

22.08.2023
Court No. 19
Item No.20
CP

C.O. 685 of 2023

Pradip Kumar Pal

Vs.

Smt. Shibani Pal

Mr. Amal Krishna Saha

Mr. Debnath Mahata

...for the petitioner.

Despite service of the revisional application and subsequent service of notices upon the opposite party, none appears. The notices and the affidavit of service are taken on record.

The question here is whether the learned Additional District Judge, Fast Track Court, Suri could have rejected the application for condonation of delay in filing the Misc. Case No. 8 of 2022, on a technical ground.

Misc. Case No. 75 of 2019 was an application for maintenance pendente lite filed by the wife in the husband's suit for restitution of conjugal rights being Matrimonial Suit No. 148 of 2019. The said suit was dismissed for default and the application for maintenance pendente lite was decreed ex parte.

The husband filed two applications – one for restoration of the suit and the other for setting aside of the ex parte order passed in Misc. Case No. 75 of 2019.

According to the husband, due to his father's demise in March, 2022 and the mental condition of the widowed mother who was also suffering from various ailments, he could not contact his learned advocate. Such inability, resulted in dismissal of his suit. The husband was not in his proper frame of mind to take steps in the suit. The suit was dismissed for default on September 6, 2022 and the Misc. Case No. 75 of 2019 was allowed, ex parte on the same date. The husband came to know about the said dismissal of his suit and the consequent ex parte order of maintenance around November 4, 2022, when the wife put the order passed in Misc. Case No. 75 of 2019 into execution and summons were served.

There was a delay of 107 days in filing Misc Case No.8 of 2022. The learned court below rejected the application on the ground that the petitioner had made an averment that the misc. case No.75 of 2019 had been dismissed for default on September 6, 2022.

This court, upon perusal of paragraphs 1, 2 and 3 of the application under Section 5 of the Limitation Act, finds that sufficient explanation had been given as to why the Misc Case No.8 of 2022 was filed belatedly.

A mistake in the pleading that Misc. Case No. 75 of 2019 had been dismissed for default, should not have been a ground for rejection of the application under Section 5 of the Limitation Act, when there was enough material for the court to come to the conclusion that the delay in filing the Misc. Case No. 8 of 2022 had been sufficiently explained and the delay was not caused due to lack of diligence or bonafide.

The medical papers and the documents with regard to the mother's illness and father's death were also before the court, which were also considered. Thus the rejection of the application under Section 5 of the Limitation Act only on the ground of a technical defect in the pleading, will result in very harsh consequences, to the detriment of the petitioner.

When there is reasonable explanation for the delay, the same should be condoned. Reference is made to the decision of **Ram Nath Sao v. Gobardhan Sao**, reported in **(2002) 3 SCC 195**. The Apex Court laid down the principles relating to condonation of delay in paragraph 10 of the decision, which is quoted below:-

“10. In the case of N. Balakrishnan v. M. Krishnamurthy [(1998) 7 SCC 123] there was a delay of 883 days in filing application for setting aside ex parte decree for which application for

condonation of delay was filed. The trial court having found that sufficient cause was made out for condonation of delay, condoned the delay but when the matter was taken to the High Court of Judicature at Madras in a revision application under Section 115 of the Code, it was observed that the delay of 883 days in filing the application was not properly explained and it was held that the trial court was not justified in condoning the delay resulting in reversal of its order whereupon this Court was successfully moved which was of the view that the High Court was not justified in interfering with the order passed by the trial court whereby delay in filing the application for setting aside ex parte decree was condoned and accordingly order of the High Court was set aside. K.T. Thomas, J., speaking for the Court succinctly laid down the law observing thus in paras 8, 9 and 10 :

8. The appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.

.....

10. ***

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause."

.....

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 v. Kuntal Kumari [AIR 1969 SC 575 : (1969) 1 SCR 1006] and State of W.B. v. Administrator, Howrah Municipality [(1972) 1 SCC 366] .

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses."

The law is well-settled that each day's delay is not required to be explained. When substantial justice and technical considerations are pitted together, cause of substantial justice would be preferred. Reference is made to the decision of *Collector (LA), Anantnag and Anr. v. Mst Katiji and Ors., reported in (1987) 2 SCC 107*, the Hon'ble Apex Court held as follows:-

"3. The legislature has conferred the power to condone delay by enacting Section 5 [Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.] of the Indian Limitation Act of

1963 in order to enable the courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice — that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is 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."

The delay of 107 days is not that inordinate,

The revisional application is allowed. The order impugned is set aside.

The delay in filing the Misc. Case No. 8 of 2022 is condoned. The learned court below is directed to decide the Misc. Case No. 8 of 2022 on its own merits, upon giving the wife every opportunity to contest the same by filing her written objection if not already filed. The merits of the Misc. Case No. 8 of 2022 has not been gone into and the learned court below shall decide the same on its own merits.

The revisional application is accordingly disposed of.

There shall be no order as to costs.

Parties are to act on the server copy of this order.

(Shampa Sarkar, J.)