

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.182 of 2010

Sri Nityananda Naik & Others ***Appellants***
Mr.M.K. Pati
S.B. Satpathy, Advocates

-versus-

Smt. Shantilata Bewa @ Nayak & Another ***Respondents***
Mr.C.R.Pattanaik
Mr.S.C. Pati,
Advocates

CORAM:
MR. JUSTICE D.DASH

ORDER
22.02.2022

Order
No.

24. 1. This matter is taken up through Hybrid Arrangement (Virtual/Physical Mode).
2. The Appellants, by filing this Appeal under section 100 of the Civil Procedure Code (for short, 'the Code'), have assailed and order dated 31.03.2010 passed by the learned District Judge, Balasore in RFA No.15 of 2006.

These Appellants being aggrieved by the final decree passed on 06.08.2004 in T.S. No.393 of 1998-I on the file of the learned Additional Civil Judge, Senior Division, Balasore had filed the above noted Appeal under Section 96 of the Code. Said Appeal having not been filed within the period of limitation but after lapse of two years, an application under section 5 of the Limitation had been filed for condonation of delay while presenting the Memorandum of Appeal.

By the impugned order, the First Appellate Court has rejected said application under Section 5 of the Limitation Act and thereby has refused to condone the delay and admit the Appeal for its hearing on merit.

3. The Appeal has been admitted on the following substantial question of law:-

“Whether the Lower Appellate Court, in the facts and circumstances of the case, has committed grave error by refusing to condone the delay in filing the Appeal and thereby rejecting the application under section 5 of the Limitation Act ignoring the settled principle of law holding the field that in such matters the courts should take liberal view as a party by approaching the court late does not thereby gain in any way?”

4. Learned counsel for the Appellants submitted that in the facts and circumstances concerning the litigation running from the date of institution of the suit till its culmination in passing the final decree as also those peculiar circumstances concerning the parties and the situations coming up; learned First Appellate Court ought not to have approached the matter pedantically and rather taking a liberal view of the matter keeping in mind that these Appellants have nothing to gain by their approach to the Court late, ought to have allowed the application and condoned the delay in filing the same.

Learned counsel for the Respondents, placing the happenings right from institution of the suit before the Trial Court till end therein and thereafter till presentation of the Memorandum of Appeal, submitted that the Lower Appellate Court is right in not delay the matter on hand liberally as according to him in the case,

the Appellants had not approached the learned First Appellate Court in carrying the Appeal against the final decree with clean hands and with an oblique view and intent to drag on the matter as long it can be to the utter harassment and sufferings of the Respondents.

5. Keeping in view the submissions; I have read the impugned order as also available records.

6. The present Appellants are the Defendant Nos.2, 3 and 5 and the legal representatives of Defendant No.4. The Respondents are the Plaintiffs. The suit had been filed for partition seeking the preliminary decree by way of allotment of share to the parties over the properties described in Schedule-Kha of the plaint.

The Defendants being noticed had filed their written statement. However, subsequent thereto, for quite a long period they did not turn up in order to participate in the hearing for which lastly on 09.08.2002, they being set ex parte, the suit was accordingly heard and disposed of on 11.10.2002 whereby a preliminary decree declaring 1/6th share of the Plaintiffs over the suit Schedule-kha property was passed.

The Defendants thereafter having allowed that preliminary decree to be made final, on 06.08.2004 have filed the Appeal challenging the same on merit on 03.02.2006.

Perusal of the impugned order reveals that on verification of the entire record, the lower Appellate Court at its level, has found that at every stage of the proceeding in the Court below, these Appellants were several times noticed and on those occasions, they intentionally did not participate in the final decree

proceeding and knowing fully about the passing of the same did not file the Appeal in time and long thereafter on initiation of the execution case wherein they had also filed an application under section 47 of the Code.

The settled principle stands that in the matter of condonation of delay, the courts normally take a liberal view so as to lean in favour of recording of a decision on merit. But it goes without saying with a rider that a party cannot be allowed to take undue advantage. The Court when is satisfied that the intent of the party seeking condonation is oblique so as to drag on the litigation at any cost. This is to balance the sufferings of the adversary which certainly stands for consideration at the equal footing that undue advantage is not taken by the party in fulfilling the oblique goal in perpetrating mischief. On a careful consideration of the submissions advanced and on going through the impugned order as well as the judgment passed by the Trial Court in T.S. No393 of 1998-I, taking into account the facts and circumstances and the conduct of the Appellants throughout, this Court is of the view that the substantial question of law as framed be answered against these Appellants-Defendants in saying that the lower Appellate Court did commit no such error in rejecting the application under section 5 of the Limitation Act and refusing to condone the long period of delay of about two years and accordingly it is answered.

11. Resultantly, the Appeal stands dismissed. No order as to costs.

***(D. Dash),
Judge.***