S/L -1
16.11.2022
Court No.652

SA 160 of 1994
With
CAN 6 of 2018
(Old CAN 547 of 2018)
With
CAN 7 of 2018
(Old CAN 548 of 2018)

Sudsons (Pvt.) Ltd.
Vs.
Subodh Kumar Sen Died, His Legal Heirs Pravabati Sen & Ors.

Mr. Arijit Bardhan
Mrs. Smita Mukherjee
... for the Appellant.

Mr. Subhasish Sengupta
Mr. Sorosij Dasgupta
Mr. Aditya Garodia
Mr. Pintu Ghosh
Mr. Ushma Garodia
... for the Respondents.

CAN 547 of 2018 and CAN 548 of 2018

Since issue involve in both the applications are the same, so both the applications are taken up for disposal by this common order. CAN 547 of 2018 relates to recalling and or setting aside the order dated 19th May, 2017 passed by this court in connection with SA No. 160 of 1994 and CAN 548 of 2018 has been filed for condonation of delay of 235 days in preferring the said application for recalling and/or setting aside the order dated 19th may 2017.

By the order impugned this court was pleased to dismiss the said appeal on the round of default without cost. Petitioner herein contended that the said second appeal was filed challenging the order passed by 2nd ADJ, Alipore, in Title Appeal No. 443/1989 dated February 22, 1992. The respondents filed an application for execution of the decree dated August,28, 1989 being Title Execution case No. 5 of 1990 and by an order dated 28.04.1993 this court in SAT 1349 of 1992 (which subsequently re-numbered as SA 160 of 1994) was *inter alia* pleased to grant an interim order of stay of all of further proceedings in said Title Execution case No. 5 of 1990. The petitioner submits that he was all along under the impression that the matter was attended and taken care of by its erstwhile learned Advocate before this court and the stay in the execution proceeding was extended from time to time. The last date of hearing in Title Execution Case No. 5 of 1990 was on 07.12.2017 when an application was filed by the Respondent No. 6 to bring on record disposal of said SA no. 160 of 1994 and for passing of further orders for Execution of decree. The petitioner immediately thereafter downloaded the server copy of the said order dated May 19, 2017 wherefrom it transpired that the learned Advocate engaged by the petitioner did not appear when the matter was listed for hearing from time to time before the court and even dealing advocate did not intimate petitioner about dismissal of the said appeal.

The petitioner states in his present application that learned Advocate engaged by the petitioner, by a letter dated 06.08.2010, had intimated the petitioner that the matter is still pending for hearing. The advocate on record of the petitioner on 06.01.2011 brought serious allegations of non-payment of costs and their nominal professional charges and had called upon the petitioner to collect cause papers. Petitioner vemiently denied such allegation of non-payment against them. On the contrary petitioner states that all the dues and bills raised by the advocate on record was settled immediately on receipt of the letter from the erstwhile advocate on record. Upon such payment petitioner were under *bonafide* impression that the matter was amicable resolved and as such the erstwhile advocate would continue as the advocate for the instant case. No change of advocate was also taken from the said advocate on record. Only upon receiving the said information the petitioners approached their erstwhile learned advocate on record for change on 15th December, 2017. Accordingly petitioner submits that he has a good case in the appeal and dismissal of the appeal was without dealing with the merits of the matter which causes irreparable loss and injury to the petitioner. Petitioner further submits that there is no wilfull latches or deliberate negligence on his part in not appearing before this court when the matter was called on for hearing on May 19th May, 2017. Accordingly he prayed for restoration of the said application. Learned counsel for the petitioner in this context relied upon following judgments

(i) International Airport Authority of India Vs. M. Dalmia

(ii) Miss. Neerja Lal 7 another Vs. Shrimati Phyllis Ann Vellis & another (2014) 2 CHN 420

(iii) Jahanara Saha Vs. Debrup Dutta (2019) SCC OnLine Cal 3855

(iv) M/S. Eastern States Commercial Company Jagadamba (India) Pvt. Ltd. (C.O. No. 2129 of 2015)

(v) Sajjan Bagaria Vs. T& I Global Ltd. & others (C.O. 3374 of 2017)

(vi) Peruman Bhagvathy Devaswom Perinadu Village Vs. Bhargavi Amma & others (2008) 8 SCC 321

Learned counsel appearing on behalf of the opposite party vehemently raised objection against petitioners prayer for recalling the order dated May 19th 2017 and/or the prayer for condonation of delay in filing the said application. He submits that the appeal was dismissed on 16 June, 1999, 15th September, 1999 and thereafter on 19th May 2017. Therefore, the Hon'ble court should not entertain the said application filed by the appellant /petitioner. He further submits that the application for restoration and or recalling of the order dated 19th May, 2017 is on abuse of process of court and the appellant/ petitioner deliberately misusing the process is enjoying the suit property by stalling the execution of the judgment and decree dated 28th August 1989. The application is misconceived and is liable to be dismissed with exemplary cost.

The case in hand is a glaring example of the well known saying that in a civil suit real trouble starts with the execution proceeding. In or about 1984 the plaintiff/respondents filed the suit for recovery of khas possession of the suit property along with mesne profit, being Title Suit No. 221/1984 before the 2nd Assistant District Judge's court at Alipore. The said suit was decreed in favour of plaintiffs /respondents by a judgment dated 28th August 1989. Being aggrieved and dissatisfied with the judgment and decree dated 28th August 1989 the appellants/petitioner herein preferred an appeal before the

District Judge, Alipore, being Title Appeal No. 443 of 1989 and said appeal was dismissed vide judgment and order dated 22th February 1992. The appellant/petitioner challenging the said judgment and decree dated 22nd February, 1992, filed present second appeal before this court being SAT No. 1349 of 1992 (later re-numbered as 160 of 1994). In the meantime plaintiff/respondents filed the execution case being Title Execution case No. 5 of 1990 to execute the said decree. By an order dated 28th April, 1993 this court stayed Title Execution No. 5 of 1990 and directed the appellant/petitioner to go on depositing a sum equivalent to monthly rent at the rate of Rs. 425/- per month by 15th day of every month before the executing court along with arrear rent within a period of three months from that date and in the said order it was also made clear that failure on the part of the appellant /petitioner to deposit any of the amounts, the interim order would stand vacated and decree for eviction would be executable.

Despite the said order appellant/petitioner failed to comply with the order dated 28th April, 1993 and failed to deposit the rent with the executing court and therefore the interim order passed by this court dated 28th April 1993 was vacated and decree also became executable .

The instant appeal was first dismissed on 16th June 1999 by the additional register High Court Calcutta and also on 18th May 2000 by the court. The appellant/petitioner filed an application for recalling of the aforesaid orders and this court recalled the said order and restored the second appeal. The respondents also filed an application for expeditious disposal of the aforesaid pending second appeal. The second appeal appeared on 3rd May 2017 and this Court directed to issue notice upon the Appellant and the other respondents and directed to file affidavit of service on the next date, with a further direction to list the matter two weeks thereafter, the matter was returnable on 19th January 2017 and on the said date this court was pleased to observe that the appeal is very old and therefore fixed 22nd February 2017 for hearing. This Court further clarified that if none appears on behalf of the appellant on the next date, the appeal would be dismissed for default. Ultimately the matter appeared on 19 May 2017 when the respondents filed the affidavit of service showing the service upon the learned advocate for the appellant and this Court was pleased to dismiss the said appeal by passing the impugned order. While passing the dismissal order the court recorded that the Appellant had not communicated with his Advocate for the last 12 years. This court noticed the office report dated 21st February 2017 that despite direction upon the learned Advocate for the Appellant for effecting service of notice of the appeal respondent No 1(a) to (b), 4 and 9, no steps have been taken by the Appellant in the matter. Thereafter appellant/petitioner filed present application for restoration of the second appeal along with applications under section 5 of the limitation Act being CAN 547 of 2018 and CAN 548 of 2018 but the said applications were not moved till 11th December, 2019, when the court was pleased to direct the petitioner to serve the copy of the application to the opposite party/respondent and a copy to the advocate on record and liberty was granted to mention the matter immediately upon service of notice, but the petitioners chose not to serve any such notice or copy of the petition upon advocate on record despite the same appellant / petitioner chose not move the application till 2022. In the meantime some of the respondents i.e. respondents No. 2, 3 and 9 had expired and petitioner /appellant failed to bring the legal representatives of such respondents on record and as such second appeal has also been abated by operation of law and for which CAN No. 8,9,10,11 of 2022 have been filed.

During course of hearing Mr. Sengupta, learned counsel appearing on behalf of respondent submits that the allegations leveled against the erstwhile advocate is unbelievable and unacceptable that the Advocate who was entrusted to conduct the proceeding did not attend or had not taken care of the case in spite of resolving alleged dispute in 2010-2011. He further submits that the petitioner was quite aware of the proceeding all along and now trying to make said erstwhile lawyer as a weapon or tool to get the condonation done. Referring earlier orders/judgments of this court Mr. Sengupta contended that said erstwhile Advocate on record is still practicing in this court and he may be directed to appear before the court after serving a notice as serious aspersion has been leveled against the erstwhile Advocate.

In reply Mr. Bardhan learned counsel appearing on behalf of the petitioner submits that though in the present applications he has made certain allegations against a member of the bar but he is not pressing the said allegations against any member of the bar and on the contrary he categorically submits that the petitioner /appellants was all along diligent in conducting the case and they in due compliance of solemn order, dated April 28, 1993 had been and is still regularly depositing an amount of Rs. 425/- per month before the executing court and hence question of non- compliance of the said order does not arise. Mr. Bardhan further submits that the record reveals that such dismissal was on account of adequate and appropriate steps not being taken, as the petitioner was ignorant about the status of the case and as such though appellant does not want to blame any lawyer but at the same time he cannot be saddled with any blame for such dismissal. He further submits that learned counsel for the opposite party has vehemently argued that the present appeal was dismissed thrice but Mr. Bardhan referring ***Jharna Saha (Supra) Mrs. Nirja lal and another (Supra) and , M/S. Eastern States Commercial company (Supra)*** contended that past conduct of the petitioner cannot be considered while adjudicating the restoration application if sufficient causes shown in the application for the absence of the petitioner at the relevant juncture and the appeal should be restored after setting aside the order of dismissal. He further submits even if on earlier occasions there were any order of dismissal of the appeal, even then, once it is restored condoning the earlier default of the petitioner, the past conduct of the petitioner cannot be taken into consideration in the subsequent application of the petitioner for restoration. In this context he also referred another Supreme Court Judgment in **International Airport Authority of India (supra)** contending that like the present one in that case also appeal was twice dismissed for default due to non-appearance the Apex Court after perusing the contents of the application and keeping in view that a litigant ought not to be denied a hearing on merit was pleased to restore the appeal. In this context Mr Bardhan also referred ***P.B. Devaswom perinadu village (supra)*** case and relied on Paragraph No. 6 of the judgment which dealt with as to what should be the approach of the courts while considering applications under section 5 of the Limitation Act, 1963 as has been derived from several past judgments. He also pointed out that the Apex Court in Paragraph 15 observed that there is significant difference between an appeal pending in subordinate court and an appeal pending in High court. While in lower courts dates of hearing are periodically fixed and a party or his counsel is expected to appear on those dates and keep track of the case it does not happen generally in the case of appeal pending in a High Court. It is common for appeals pending in High Courts not to be listed at all for several years.

Having considered the submissions and the fact of the case, observation made by court while dismissing the appeal needs to be quoted at the outset, which is as follows:-

"Affidavit of service filed by the respondent today be kept with the record.

None appears for the appellant even on second call.

Learned Advocate Mr. Dasgupta appearing for the respondent no.6 submits that he has communicated learned Advocate Mr. Moti Sagar Tiwari who previously appeared for the appellant, that the mater has been fixed today at 2-00p.m for the second call. But Mr. Tiwari has informed him that he has no communication with his client since last twelve years.

There is an office report dated 21st February, 2017 that in spite of direction upon the learned advocate for the appellant for effecting service of notice of the appeal upon the respondent no. 1(a)-(b), 4 and 9 but no step has been taken by the appellant in the matter.

It is an old appeal of the year 1994 and the appeal is running in the list since long. But no one is appearing for the appellant.

On the last date i.e. on 19thh January, 2017 a clear order was passed to the effect that if the appellant does not appear today also then the appeal would be dismissed for default. But in spite of such alert, none has appeared for the appellant even on second call.

In view of the facts stated above, it is clear that the appellant is no more interested to proceed further with the appeal. Hence, the appeal is dismissed for default without any order as to costs.

In view of such order, CAN 10584 of 2016, which has been filed for expeditious hearing of the appeal, does not call for any separate order and hence the application is taken on day's list with the appeal and disposed of accordingly.

The interim order if any, passed earlier is hereby vacated."

It further appears that in CAN 1058 of 2016 opposite party/respondents had narrated the entire incident before the court. Respondent submits even for a speedy disposal respondent at their own initiative had filed the paper books

It also appears that it is the respondents who on their own initiative filed application for expeditious disposal of the appeal being CAN 10584 of 2016. Even if for the sake of argument, if it is taken for granted that there were certain dispute/differences with erstwhile lawyer which allegedly resolved in January, 2011, why the Appellate did not pray for listing and/or expeditious hearing until Respondent did the same in 2016. In fact there is nothing in record that in between 2010 to 2017, petitioners, at all made any contact with their erstwhile lawyer, whom they are trying to use as shield by making written aspersion relating to his conduct, who may not even aware of such aspersion to place his stand.

In order to judge how diligent the petitioner was in conducting the appeal, it appears that petitioner obtained stay in execution case initially on 28.04.1993 but subsequently did not pay occupational charges in compliance with court's order, and allowed to keep the proceeding pending without making any initiative for it's hearing. Even if his past conduct is ignored it appears that vide order dated 03.01.2017, this court directed to issue notice upon Appellants and Respondents and affidavit of service shows that it was served upon Advocate but it is recorded by court that Appellate had not communicated with his Advocate for 12 years. Though Mr. Bardhan argued that letter dated 06.08.2010 issued by erstwhile advocate shows that it is not correct to say that petition had not made contact with his lawyer for 12 years but at the same time petitioner has nothing to show that he had made any contact with his lawyer from 06.08.2010 till 07.12.2017 or they made any attempt for expeditious listing or hearing of the appeal during that period. On the contrary it appears that present applications for restoration were filed admittedly after a delay of 234 days on 17.01.2018.

No cogent explanation given for such delay in filing restoration application, nor any sufficient cause shown as to what prevented petitioners from appearing on 19.05.2017 specially when R. Bardhan has not pressed the aspersion leveled against erstwhile advocate in his application at the time of hearing and court also while passing dismissal order recorded that petitioner did not make contact with his lawyer for a considerable period of time.

It is true that court must adopt liberal approach in condoning delay in filing the application and it would not be the approach of the court to find a fault in the petitioner but some latitude should be given, so that the causes of the said application is found to be satisfactory and sufficient. The litigant should not be allowed to make a lawyer as a shield in support of condonation of delay unless it is proved or pressed by a convincing evidence, which suggest such conduct to be not free from any blame.

Prayer for condonation of delay can be construed liberally so as to advance substantial justice if no negligence or in action or *bonafide* is imputable to the petitioner. Section 5 of the limitation Act, 1963 cannot be resorted to dilatory tactics and in the present case, I have reason to believe that the delay is occasioned by the petitioner deliberately to gain time and the cause is not free from *malafide* and such delay cannot be condoned in a routine like manner, specially when there is want of diligence and inaction which can very well be attributed against petitioner.

From the facts and circumstances of the case it persuaded me to believe that in the disguise of watching the matter, the petitioners was avoiding the court in order to frustrate the decree and it's execution which was passed long back in the year of 1989, which arose on the basis of a suit for recovery of possession which was filed in the year 1984. I have gone through all the judgments that are being referred by the petitioner but in no case I find that such an inordinate delay occurred. Every case has to be judged from it's own perspective and attending facts and circumstances of the case. By filing supplementary affidavit learned counsel for the respondents further submits that when the suit has got abated for not substituting legal heirs some of the respondents, they suddenly wake up from slumber and moved the said application. He has also attached the bailiff's report in connection with aforesaid Title Execution case which goes to show that on 07.11.2022 bailiff went to the spot to execute the decree, but he was vehemently resisted by some hooligans and for which decree could not be executed as has been reflected in the bailiff (process servers) report. When it is very much apparent that the petitioners have resorted to dilatory tactics, the question of taking lenient view in allowing the applications of the petitioner does not arise because rules of limitation are not meant to give indulgence to unscrupulous litigants. In fact in the present case the facts and circumstances of the case clearly discloses that there is deliberate delay in making the applications and the explanation reveals smack of *malafide a*nd has been put forth as a part of dilatory strategy. Accordingly I have found that the delay in filing the petition under section 5 was occasioned by the petitioner deliberately to kill time and such explanation for condonation of delay under section 5 of the Limitation Act is neither plausible nor acceptable. In view of above CAN 548 of 2018 under section 5 of the limitation Act is dismissed and as a result and in view of the facts and circumstances of the case CAN 547 of 2018 also dismissed accordingly. In view of the aforesaid disposal all other CAN application also stands dismissed.

(Ajoy Kumar Mukherjee, J.)