

1. Md. Balal Uddin son of Jansul Ali, resident of village- Dauna, P.O.- Bagchchapad, P.S.- Sakhund, District- Bhagalpur

Versus

.... Respondent/s

For the Petitioner/s : Mr. Ranjan Kumar Jha
& Mr. Subhash Kumar Jha
For the Respondent/s : Mr. Abdul Mannan Khan
With Mr. N. Hoda

Heard learned counsel for the parties.

3. The petitioner has challenged the said order, which is *ex parte* on the ground that the petitioner had no knowledge about the pendency of such proceeding before the Court below and no notice of the said proceeding under



Section 125 of the Code was ever served on him. It has been submitted that there is no finding by the Court below to the effect that the petitioner was wilfully avoiding service or wilfully neglecting to attend the Court, which is a condition precedent under Section 126 of the Code for passing an order under Section 125 of the Code *ex parte*.

4. Learned counsel appearing on behalf of Opposite party has submitted that the petitioner has remedy of filing an application of setting aside the said *ex parte* order under Section 126 of the Code itself, if he could satisfy the court below that he was not wilfully avoiding service of notice and there was good cause for setting aside the said *ex parte* order on that ground.

5. Learned counsel appearing on behalf of the petitioner in response to the said submission on behalf of the Opposite party has submitted that proviso to Section 126(2) of the Code allows three months time for making an application for setting aside an *ex parte* order made under Section 125 of the Code whereas the petitioner did not have any knowledge about the said *ex parte* order for more than two years.

6. According to him, since three months period has expired, his application for setting aside the said *ex parte* order contemplated under proviso to section 126(2) of the



Code may not be maintained. He has submitted that Limitation Act, 1963 will have no application for condoning the delay of limitation of time prescribed under proviso to Section 126(2) of the Code.

7. Submission advanced on behalf of the petitioner to the effect that Section 5 of the Limitation Act, 1963 will not apply for condoning the delay in filing an application under Section 126(2) of the Code, is misconceived. This is for two reasons. The proviso to Section 126(2) of the Code does not put any bar over application of Section 5 of the Limitation Act. Section 5 of the Limitation Act applies to any appeal or any application other than application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, unless its application is expressly barred by any other enactment. In the Full Bench decision of Kerala High Court in case of **Balan Nair Vs. Bhavani Amma (AIR 1987 Kerala 110)**, similar view has been taken holding that Section 5 of the Limitation Act can be invoked for condoning the delay in filing application under Section 126 of the Code.

8. This application is, accordingly, disposed of with a liberty to the petitioner to file an application before the Court below seeking setting aside of the said *ex parte* order passed under Section 125 of the Code under proviso to Section 126(2) of the Code. As has already been held in the



present order, Section 5 of the Limitation Act shall have application for seeking condonation of delay in filing the application.

9. It is made clear that the Court below while considering the question of appeal in filing of application shall also take into account the fact that the petitioner had been pursuing his remedy before this Court by filing the present criminal revision application.

10. This application stands disposed of accordingly.

(Chakradhari Sharan Singh, J)

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