

18.07.2023
Court No. 19
Item no.53
CP

C.O. 1205 of 2023

Sri Partha Nandi alias Partha Nandy & anr.
Vs.
Sri Pravat Kundu

Mr. Ayan Banerjee
Mr. Soumo Chaudhury
Ms. Debasree Dhamali

.....for the petitioners.

Mr. Kajal Ray
Mr. Suman Nandi

.....for the opposite party.

The revisional application has been filed challenging an order dated March 13, 2023, passed by the learned Additional District Judge, Fast Track Court, Chandannagar, Hooghly in Misc. Appeal No. 06 of 2018, affirming an order dated February 2, 2018, passed by the learned Civil Judge (Junior Division), 1st Court, Chandannagar in Misc. Judicial Case No. 138 of 2015.

The petitioners are aggrieved because the application for condonation of delay in filing the application under Order 9 Rule 13 of the Code of Civil Procedure had been rejected by both the learned courts below.

The plaintiff/opposite party filed a suit before the learned Civil Judge (Junior Division), 1st Court at Chandannagore being Title Suit No. 46 of 2013 for a

decree of recovery of khas possession, mesne profits etc, against the petitioners. The petitioners entered appearance in the suit by filing a vokalatnama and, thereafter, did not take further steps. The suit was fixed for ex parte hearing and thereafter decreed ex parte on June 27, 2014.

It is the contention of the petitioners that the factum of passing of the ex parte decree came to the knowledge of the petitioners on August 13, 2015, when the petitioners heard rumours from a local digital news channel that the suit had been decreed ex parte.

Thereafter, the petitioners filed an application under Order 9 Rule 13 praying for setting aside of the ex parte decree on August 17, 2015, i.e. within four days from the alleged date of knowledge along with an application under Section 5 of the Limitation Act for condonation of delay in filing the application under Order 9 Rule 13 of the Code of Civil Procedure.

The ground for delay as explained, was that after receiving the summons of the suit, the petitioners met the opposite party. The petitioners were told that the suit was only a threat to ensure repayment of the loan amount and the opposite party would not proceed with the suit.

According to the petitioners, the time for repayment of the loan amount as per the alleged

agreement entered into between the parties had not expired when the suit had been filed. Thus, believing the opposite party, the petitioners stopped taking steps in the suit. Ultimately, a negotiation had taken place between the opposite party in the presence of the learned advocate of the petitioners.

The learned Trial Judge rejected the application for condonation of delay upon dealing with the merits of the application under Order 9 Rule 13 of the Code of Civil Procedure. It appears that on the point of delay, the learned trial court found that the contention of the petitioners that a negotiation had taken place in the presence of the advocate was not established. The PW1 had admitted in the cross-examination that he had not visited the chambers of the learned advocate.

The petitioners preferred an appeal being Misc. Appeal No. 6 of 2018 before the learned Additional District Judge, Fast Track Court, Chandannagar, Hooghly. The Additional District Judge upheld the order of the learned Trial Judge and rejected the application under Section 5 also considering the merits of the order.

Mr. Ray, learned advocate appearing on behalf of the opposite party, submits that the orders impugned have been correctly passed. That the petitioners were only trying to delay the suit and

deprive the opposite party from enjoying the property and the fruits of the decree.

It appears that evidence was adduced. The PW-1 stated that the delay in filing the application under Order 9 Rule 13 of the Code occurred only because the opposite party had misled the petitioners into believing that they would not take any steps in the suit and the suit was only filed as a threat for repayment. It was further stated that there was a talk of negotiation between the parties in the presence of the learned advocate and the petitioners did not keep track of the suit.

In the cross-examination, the, PW-1 stated that he had not gone to the chambers of the advocate, Ashim Kr. Chatterjee. On such statement alone, the factum of negotiation and the allegation of being misled by the opposite party to the effect that no further steps would be taken in respect of the suit, was disbelieved by the learned courts below.

This court is of the view that the said factor should have been taken into consideration while deciding the issue of condonation of delay. The ground for the delay has been explained. The parties were negotiating and the petitioners on the assurance that no further steps would be taken in the suit, did not take steps in the suit. It is a plausible explanation. Such explanation has also

been stated in the affidavit-in-chief by the PW-1. The learned court below disbelieved the PW-1 on the ground that he had stated that in his cross-examination that he had not visited the advocate's chamber. In my view, the standard of proof in deciding an application for condonation of delay and an application under Order 9 Rule 13 of the Code are different. The learned Courts proceeded to decide the application under Order 9 Rule 13 of the Code, itself, instead of deciding the issue of condonation. Hence a rather harsh and strict approach was adopted by the learned Courts. A liberal approach ought to have been adopted in this case as the pleadings indicate that the parties were known to each other and in villages, talk of negotiations and amicable settlement of disputes cannot be ruled out.

When there are merits in the case or the case is arguable, delay 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. 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.”

Thus, for the ends of justice one last chance should be given to the petitioners to contest the application under Order 9 Rule 13 of the Code of Civil Procedure.

The orders impugned are set aside. The delay in filing the application under Order 9 Rule 13 of the Code of Civil Procedure is condoned.

The learned court below is directed to hear out the application under Order 9 Rule 13 of the Code of Civil Procedure provided the petitioners pay a sum of Rs.30,000/- as cost to the plaintiff in the suit. The cost shall be paid within a period of two weeks from date. This order is subject to the payment of cost.

In case of default, this order shall remain inoperative and shall stand automatically vacated and the plaintiff can proceed with the execution.

The petitioners are at liberty to pray for stay of the execution till the disposal of the application under Order 9 Rule 13 of the Code of Civil Procedure.

The learned trial court is directed to dispose of the application under Order 9 Rule 13 of the Code of Civil Procedure within a period of one month from the date of communication of this order.

The execution proceedings shall remain stayed for a period of three weeks from date.

The decision of this court is restricted to the application for condonation of delay and shall not influence the learned court in any way while deciding the application under Order 9 Rule 13 of the Code. The learned trial court also shall not be influenced by its earlier findings and shall decide the application under Order 9 Rule 13 of the Code on its own merits and independently.

The revisional application is accordingly disposed of.

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

(Shampa Sarkar, J.)