

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

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**C.O. 718 of 2019
Amiya Biswas & Ors.
Vs
Madanlal Adhikary & Anr.**

For the petitioners : Mr. Buddhadev Ghosal
Mr. Udayan Dutta

Heard on : 03.08.2023

Judgment on : 17.08.2023

Ajoy Kumar Mukherjee, J.

1. This is an application under Article 227 of the Constitution of India preferred against order dated 11th January, 2019, passed in Misc. Appeal No. 34 of 2018. Petitioner contended that the opposite party herein as plaintiff filed a suit which was decreed exparte on 10.12.2007. The petitioner herein being defendant in that suit, filed an application for setting aside the exparte decree along with an application under section 5 of the Limitation Act, 1963, seeking condonation of delay in filing the said application for setting aside the exparte decree. Learned Trial Court refused the prayer made by the petitioner seeking condonation of delay.

2. Being aggrieved by that order petitioner herein preferred aforesaid Misc. Appeal No. 34 of 2018. The Appellate Court by the impugned

judgment dated 11.01.2019 affirmed the order dated 08.01.2018 passed by the Trial Court.

3. In spite of service of notice the opposite party is not represented.

4. Mr. Ghosal learned counsel appearing on behalf of the petitioner submits that the plaintiff/opposite party no.1 herein filed aforesaid suit *inter alia* for declaration and injunction being Title Suit No. 163 of 1993. The said suit was decreed on 10.12.2007. The petitioner prayed for setting aside the exparte decree along with an application under section 5 of the Act of 1963. The petitioner contended that he for the first time came to know about exparte decree on 05.11.2009 and the prayer for setting aside the exparte decree was filed on 25.11.2009. The petitioner's further case is that he has given explanation for delay for the period from 10.12.2007 to 25.11.2009. The explanation given in two fold way i.e. communication gap with Advocate and secondly prolonged illness of petitioner's mother leading to her death, which prevented him for attending the court for taking steps on the stipulated date. Petitioner submits, unfortunately both the courts below refused to accept the explanation given by the petitioner and were pleased to reject the prayer for condonation of delay. The petitioner further submits that his mother was suffering from demnesia and ultimately expired on 25.04.2009 after prolonged illness and he has also filed medical documents in support of the same. Accordingly petitioner has contended that both the courts below without any sufficient cause and without assigning any cogent reason have rejected petitioner's explanation. Petitioner therefore has prayed for setting aside the orders impugned and for condonation of delay in filing

application under order IX rule 13 C.P.C, so that such application can be disposed of on merit.

5. I have gone through the order impugned and the application filed by the petitioner in respect of his prayer for condonation of delay. In the said application, the petitioner has contended that the petitioner regularly attended in the advocate's chamber. In the month of November, 2007 their advocate advised not to come to court regularly and when they will be required to come, learned advocate will inform them. Petitioners further contended that their mother became seriously ill and they have tried their level best for treatment of their mother by different doctors but ultimately she died on 25.04.2009. They further contended that due to death of their mother the petitioners were shocked and on 05.11.2009 when one person of opposite party's camp delivered a copy of judgment, the petitioner got surprised and at once made contact with their advocate, who advised to file the aforesaid application. He further stated that petitioner had no wilful latches or negligence in attending the court proceedings.

6. It appears from order impugned that the court below recorded in the order dated 03.03.2006 that the defendant is not taking steps since long. Further the order dated 23.07.2007 reflects that the defendant is found absent on repeated call. On 10.12.2007, the suit was disposed of exparte. Learned court below quoted evidence of PW-1 and contended that the witness stated that the mother of the petitioner became ill in 2003 to 2004 and there is no document to show that at the relevant point of time i.e. in the year 2007 the mother of the defendant got seriously ill. Moreover the petitioner has not examined the concerned doctor who has issued certificate

about illness of the mother of the petitioner and as such the doctor's certificate has not been proved and the documentary evidence as filed by the petitioner failed to satisfy the court that mother of the petitioner was ill at the relevant point of time for which, the petitioner could not file the application under order IX rule 13 for setting aside the exparte decree in time.

7. Having considered the facts and circumstances of the case it appears that both the courts below have swayed away by the petitioners' alleged past conduct. It is accepted law that at the time of hearing of an application for restoration of a case after setting aside the order of dismissal for default, the court is required to examine the explanation given in the application for restoration and if said application is found to be plausible and acceptable then the court should restore the case, even if the petitioner was guilty of latches on earlier occasions.

8. In ***Ram Nath Sao Vs. Gobardhan Sao and others*** reported in **(2002) 3 SCC 195** it was held by the Apex Court in paragraph 12,13

“12. Thus it becomes plain that the expression “sufficient cause” within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. In a particular case whether explanation furnished would constitute “sufficient cause” or not will be dependent upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over-jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal, an exception, more so when no negligence or inaction or want of bona fides can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine-like manner. However, by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable

injury to the party against whom the lis terminates, either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.”

9. In the present case from the explanation given by the petitioner it appears that it does not smack of *malafide* nor there is anything which shows that such application was put forth as a part of dilatory strategy. In fact even if there is some lapses on the part of the petitioner in not filing the application in time but that alone should not shut the door against the petitioner, as it would then completely non-suit him. In fact it has been held time and again that in such cases the court should not proceed with a tendency of finding fault with the cause shown and reject the petition by slipshod order in over jovilation of dismissal drive. Acceptance of explanation furnished should be the rule and refusal an exception. More so when no intentional negligence or inaction or *malafide* can be imputed to the defaulting party, [Re: **Ramnath Shaw (supra)**]. In fact the expression sufficient cause used in section 5 should be considered with pragmatic and justice oriented approach rather than the technical detection of sufficient cause for explaining every days delay.

10. In the interest of justice and under the circumstances of the case I am inclined to set aside both the orders impugned, as the delay in filing the application for setting aside exparte decree is liable to be allowed.

11. C.O. 718 of 2019 is accordingly allowed. The order impugned dated 08.01.2018 and 11.01.2019 are hereby set aside and delay in filing the application for setting aside the exparte decree is hereby condoned. Learned

court below is directed to dispose of petitioner's application under order IX rule 13 of C.P.C. preferably within the period of 12 weeks from the date of communication of the order.

12. There will be no order as to the costs.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)