

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.163 of 2005

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1. Shobha Devi wife of late Jiwachh Prasad Sah @Jiwachh Prasad
1. (i) Shyam Shankar Prasad S/o Jiwachh Prasad Sah @Jiwachh Prasad.
(ii) Rinki Kumari
(iii) Kalyani Kumari, both D/o Jiwachh Prasad Sah @Jiwachh Prasad
All resident of mohalla Ruhelaganj P.S. Lalit Narayan Mithila
University Dist. Darbhanga.

.... Appellant/s

Versus

1. Rajendra Sah son of late Parmeshwar Sah, resident of mohalla Rahamganj P.S.
Laheriasarai District Darbhanga.
2. Ram Prasad Sah son of Munni Sah resident of Mohalla Kaidrabad Balughat,
P.S. Town Darbhanga Naka No. 2 District Darbhanga

Plaintiff- Respondent-Opposite Party- Respondent/s

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Appearance :

For the Appellant/s : Mr. Md.Sufiyan, Advocate
Mr. Thakur Brajesh Singh, Advocate

For the Respondent/s : Mr. Jitendra K. Verma, Advocate

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CORAM: HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT

Date: 11-04-2018

Heard learned counsels for the appellants and the respondents.

2. The Title Appeal No. 47 of 1994 stood dismissed for non-prosecution/default on 17.12.1999. For restoration of the same one Miscellaneous Case No. 02 of 2000 was filed by the instant appellant. Under order dated 05.03.2005 passed by the Second Additional District Judge, Darbhanga, the Miscellaneous Case No. 02 of 2000 has been dismissed and readmission of Title Appeal No. 47 of 1994 has been disallowed.

3. The brief background/facts of the case are that Title



Appeal No. 47 of 1994 was filed on 30.09.1994. After admission it was transferred to the Court of 2nd Additional District Judge, Darbhanga. The appellant was directed to take steps for issuance of notice. Pursuant to the said order requisites were not filed in proper form and there was some deficiency in the requisites filed by the appellant. From the order sheet it is apparent that since 28.07.1998 the appellant had left the 'Parvi' of the case. In the circumstances, the Title Appeal No. 47 of 1994 was dismissed on 17.12.1999.

4. In view of the aforesaid circumstance, the Miscellaneous Case No. 02 of 2000 was filed for readmission of the title appeal dismissed for default on 17.12.1999. The same has been rejected by the order dated 05.03.2005 which is the subject of the instant appeal. The Court of 2nd Additional District Judge, Darbhanga had dismissed the Miscellaneous Case No. 02 of 2000 by disbelieving the case of the appellant regarding his illness as the same could not be established.

5. Another ground of dismissal of the petitioner's miscellaneous case was that he was ill from 30.11.1997 to 29.04.2000. However, in the evidence before the Court he has only stated that he was ill from October, 1999 to December, 1999. Thus, the story of the petitioner's illness has been disbelieved by the Court below. The other witnesses examined on behalf of the appellant has not stated the period of illness of the appellant.



6. The Miscellaneous Case No. 02 of 2000 has also been rejected for the reason that even though the same had been filed for readmission after considerable delay, no application for condonation of delay under Section 5 of the Limitation Act in support of the miscellaneous case had been filed.

7. Counsel for the appellant has submitted that in view of the specific plea of illness, the Court below should have readmitted the Title Appeal No. 47 of 1994 and allowed the Miscellaneous Case No. 02 of 2000. He has submitted that the Court below has failed to consider that dismissal of Miscellaneous Case No. 02 of 2000 has caused irreparable loss to the appellant. He has also submitted that the learned court below while considering the petitioner's prayer in Miscellaneous Case No. 02 of 2000 should have adopted a liberal approach and should have exercised its power to condone the delay in filing of application under Order 41 Rule 19.

8. He has submitted that for the aforesaid reasons the order dated 05.03.2005 rejecting his application under Order dated 41 Rule 19 is unsustainable and the order dated 05.03.2005 passed in Miscellaneous Case No. 02 of 2000 is fit to be set aside. He has prayed that as a consequence of setting aside of the impugned order his Title Appeal No. 47 of 1994 may be readmitted to its original file.

9. Counsel for the appellants has relied upon the decisions



in the case of *Mosmat Ram Kali Kuer & Ors. vs. Indradeo Choudhary & Anr.* reported in AIR 1985 Pat 148 and another decision in the case of *Ram Nath Sao v. Gobardhan Sao* reported in AIR 2002 SC 1201. By citing the said judgment counsel for the appellant has submitted that in the matter of condonation of delay the expression “sufficient cause” should receive a liberal construction to advance substantial justice. He has also submitted that even if there is no formal or written application for excusing the delay then the Court should afford a reasonable opportunity to the parties.

10. He has also submitted that in terms of Article 123 of the Limitation Act, it is the date of knowledge which is relevant for computing the period of delay; and that his date of knowledge being 29.04.2000 has not been taken into consideration by the Court below for condoning the delay in filing the application under Order 41 Rule 19.

11. Learned counsel for the respondents, on the other hand, has submitted that in view of the conflicting evidence of the appellant and the other witnesses examined on his behalf regarding the period of illness, the Court below has rightly disbelieved the case put forward in respect of his illness so as to get over the delay in filing the application under Order 41 Rule 19 CPC for readmission of Title Appeal No. 47 of 1994. He submits that it is the appellants’ own case



that he has filed the miscellaneous case on 01.05.2000. He submits that the Title Appeal No. 47 of 1994 had stood dismissed on 07.12.1999. He has submitted that Article 122 and not 123 of the Limitation Act is applicable in respect of an application under order 47 Rule 19. The same clearly mandates a period of 30 days for making an application for restoration and that the period of 30 days has to be from the date of dismissal as Article 122 does not consider the date of knowledge to be relevant.

12. This Court finds that the said submission is correct on bare perusal of Article 122 of the Limitation Act.

13. In the background of Article 122 of the Limitation Act, the appellant was required to make an application for readmission under order 41 Rule 19 within 30 days from 07.12.1999 being the date of dismissal of Miscellaneous Case No. 47 of 1994. The application under Order 41 Rule 19 has been made after delay of more than 4 months on 01.05.2000 without any explanation for the delay. Even petition under Section 5 of the Limitation Act for condoning the delay in approaching the Court for readmission, has not been filed.

14. Placing reliance on the provisions contained in Section 3 of the Limitation Act counsel for the respondents has submitted that since no application under Section 5 had been filed, the application under Order 41 Rule 19 was liable to be dismissed.



15. This Court would further observe that the sufficient cause has not been shown to satisfy the conditions for invoking the order 41 Rule 19 by the appellant. The Court below has rightly come to the conclusion, with reference to evidence and records of the Court below the appellant was not able to establish his case of being prevented on account of his illness from not prosecuting his appeal.

16. Counsel for the respondents has relied upon the decision in the case of *Sneh Gupta v. Devi Sarup* reported in (2009) 6 SCC 194. With reference to the same he submits that in absence of an application for condonation of delay, as in the instant case, in terms of section 3 of the Limitation Act 1963 the Court had no jurisdiction even otherwise to condone the delay or entertain the application under Order 41 Rule 19.

17. It is submitted on behalf of the respondents that party who acts in a negligent manner, whose conduct was lacking in bonafide and who had not acted diligently or remain inactive cannot be heard to say that there was “sufficient cause” for non-prosecution of his appeal. Relying upon paragraph 9, 12 and 15 of the judgment in the case of *Basawaraj v. Spl. Land Acquisition Officer* reported in AIR 2014 SC 746 he submits that the Court below had no option to ignore the statutory provisions, moreso since with reference to evidence the appellant was unable to establish his claim of illness



preventing him from prosecuting his appeal. He has not been able to show any sustainable reasons that prevented him from approaching the Court. His conduct has been negligent and as such the order under appeal does not require any interference.

18. This Court finds force, and is in agreement with the submissions advanced on behalf of the respondents. Perusal of the order dated 05.03.2005 shows that the Court below has considered all these aspects of the matter. The appellant has not been able to show any sufficient explanation for non-prosecution of the appeal. His case put forward regarding the illness was not supported by any evidence. The application under Order 41 Rule 19 had been filed after a delay of more than 4 months without making an application for condonation of delay under Section 5 of the Limitation Act. The Court below has also noticed that even otherwise the conditions requisite for readmission of the appeal in terms of order 41 Rules 19 CPC were not fulfilled.

19. In the circumstances, this Court finds no infirmity in the order dated 05.03.2005 passed by the 2nd Additional District Judge, Darbhanga in Miscellaneous Case No. 02 of 2009.

20. The Miscellaneous appeal is therefore, dismissed.

(Madhuresh Prasad, J)

Prakash/-

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

