

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.1305 of 2016

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Ramprit Choudhary S/o - Late Ramdhari Choudhary Resident of Dalsinghsarai,
District - Samastipur at present residing at mohalla - Hajipur, P.O./P.S./District -
Khagaria.

.... Appellant/s

Versus

1. Kavita Devi w/o - Late Vidyanand Thakur
2. Shashi Kumar
3. Sanjay Kumar
4. Rishi Kumar all sons of late Vidyanand Thakur
5. Ganesh Kumar
6. Ravishankar Kumar both sons of late Kamleshwari Thakur All are residents of
mohalla - Hajipur, P.O./P.S./District - Khagaria.

.... Respondent/s

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Appearance:

For the Appellant/s : Mr. Rakesh Chandra, Advocate.
For the Respondent/s : Mr. Dronacharya, Advocate.
Mr. Arghesh Kumar, Advocate.

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**CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL**

ORAL JUDGMENT

Date: 17-07-2018

Re.: I.A. No. 9110 of 2016

The appellant has filed aforesaid interlocutory application for condonation of delay of 155 days in preferring this appeal with the case that the appellant happens to be only earning member of his family. He happens to be old person aged about 73 years and was suffering from back ache from 15.02.2016 to 15.11.2016 and was advised to take bed rest by his attending doctor namely Dr. C.P. Verma. He was unable to move from one place to another. Hence, due to aforesaid reason, he could not contact his



counsel to file the appeal against the remand order dated 24.02.2016 passed in M. Title Appeal No. 12 of 1996 by the learned A.D.J.-I, Khagaria filed by defendant second party. However, after recovery from the said ailment, he contacted his learned counsel on 16.11.2016 and finally got this miscellaneous appeal preferred on 22.11.2016.

2. Hence, there has been no willful and deliberate latches on his part in preferring this appeal late rather aforesaid delay has been caused due to his aforesaid ailment. He has filed certain prescriptions of Dr. C.P. Verma and certificate issued by the aforesaid doctor in buttress of his case. He has relied upon the verdict of Hon'ble Apex Court rendered in **N. Balakrishnan Vs. Mr. M. Krishnamoorthy** reported in **1998 (7) SCC 123** in buttress of his case.

3. Respondent nos. 5 and 6 by filing rejoinder against the aforesaid interlocutory application attaching the order sheets of the court below of different dates have opposed the aforesaid interlocutory application and submitted that the appellant never fell bed ridden and appeared before the court below on each and every dated fixed and took active part in the court below. There is no sufficient ground for condonation of delay rather aforesaid delay has been caused by the appellant deliberately and intentionally.



Respondent nos. 5 and 6 have relied upon the verdict of Hon'ble Apex Court rendered in **Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy** reported in **2014 (1) PLJR 290** in buttress of their case.

4. From perusal of the order sheets, it appears that attendance had been filed on behalf of the appellant in the court below on different dates fixed in the case, but mere filing of the attendance on behalf of the appellant in the court below does not necessarily indicate that the appellant was personally present before the court. As attendance in the court below is filed through learned counsel by the parties. From perusal of the medical prescriptions and certificate filed by the appellant, it appears that the appellant was suffering from back ache from 15.02.2016 to 15.11.2016 and he was under treatment of Dr. C. P. Verma and was advised to take bed rest during the aforesaid period. He has filed the aforesaid appeal on 22.11.2016 after recovery from the aforesaid ailment. Thus, there appears to be sufficient cause for condonation of aforesaid delay made in preferring this appeal.

5. Hon'ble Apex Court in **N. Balakirshanan Vs. Mr. M. Krishnamoorthy (supra)** has been pleased to observe that the primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time limit fixed for



approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. It has also been pleased to observe that the Rules of limitation are not meant to destroy the rights 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 repair the damage caused by reason of legal injury. The law of limitation fixes a life span 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 maximum interest *reipublicae up 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 v. Kuntal Kumari* (1969) 1 SCR 1006 and *State of W.B. v. Administrator, Howrah Municipality* (1972) 1 SCC 366. It has further been pleased to observe that it must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor.

6. In *Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy & Others* (supra) relied upon by the learned counsel for the respondent nos. 5 and 6, Hon'ble apex court has been pleased to observe that 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.

7. But in the case under hand, appellant has shown sufficient cause for condonation of delay made in preferring the



appeal by explaining that he was suffering from back ache and as per the advice of his doctor, he was under treatment from 15.02.2016 to 15.11.2016. He was only earning member of his family and was aged about 73 years old. So there appears to be sufficient reason for condoning the delay and ground taken by the appellant does not appear to be concocted and fanciful.

8. In the facts and circumstances of the case and in the interest of justice, aforesaid delay made by the appellant in preferring this appeal is condoned and the aforesaid interlocutory application is accordingly allowed.

Re.: M.A. No. 1305 of 2016

Heard learned counsel for the appellant and learned counsel for the respondent nos. 5 and 6 on this miscellaneous appeal. None turned up on behalf of respondent nos. 1 to 4 despite service of notice.

2. Appellant has filed the aforesaid miscellaneous appeal against the judgment dated 24.02.2016 passed by 1st Additional District Judge, Khagaria in M. Title Appeal No. 12 of 1996 whereby the learned lower court setting aside the judgment dated 10.05.1996 and decree 21.05.1996 passed by learned Addl. Munsif, Khagaria in Title Suit No. 22 of 1991 remanded the



matter back to the learned court below giving liberty to the parties to lead evidence on the point of disputed issues i.e. on the point of measurement and configuration of the land claimed by them directing the learned lower court to record the evidence, if so adduced and dispose of the suit within a period of six months.

3. Factual matrix of the case is that father of respondent nos. 5 and 6, namely, Kamleshwari Thakur filed Title Suit No. 22 of 1991 against the appellant and Vidyanand Thakur for declaration that the plaintiff of the said suit has got the perfect title in the schedule 'A' land by virtue of Deed of Gift dated 01.12.1980 executed by Most. Daulati Devi in favour of the plaintiff and also for declaration that the plaintiff has got title in property of Schedule 'B' which is part of Schedule 'A' and has been coming in possession over the same before the dispossession of the plaintiff by the defendant first party and possession of defendant first party is that of a trespasser and also sought relief for recovery of possession over the property of schedule 'B' and permanent injunction restraining defendants from interfering in the possession of the plaintiff over the suit property.

4. Aforesaid defendants of the said title suit put their appearance in the case and filed their written statements. Both the



parties adduced ocular as well as documentary evidence in buttress of their case and after hearing the parties and perusing the record, learned Additional Munsif, Khagaria vide judgment dated 10.05.1996 and decree dated 21.05.1996 partly decreed the suit against defendant second party on contest holding that the plaintiff has perfect title over the suit land by virtue of 'deed of gift' in respect of suit land and partly dismissed the suit against the defendant first party finding no encroachment of the suit land as detailed in Schedule 'B' by the defendant first party for the want of scientific measurement /report of survey knowing Pleader Commissioner.

5. Being aggrieved and dissatisfied with the aforesaid judgment and decree, heirs of defendant second party preferred Title Appeal No. 12 of 1996 which was decided by 1st Additional District Judge, Khagaria vide impugned Judgment dated 24.02.2016 as detailed in the earlier paragraph. Being aggrieved by the aforesaid judgment of the appellate court, defendant first party of aforesaid Title Suit namely Ramprit Choudhary preferred this appeal.

6. It is submitted by learned counsel for the appellant that the Appellate Court has committed gross illegality in remanding the matter to the court below instead of deciding the appeal itself as it is well settled that the first appellate court is the last court of facts as



well as of law. It has also committed gross illegality in remanding the matter for appointment of survey knowing Pleader Commissioner though the plaintiff was much aware of this fact, hence there was no need to remand the matter. Learned counsel for the appellant has relied upon the judgment of this court rendered in **M.A. No. 251 of 2004 (Smt. Gayatri Devi v. Ram Balak Singh and Others)** by which this court has been pleased to observe that “where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellant Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.” He has further relied upon the judgment of this Court rendered in **M.A. No. 710 of 2008 (Ambika Yadav v. Ganesh Prasad Mishra & Ors.)** by which this Court has been pleased to observe that “there was no need for appellant court for remand of the matter. The appellate court has not recorded any where that evidence are not sufficient to decide the case on merit but only said that the evidence of Bhagwat Prasad Sharma was necessary and expert opinion of Government handwriting expert in respect of thumb impression of Bhagwat Pd. Sharma and Ambika Yadav, Ext.-A and Ext.-2 is necessary to arrive the truth. The court below has not



recorded any finding on the merit of expert report, Ext.-4. Thus, the appellant court has wrongly exercised the power and remanded back the matter. Accordingly, the order of appellant court is set aside and the court below is directed to decide the case on the basis of material available on record.

7. On the other hand, learned counsel for the respondent nos. 5 and 6 have submitted that the plaintiff has taken the case of encroachment of the part of the said land as detailed in Schedule 'B' by the defendant first party, but there is no report of survey knowing pleader Commissioner or the report of scientific measurement regarding the encroachment allegedly made by the defendant first party over the suit land. Plaintiff has filed petition under Order XXVI Rule 10 (a) CPC for measurement of the land in question by the Survey knowing Pleader Commissioner to appreciate the alleged encroachment made by the defendant first party in the aforesaid appeal No. 12/96. For final and just adjudication of the matter, the appointment of survey knowing Pleader Commissioner is necessary.

8. From perusal of the record, it appears that the plaintiff has taken the case that the defendant first party has made encroachment over three dhur of land of Khata No. 58, Khesra No.



19, Ward No. 12, Touzi No. 525, Thana No. 267, Mauza – Hajipur, Pargana - Farkia, P.S. and District – Khagaria as detailed in Schedule 'B' of the plaint. On the other hand, defendant first party-appellant Ram Prit Choudhary has denied aforesaid case of the plaintiff.

9. As plaintiff of the aforesaid title suit has taken the case of the encroachment of the land in question allegedly made by defendant first party, the burden to prove the same squarely lies on his shoulder. He ought to have discharged the aforesaid burden by getting the land measured through survey knowing Pleader Commissioner by filing the petition therefor in the trial court, but he has not taken any step in this regard and finding no scientific measurement and no report of the survey knowing Pleader Commissioner regarding alleged encroachment of the land by the defendant first party on record, learned Appellate Court has remanded back the matter to the court below with the direction to decide the case after taking fresh evidence in this regard. The plaintiff-respondent has filed a petition under Order XXVI Rule 10 (a) CPC for getting the aforesaid land measured through survey knowing Pleader Commissioner in the aforesaid Appeal No. 12/96.

10. From perusal of the record, it appears that in the case under hand, learned Appellate Court appears to have remanded



the matter back to the court below to decide the issue of encroachment of the part of the suit land as detailed in Schedule 'B' by the defendant first party by giving opportunity to the parties to adduce evidence on the point of measurement and configuration of land claimed by them finding no scientific report or report of survey knowing Pleader Commissioner on record to enable the court to decide the aforesaid issue. It further appears that the M. Title Appeal No. 12 of 1996 was filed by the heirs of the defendant second party and not by the plaintiff. Aforesaid suit has been decreed in part regarding relief no.1 as claimed by the plaintiff against defendant second party and dismissed regarding relief of encroachment of the suit land allegedly made by defendant first party, but the plaintiff has not assailed the aforesaid judgment passed by the learned lower court turning down the aforesaid relief. It is not a partition case. As the aforesaid case of encroachment allegedly made by defendant first party has been turned down by the learned lower court and has not been assailed by the plaintiff, it has become final and it cannot be reiterated. But the Appellate Court wrongly and illegally reiterated the same and remanded the case to the court below for deciding the aforesaid issue by taking additional evidence on the said issue. It ought to have decided the appeal filed against the relief of gift deed granted in favour of the plaintiff on the basis of material and



evidence available on record.

11. Hence, in my considered opinion, aforesaid judgment and decree passed by the learned Appellate Court remanding the case to the court below is wrong and illegal and is accordingly set aside. Accordingly, this appeal stands allowed.

(Prakash Chandra Jaiswal, J)

Mishra/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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