard learned counsel appearing for the parties and perused the records of both the Courts below with utmost circumspection.

(12) It is well settled law the Courts should adopt a justice-oriented approach in considering the application for condonation of delay. However, the Court while allowing such application has to draw a distinction between delay and inordinate delay for want of *bona fides* of an inaction or negligence would deprive a party of the protection of Section 5 of the Limitation Act, 1963. Sufficient cause is a condition precedent for exercise of discretion by the Court for condoning the delay.

(13) In case of **N. Balakrishnan V. M. Krishnamurthy**¹, it has been held by the Supreme Court that the sufficient cause has to be construed liberally especially when the delay is not deliberate and malafide. Relevant portion of the report held as under:-

“11. Rules of limitation are not meant to destroy the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to

1 (1998) 7 SCC 123

repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the Courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim *interest reipublicae ut sit finis litium* (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the Court is always deliberate. This Court has held that the words “sufficient cause” under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide **Shakuntala Devi Jain Vs. Kuntal Kumari [AIR 1969 Sc 575]** and **State of West Bengal Vs. The**

**Administrator, Howrah Municipality [AIR 1972 SC
749].”**

(14) Recently, the Supreme Court in the case of **Esha Bhattacharjee V. Managing Committee of Raghunathpur Nafar Academy and others**² has laid down the principles for deciding application for condonation of delay, which has been followed by this Court in case of **Pradeep Majumdar V. Duvas Bai and others**³.

Para 21 of the **Esha Bhattacharjee(Supra)** states as under:-

“21. 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.

² JT 2013 (2) SC 450

³ 2013 (4) B.L.J. 433

- 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, behavior 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.”

(15) Keeping in view the principles laid down in the above-stated cases, the facts of the instant case is examined, I find from the record that defendants No. 1 to 3 were regularly appearing in the trial Court diligently and seriously contested the suit and that immediately after delivery of judgment & decree of the trial Court dated 14.01.2008, they informed their original counsel Shri L.L. Yadu, who was conducting the suit before the trial Cour, to which he assured them that he after obtaining certified copy of the judgment & decree, appeal will be filed right in time against the judgment & decree of the trial Court dated 14.01.2008. It is further case of the defendants that respondent No.1/plaintiff has also preferred appeal against the said judgment & decree, which was registered as Civil Appeal No.23-A/2011(re-numbered as Civil Appeal No.24-A/2011) and upon receiving the summons of that appeal, they requested their counsel Shri Rajesh Kumar Sahu to inspect the record, who in turn upon enquiry, it is informed to the defendants that no such appeal has been filed by Shri L.L. Yadu, Advocate on their behalf, immediattley thereafter the appellants have applied for obtaining the certified copy

of the said judgment & decree dated 14.01.2008 on 22.11.2011 through his counsel and it was delievered to them on 13.01.2012 and then appeal was preferred on 27.01.2012. On notice being issued, the present respondent No.1/plaintiff filed his reply and opposed the application but not counter affidavit was filed and, as such, affidavit filed by the defendants remained uncontroverted. No enquiry was made on the application under Section 5 fo the Limitation Act.

(16) After hearing learned counsel appearing for the parties and taking into consideration the facts & circumstances of the case, I do not find any malafide or deliberate delay caused by the appellants/defendants in filing the appeal and, as such, cause shown for delay in filling the application is an a "sufficient cause" within the meaning of Section 5 of the Limitation Act.

(17) This Court is of the considered opinion that the First Appellate Court has committed illegality in rejecting the application under Section 5 of the Limitation Act. The impugned order/judgment dated 23.03.2015 is hereby set aside. The delay in filing the appeal is condoned. The First Appeal (Biselal & others Vs. Chamar Rai & another) is restored to the original file of Second Additional District Judge, Durg for hearing and disposal of appeal on merits in accordance with law subject to payment of cost of Rs.5,000/- payable to the respondent No.1/plaintiff within a period of one month from today. Second appeal is allowed in part.

(18) The parties are directed to appear before the Second Additional District Judge, Durg on 05th September, 2016. The First Appellate Court is directed to decide the appeal on merits

expeditiously preferably within a period of three months as the judgment & decree of the first appellate Court was passed way back on 27.01.2012. No cost (s).

(19) A decree be drawn accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-