

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.422 of 2009**

1. Brijlal Sahu, S/o Samaruram Sahu, aged about 75 years,

2. Mulchand S/o Brijlal Sahu, aged about 35 years,

All are R/o Village-Khapri, P.O.-Demar, Tahsil & Distt. Dhamtari (CG)

----- Appellants/Defendants

Versus

1. Tikaram Sahu, S/o Brijlal Sahu, aged about 45 years,

2. Abhayram Sahu S/o Brijlal, aged about 40 years,

3. Ramkrishna S/o Brijlal, aged about 35 years,

4. Swat Kumar Sahu, S/o Brijlal, aged about 27 years,

All are R/o Village-Khapri, P.O.-Demar, Tahsil & Distt. Dhamtari (CG)

-----Plaintiffs

5. State of Chhattisgarh Through-the Collector Distt. Dhamtari (CG)

6. Narayan Sahu S/o Brijlal Sahu, aged about 50 years, R/o Village-Khapri, P.O.-Demar, Tahsil & Distt. Dhamtari (CG)

-----Respondents

For Appellants/Defendants : Mr. Vivek Tripathi, Advocate
For Respondents: None present

Hon'ble Shri Justice Sanjay K. Agrawal
Order on Board

03/11/2020

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

"Whether the first appellate Court was justified in rejecting the application for condonation of delay holding that sufficient cause has not been shown for the delay of 90 days thereby dismissed the appeal by recording a finding which is perverse and contrary to the record ?"

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

2. The plaintiffs are sons of defendant No.1 and defendants No.2 and 3 are also sons of defendant No.1. The plaintiffs being sons of defendant No.1 filed a suit for declaration of title, partition and separate possession in which the present defendants proceeded ex-parte and ultimately, on 13.6.2006 ex-parte decree for partition and possession was passed in their favour and against the defendants. Since the defendants were ex-parte, they could not know about the passing of the decree and when they received the notice of Tahsildar of partition proceeding they applied for certified copy on 29.8.2006 which was received on 31.8.2006 and they preferred an appeal on 15.9.2008 with a delay of 90 days in preferring appeal and application for condonation of delay stating inter-alia that on account of being ex-parte and they could not know about the notice of suit, they could not prefer appeal right in time. The application was supported by affidavits of all three defendants before the first appellate Court. No counter

affidavit was filed controverting the statement made in the application for condonation of delay, but the first appellate Court held that since the date on which they received the notice of Tahsilar has not been mentioned in the application, therefore, no sufficient cause has been shown and held that sufficient cause has not been shown and accordingly, rejected the application for condonation of delay and consequently dismissed the appeal, against which, this second appeal under Section 100 of the CPC has been preferred by the appellants/defendants, in which substantial question of law has been formulated by this Court, which has been set-out in the opening paragraph of this judgment for sake of completeness.

3. Mr.Vivek Tripathi, learned counsel for the appellants/defendants, would submit that the first appellate Court went too technical in rejecting the application for condonation of delay as sufficient cause has been shown for not preferring the appeal within time. The first appellate Court ought to have condoned the delay in preferring the appeal as there is no counter-affidavit controverting the statement made in the application for condonation of delay, as such, the delay be condoned and the matter be remitted to the first appellate Court for deciding the appeal afresh.

4. None present for the respondents though served.

5. I have heard learned counsel for the appellants/defendants, considered his submissions made herein-above and also went through the records with utmost circumspection.

6. It is quite apparent from the record that the present defendants and the plaintiffs are closely related as the plaintiffs had filed a suit for partition against his father and two brothers. It is true that the defendants proceeded ex-parte and ex-parte decree was passed on 30.6.2006 and on coming to know of partition proceedings on notice issued by Tahsidlar they filed an application on 29.8.2006 for certified copy, which they received on 31.8.2008 and preferred an appeal on 15.9.2006, which has been held to be barred by 90 days by the first appellate Court.

7. It is well settled law the Courts should adopt an 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.

8. In the matter of N. Balakrishnan V. M. Krishnamurthy¹, 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 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.

¹ (1998) 7 SCC 123

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 SC749]."

9. Recently, the Supreme Court in the matter 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 the matter 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

² JT 2013 (2) SC 450

³ 2013 (4) B.L.J. 433

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.

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."

10. Reverting to the facts of the present case in the light of principle of law laid down by the Supreme Court in the above-stated judgments (supra), it is quite vivid that the defendants were ex-parte in the trial Court as according to them no summons were served to them. Their application for condonation of delay was supported by affidavits of all three defendants and there was no counter-affidavit controverting the statement made in the application. Therefore, no option was available to the first appellate Court to reject the application for condonation of delay in absence of counter-affidavit controverting the statement made in the application. Even otherwise, the defendants could not gain by remaining deliberately ex-parte in the suit which has been filed against them for partition and possession, therefore, the first appellate Court ought

to have accepted the reasons assigned in absence of counter-affidavit and there is no dispute with regard to the fact that on account of being ex-parte, they could not appear in the suit proceeding, as such, sufficient cause has been shown. The first appellate Court went wrong even not excluding 30 days' time as required for preferring appeal, as such, this delay is neither deliberate nor malafide on the part of the defendants.

11. Accordingly, delay in filing the appeal is condoned and dismissal of first appeal is set aside. The matter is remitted to the first appellate Court for deciding the appeal on merits. The first appellate Court shall decide the appeal within two months from the date of receipt of copy of this order.

12. The second appeal is allowed to the extent indicated hereinabove. Records be sent to the first appellate Court forthwith. No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-