

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS**

F.A.T No. 61 of 2019

C.A.N. 1 of 2019

C.A.N. (OLD) 1474 of 2019

IA No : CAN 2 of 2022

**Bhagabati Mondal (since Deceased)
Dwipchand Mondal & Ors
Vs.
Sri Ram Hari Mondal**

For the petitioners	:Mr. Debasish Roy, Adv. Mr. Srinjoy Sengupta, Adv. Mr. Saurav Roy, Adv. Mr. Narottam Acharyya, Adv. Mr. Ankush Ghosh, Adv.
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For the respondent	:Mr. Ramdulal Manna, Ms. Manju Manna (Dey), Mr. Sayan Mukherjee,
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Judgment on	:13.09.2023
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Prasenjit Biswas, J:-

1. This instant appeal has been preferred by the appellants challenging the impugned order No. 104 dated 26th February, 2013 passed by the learned Additional District Judge, First Track Court Malda in

connection with Misc. Probate Case No. 20 of 1996. There is inordinate delay in filing this instant appeal.

2. It is submitted on behest of the appellants that the aforesaid Probate Case was taken for first time on 19th May, 1996 and on that day learned Trial Court directed the respondent herein to serve notice upon opposite parties to the case. Since long notices were not served upon the opposites parties/appellants (herein), direction was passed by the learned Trial Court to take appropriate steps for causing service of notice. Thereafter, Opposite Party No. 5 Sashi Bala Mondal was served with the notice and she appeared before the Court on 24th January, 2006 through her learned Advocate by filing Vakalatnama. Opposites Parties Nos 1 to 4 were also served with the notices and they appeared on 14th January, 2008 and prayed for filing written objection which was allowed by the learned Court below fixing next date of the case on 26th June, 2008.

3. On the said date the opposite party again prayed for time by filing petition and the said petition was rejected by the learned Trial Court fixing the date for exparte hearing. On 24th April, 2008 as no step was taken on behalf of the opposite parties, again date was fixed by the Trial Court for exparte hearing.

4. On 10th December, 2009 none appeared on behalf of the appellants despite repeated call and as such the Probate Case was dismissed for default. Thereafter, upon an application under Order 9 Rule 4 of the Civil Procedure Code by the Opposite Party case was restored on 5th February, 2010 by the trial court. On 13th September, 2010, the learned District Judge, Malda, directed that the matter to be transferred to the 1st Court of Learned Additional District Judge, First Track Court, Malda. The date was fixed on 7th December, 2010 but on the date none appeared on behalf of the respondent and as a result the case was again dismissed for default and thereafter on the strength of a petition filed by the respondent under Order 9 Rule 4 of

the CPC the matter was again restored, fixing date on 11th January 2011 for ex-parte hearing.

5. It is the specific averment on the part of the appellant that they could only know about the order dated 26.02.2013 passed by the Trial Court in connection with misc case No. 20/96 (probate) on 2nd February, 2019 as disclosed by the respondent in connection with another case. Thereafter, this appellant took step to file this instant appeal and accordingly the same has been filed causing delay of 865 days which is totally unintentional and there is no deliberate lapse/negligence on their part for preferring this appeal on late.
6. The above submission as advanced on behalf of the appellant was denied by this respondent by stating that the appellants did not explain the period of delay caused in preferring appeal after the Order passed on 26th February, 2013 and in view of such one can easily presume that the instant application filed by the appellant is suffering from material suppression of facts and there is unexplained delay in preferring the appeal and as such the same may be dismissed outright.
7. Our attention is drawn by the Learned Counsel on behalf of the respondent that from Order No. 103 dated 12.02.2013 it would reveal that this appellant filed hazira in the Probate Case on 26.02.2013 and after that date was fixed for taking evidence of the opposite party/respondent. It is further submitted on behalf of the respondent that both in application under Section 5 of the Limitation Act and the supplementary affidavit are far from truth and the same is made in order to distort the facts of the case and as such this appellant has not come before this Court with clean hands.

8. We have considered the rival submissions advanced by both the parties.
9. It is profitable to quote the observations made by the Hon'ble Apex Court in case of ***Lanka Venkateswarlu(Dead) by LRs. Vs State of Andhra Pradesh and Others*** reported in **(2011) 4 SCC 363**.
10. In the above referred case Hon'ble Court observed that the courts in the country, including the Supreme Court, adopt a liberal approach in considering the application for condonation of delay on the ground of sufficient cause under Section 5 of the Limitation Act. However, the concepts such as "liberal approach"," justice oriented approach", "substantial justice" cannot be employed to jettison the substantial law of limitation. Especially, in cases where the court concludes that there is no justification for the delay. Whilst considering application for condonation of delay under Section 5 of the Limitation Act, the courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of the property. Justice must be done to both parties equally.
11. It has been observed by the Hon'ble Apex Court in case of ***Maniben Devraj Shah vs Municipal Corporation of Brihan Mumbai*** reported in **(2012) 5 SCC 157** at paragraphs 14 and 15 interalia that-

“14. We have considered the respective arguments / submissions and carefully scrutinized the record. The law of limitation is founded on public policy. The Limitation Act, 1963 has not been enacted with the object of destroying the rights of the parties but to ensure that they approach the Court for vindication of their rights without unreasonable delay. The idea underlying the concept of limitation is that every remedy should remain alive only till the expiry of the period fixed by the Legislature. At the same time, the Courts are empowered to condone the delay provided that sufficient cause is shown by the applicant for not availing the remedy within the prescribed period of limitation.

15. The expression “sufficient cause” used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the Courts to apply the law in a meaningful manner which serve the ends of justice. No hard and fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years this Court has advocated that a liberal approach should be adopted in such matters so that substantive rights of the parties are not defeated merely because of delay.”

12. We are not unmindful that even after sufficient cause has been shown a party is not entitled to the condonation of delay as a matter of right. The proof of a sufficient cause is a condition precedent for exercise of the discretionary jurisdiction vested in the Court by Section 5. We are also of the opinion that if sufficient cause is not proved anything further has to be done and the application for condonation of delay has to be dismissed on that ground alone but if sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay.

13. So, we find that the words “sufficient cause for not making the application within period of limitation” should be understood and applied in a reasonable, pragmatic, practical and liberal manner, depending upon the facts and circumstances of the case and the type of the case. The words

sufficient cause in Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice, when the delay is not on account of any dilatory tactics, an want of bona fides, deliberated in action or negligence on the part of the appellant. The explained delay should be clearly understood in contradistinction to inordinate unexplained delay.

14. On analysis of the above principles we now revert to the merits of the application in hand. It appears from the materials on record that the appellant herein entered appearance in the suit before the Trial Court through his Leaned Advocate by filing Vakalatnama and prayed for filing objection against the petition for getting order of probate. Thereafter as the respondent herein did not take any step it was dismissed for default on 10th December, 2009 and thereafter it was restored on 5th February, 2010 on the basis of the application filed by the respondent. It is further lighted that the said Probate Case was again dismissed on 7th December, 2010 and again restored on 11th January, 2011 on the application filed by the respondent herein. It further appears from the order-sheet of the Trial Court that on 12th February, 2013 the appellant herein appeared in the probate proceeding by filing hazira and after hearing both sides the learned Trial Court closed the evidence of the respondent and fixed 26th February, 2013 for taking evidence of the appellant (herein). But it is quite astonishing that in spite of the order dated 12th February, 2013 the appellant did not appear in the case and also did not adduce any evidence and accordingly, probate has been granted by the learned Trial Court on 26th February, 2013 (vide order no. 104).

15. So, by no stretch of imagination it can be said or presumed that the appellant herein had no knowledge of the said probate proceeding after dismissal of the same on 7th December, 2010. On the contrary it is further appeared that this appellant filed hazira on 12.02.2013. This appellant filed hazira on the said date and after closing of evidence of the respondent herein the next date was fixed for adducing evidence on the part of this appellant but he did not venture to avail the said opportunity and accordingly, impugned order was passed by the learned Trial Court.

16. As we have already stated that except a vague averment that the appellants were not aware about the pendency of the probate proceeding before the Trial Court, there is no other justifiable reason stated in the application praying for condonation of delay. We have no hesitation to hold that the application does not contain correct and true facts and it is want of bona fides, it is imputable to the applicant. There is also no other reason or sufficient cause shown as to the steps taken by this appellant even after coming to know on the date when the evidence of the appellant was closed by the trial Court in their presence. We find that it is an abnormal conduct on the part of the appellant who was present at the date of hearing i.e. 12.02.2013 and was fully aware of the proceeding but did not take appropriate steps in that case and now they took the plea that he was not aware about the proceeding of the probate case. It is stated by the appellant that he could only know about the said order dated 26.2.2013 passed by the Trial Court when it was disclosed by the respondent in connection with another case, we are unable to accept this plea taken by the appellant. The cumulative effect of all this circumstances is that the appellants have miserably failed in showing any sufficient cause for condonation of delay of 865 days in preferring this present appeal.

17. It is true that the legislature has conferred the power to condone the delay by enacting Section 5 of the Indian Limitation Act in order to enable the Court to do substantial justice to the parties by disposing of the matter on merit but it is also equally true that by taking advantage of the said provision one cannot be allowed to deprive the other side and frustrate the very purpose of disposal of such type of cases within the stipulated period. Appellants have failed to show the sufficient cause in not preferring the appeal within the stipulated period. The ground of delay of such long period in preferring the appeal, as we have already stated earlier is not at all satisfactory and as such question of condonation of the same does not arise. This Court is not unmindful of the fact that an application U/s 5 of the Limitation Act is to be interpreted liberally but that does not amount that the

petitioners will get walk over just by filing one application U/s 5 of the Limitation Act. The appellant has not explained the delay by submitting cogent reasons. The explanation is very vague in nature and made in a casual manner.

18. We are tempted to reproduce the following observation of the Hon'ble Apex Court in case of ***P.K. Ramachandran Vs. State of Kerala and Another*** reported in **(1997) 7 SCC 556**.

19. In above referred case of ***P.K. Ramachandran (supra)*** Hon'ble Court observed at paragraph 6 interalia that "Law of limitation may harshly affect a particular party but it has to be applied with all its rigor when the statute so prescribes and the Courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the delay cannot be sustained. This appeal, therefore, succeeds and the impugned order is set aside. Consequently, the application for condonation of delay filed in the High Court would stand rejected and the Miscellaneous First Appeal shall stand dismissed as barred by time. No costs."

20. In this case, it is difficult to fathom any logic or rationale which can impel this court to condone the delay after holding the same to be justifiable. Thus, the application being CAN 1/2019 (CAN (OLD) 1474 of 2019) filed by the appellant praying for condonation of delay in preferring this instant appeal does not survive for consideration and accordingly, it is dismissed.

21. Accordingly, the instant appeal filed by the appellant challenging the impugned order dated 26thFebruary, 2013 passed by the learned Trial Court is hereby dismissed as time barred and also sans merit.

22. Consequently, the application being CAN No. 2 of 2022 praying for stay of the operation of the impugned order dated 26.02.2013 passed in Misc. (Probate) Case No. 20 of 1996 passed by the learned trial court is hereby also dismissed as disposed of.

23. There shall be, however, no order as to costs.

24. Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)