

19.9.2022
34
Ct. no. 652
sb

**C.O. 1979 of 2019
with
CAN 1 of 2022**

**Sajahan Sipai
Vs.
Sahajan Mallick**

Mr. B.P. Mondal
Mr. Sukanta Mondal ...for the petitioner

Mr. Chitra Ranjan Chakraborty
Mr. M. Rahaman ...for the opposite party

This is an application under Article 227 of the Constitution of India against an order dated 2.2.2019 passed by the learned District Judge, Nadia in Misc. appeal no. 11 of 2017 by affirming the order no. 34 dated 19.4.2017 passed by the learned Civil Judge, Junior Division, 1st Court, Krishnangar, Nadia in Misc. case no. 13 of 2014 arising out of a judgment and decree dated 24.9.2012 passed by the said court.

The plaintiff/opposite party filed title suit no. 159 of 2009 before the learned Civil Judge, Junior Division, 1st Court, Krishnangar, Nadia against the defendant/petitioner herein for eviction and khas possession.

The petitioner contended that in the first part of 2005 the petitioner/defendant herein requested the

plaintiff/decreed holder to allow him to live in the two rooms lying vacant in the suit property and such request was accepted by the plaintiff/opposite party. While the defendant/petitioner was enjoying such permissive possession of the said property, he expressed his intention to the plaintiff/opposite party to purchase the suit property and in terms of written agreement dated 17.11.2005, the defendant/petitioner was to pay a total consideration of Rs. 1 lakh and he paid Rs. 5000/- as an advance to the petitioner and the remaining sum of consideration of Rs. 95 thousand was to be paid on or within 17.4.2006 to complete the performance of contract. On 30.12.2005, the petitioner paid a sum of Rs. 20000/- but the remaining amount was not paid in spite of request on several occasions and accordingly lawyer's notice was served on 14.5.2007 informing him about revocation of licence and also asking him to deliver vacant possession but in spite of receipt of notice the petitioner did not vacate the suit premises nor had given any reply to such notice. The agreement for sale has got no existence in the eye of law at present. Accordingly the opposite party filed suit for eviction and the petitioner received the summon of said suit and he appeared and had taken time for filing written statement. Subsequently the petitioner did not take any step and for which the suit was posted for ex parte hearing and ultimately the

suit was decreed ex parte on 24.9.2012 against the petitioner.

The petitioner filed an application for setting aside the ex parte decree which was registered as misc. case no. 13 of 2014 under Order IX Rule 13 read with Section 151 of the Civil Procedure Code and an application under Section 5 of the Limitation Act was also filed for condonation of delay.

Learned Civil Judge, Junior Division, 1st Court, Krishnangar, Nadia was pleased to take up the said application under Section 5 of the Limitation Act in connection with said misc. case no. 13 of 2014 under Order 9 Rule 13 of the Civil Procedure Code but learned trial court had rejected the prayer for condonation of delay and as such the petition under Section 5 of the Limitation Act and as a consequence Misc. case under order IX rule 13 were dismissed. Having no other alternative, the petitioner/appellant filed Misc. appeal no. 11 of 2017 before the District Judge, Nadia and learned District Judge, Nadia by passing the impugned order was affirmed the order passed by learned trial court.

learned counsel for the petitioner submits that sufficient reason was prevented from filing the Misc. Case before the court in time but without appreciating the same, learned trial court and the first appellate court have rejected his prayer for condonation of delay.

Plaintiff's suit was initially dismissed for default and petitioner's advocate instructed him that no further step need be taken as suit has been dismissed. However on the basis of plaintiff's application under order IX rule 4 of the Code, suit was restored, subsequently but such notice of restoration was not given to petitioner herein and subsequently suit was decreed ex parte on 24.9.2012. Defendant was not aware of such ex parte decree and defendant came to know about ex parte decree on 13.12.2013 and then they filed the Misc. case under Order IX rule 13. Both the courts below misconstrued the object of exhibit-B produced by the opposite party. In such circumstances, the petitioner had prayed for condonation of delay and for restoration of original Misc. case no. 13 of 2014 in its original file.

Learned counsel on behalf of the opposite party submits that it is true that suit was initially dismissed on 7.6.2010 but it was restored subsequently and ultimately decreed ex parte on 24.9.2012. It is not correct to say that defendant/petitioner came to know about the ex parte decree on 13.12.2013. in fact on 31st July, 2013 defendant/petitioner approached before District Legal Service Authority, when a copy of ex parte decree was supplied to him and in the impugned order same has been mentioned as Exhibit B and said proceeding before District legal Service Authority was dropped on 19.8.2013. So petitioner had gathered

knowledge about ex parte decree much before 13.12.2013, but he had not taken any legal step within statutory period for setting aside ex parte decree.

Learned counsel for the opposite party further submits that the petitioner is possessing the property in question without paying a single furthering. The petitioner actually wants to remain in possession without paying any occupational charge to the opposite party/owner. He further contended that both the courts below rightly held that there is no cogent ground for the petitioner that he was being prevented by any sufficient cause for not filing the petition for vacating ex parte order in time and as such there is no scope for setting aside the order impugned.

It appears that both the courts below have relied upon Exhibit B and placing reliance on Exhibit B, it is apparent that within thirty days of knowledge of ex-parte decree, defendant/petitioner has not filed misc. case under Order IX rule 13 of Civil Procedure Code, though learned counsel for the petitioner has his explanation as to why said misc. case could not be filed in time.

However considering the facts and circumstances of the case, when the defendant wants to press the misc. case and if opposite party after being compensated by adequate cost, the dismissal order is set aside in order to give opportunity to defendant/petitioner to place his case for setting aside ex-parte decree, the highest prejudice

that may cause to plaintiff/opposite party would be that the case would be disposed of on merit after contested hearing once for all and nothing more. In that context, reliance has been placed upon **AIR 1987 SC 1353 (Collector, Land Acquisition, Anantnag & Another Vs. Katiji & Others)** where a liberal approach was adopted on principle as it is realized that :-

“1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. “Every day's delay must be explained” does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”

In view of above, and taking a justice-oriented approach the impugned order dated 2.2.2019 passed in misc. appeal no. 11 of 2017 is hereby set aside on condition of payment of cost of Rs. 50000/- to be paid by the petitioner to the opposite party. On being such payment of Rs. 50000/- by the petitioner in favour of the opposite party within a period of 12 weeks from the date of communication of the order, the misc. case no. 13 of

2014 shall be admitted in its original file for hearing. if such restoration happens plaintiff/opposite party will submit a written objection, if any, within a period of four weeks from the date of restoration and the court below will dispose of the entire proceeding being Misc. case no. 13 of 2014 within a period of one year from the date of such restoration. In the event of non-payment of cost as above by the defendant/petitioner within specified period, the order impugned shall get affirmed.

Accordingly, C.O. 1929 of 2019 is disposed of and the application CAN 1 of 2022 is also disposed of.

Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)