

20.06.2023
sayandeep
Sl. No. 54
Ct. No.652

CO 3271 of 2019

Siddharth Land & Building Pvt. Ltd.
Vs.
Sayed Mohammad Abdullah Parviz Ishaque &
Ors.

Mr. Debrup Bhattacharjee
Mr. Subrata Goswami
.....for the petitioner

Mr. Abdul Hadi
Mr. Syed Nasir Hasan
.....for the Opposite party

Order No. 17 dated July, 23, 2019 passed by Waqf Tribunal , West Bengal in Misc.(J) Case No. 1 of 2017 arising out of Suit No. 09 of 2005, has been assailed in the present application wherein the petitioner had contended that initially the plaintiff/opposite party No. 1 filed Title Suit No. 248 of 1997 in the Court of learned Civil Judge (Senior Division), Alipore against the petitioner herein for recovery of possession, declaration, mandatory and permanent injunction. Subsequently by operation of law, the said suit was transferred to the Waqf Tribunal, West Bengal and the same was renumbered as suit No. 09 of 2005. The petitioner herein being defendant No. 11 of the said suit had entered appearance and contested the same by filing written statement. However, the said suit was dismissed for default on October 20, 2009 due to non-appearance of the plaintiff/opposite party No. 1 herein.

The petitioner alleged that the plaintiff was aware about the dismissal of the said suit but no step was

taken for long and ultimately sometimes in March 15, 2017, an application under Order IX Rule 9 of the Code of Civil Procedure was filed praying for setting aside the order of dismissal dated 20th October, 2009 and for restoration of the same to its original file and number. An application under Section 5 of the Limitation Act also filed subsequently for condonation of delay for about 7 years 147 days, in filing restoration application. The aforesaid application was numbered as Misc. (J) Case No. 1 of 2017. The application under Section 5 of the Limitation Act was not filed along with the application under Order IX Rule 9 but it was filed subsequently on June 21, 2017 which was initially fixed for ex parte hearing. The learned Tribunal after hearing both the parties was pleased to vacate the ex-parte hearing of the Application filed under section 5 of the Limitation Act. One constituted attorney on behalf of the plaintiff deposed and he was duly cross-examined and the matter was adjourned for further cross-examination. However, the said constituted attorney subsequently made a prayer before the Court stating that due to some disputes and differences between the plaintiff and his power of attorney holder, the power of attorney holder does not want to depose any further and as such her evidence may be expunged. On the basis of her application, learned Tribunal by an order dated 23rd April, 2018 was pleased to declare the evidence of PW1 as closed without granting opportunity

of cross-examination by petitioner herein. On the next date i.e. on 05.07.2018 no new witness was brought in by the plaintiff and as such the petitioner herein filed application for dismissal of said Misc. case in as much as upon withdrawal of the said attorney, there is no competent application at the instance of plaintiff for restoration.

Thereafter petitioner herein had filed written objection against the application under Order IX Rule 9. In the said written objection, petitioner has categorically stated that the plaintiff was not diligent in conducting the said suit and they were aware that the suit would be taken up by the Tribunal on the date fixed but they have not intentionally make contact with the Advocate, nor had taken steps. It is further urged in the said objection that practically no ground has been made out in the said application as to what prevented him from taking any step in the year 2015 when he was allegedly present in India and had to wait till 2017 to file the application. It was further urged that the said application was filed on the basis of a power of attorney which was executed on January 30, 2016. However, from the documents annexed to the said application, it would appear that at the material point of time, the executant was not available in India, which cast a doubt as to the execution of the very authority on the basis of which the said application was filed.

Petitioner further contended However, the said application came up for hearing before the learned Tribunal on 23.07.2019 and by the impugned order the Tribunal was pleased to allow the said application under Order IX Rule 9 of the Code, subject to payment of cost of Rs. 33,000/- thereby condoning the delay of 7 years and 147 days in a perfunctory manner without advertting to the real cause cited for delay.

The petitioner argued that the Court below has acted illegally in restoring the said suit as there appears to be no sufficient cause for condonation of delay and he has failed to appreciate that no justiciable case has been made out by the plaintiff which warrant condonation of delay of 7 years 147 days. In fact plaintiff was never diligent in proceeding with the suit and mere allegation, alleging misconduct of the learned advocate without giving said Advocate an opportunity of hearing, cannot form the basis of allowing the said application. Moreover, no explanation has been provided by the plaintiff as to what prevented him from filing the said application when he was in India in 2015 but he had to wait till 2017 to file the said application. Learned Tribunal below failed to appreciate that the constituted attorney had withdrawn herself, who had affirmed the affidavit and the application and no constituted attorney is brought on record to substitute her and as such the application cannot continue and the same has to be dismissed for want of prosecution.

The Tribunal also failed to appreciate that the right in favour of the petitioner has been crystallized due to dismissal of the suit and the petitioner had transferred its shares in the said property to the outsider.

Learned Counsel appearing for the petitioner in this context relied upon guidelines laid down by Apex court in ***Esha Bhattacharjee vs. Managing Committee of Raghunathput Nafar Academy & Ors.*** reported in **(2013)12 SCC 649** and in order to distinguish what is “good cause” what is “sufficient cause” as appearing in Order IX Rule 7 and Order IX Rule 9 he relied upon ***M. Periasamy & Ors. vs. Korrai Kula Kongu Vellalargal & Ors.*** reported in **(2004)1 L.W. 66.**

Learned counsel appearing for the opposite parties submits that the suit was dismissed on 21.10.2009 and he through his constituted attorney handed over papers and documents to his newly appointed advocate on 20.02.2017 and after preparing the same, he filed the said application and also application for condonation of delay and there was no intentional laches in filing the said application. He further submits that due to personal avocation of the plaintiff/opposite party No. 1, he had to leave for New Zealand in the later part of the year 2008 and when the plaintiff left for New Zealand permanently in the month of November, 2008, he entrusted the above case to his learned advocate Mr. Udayan Pramanick to look after

the same and to take all necessary steps in the learned Court in his absence. Thereafter there was no communication with his learned advocate, due to his pre-occupancy in New Zealand as well as the distance between the two countries, which made the communication more difficult. He lastly arrived in India in November, 2015 and he made attempts to contact with the learned advocate to enquire about the status of the suit, but most unfortunately, he met with a very cold response. Thereafter on being search, conducted before the learned Waqf Tribunal, it could be ascertained from the record, that the above suit had already been dismissed. It is incorrect to say that the dismissal order was earlier known to the plaintiff/opposite party No. 1. The said application for restoration was justly allowed by the Tribunal and accordingly the order impugned does not call for any interference.

On perusal of the prayer of the paint, it appears that the present suit relates to *inter alia* a prayer for declaration that the annexures “C”, “D”, “E” & “F” as averred in the body of plaint are null and void and cannot take away the rights of the plaintiff as Mutwalli and also cannot take away Waqf Estate created by the deed of Waqf dated 22.07.1930 along with other declarations and injunction. Learned Tribunal below has elaborately discussed the “sufficient cause” as made out by the plaintiffs in support of restoration.

The jurisdiction of the High Court under Article 227 of the constitution of India is limited. High Court interfere with the observation of Tribunal in support of restoration of the suit and/or condonation of delay only on limited grounds namely illegality, irrationality and procedural impropriety. On the perusal of order impugned and the reasons assigned by the Tribunal, one can hardly arrived at a conclusion that there had been a substantial failure of justice in allowing the prayer for restoration of suit or order passed by the Tribunal or it contains any error which is apparent on the face of the record, warranting interference by this court in exercise of it's supervisory jurisdiction under Article 227 of the Constitution of India.

The technicalities raised by petitioner in connection with the maintainability of the application on the ground of power of attorney holder's unwillingness to depose on behalf of opposite party herein should not stand as obstruction to an aid to justice. Ultimate object of allowing the petition for restoration by the Tribunal below is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation.

It is settled principle of law that there should be liberal, pragmatic, justice oriented, non-pedantic approach while dealing with the application for condonation of delay, for the courts are not supposed

to legalize injustice but to do justice and are obliged to remove injustice. It is also well settled that substantial justice being paramount and pivotal, the technical consideration should not be given undue and uncalled for emphasis. The question of condonation of delay in filing the restoration application is required to be considered from that perspective. Here in present case, if the suit is restored in its original file after setting aside the order of dismissal and if the impugned order of the Tribunal below is affirmed, the highest prejudice that may cause to the petitioner herein would be that main dispute between the parties i.e. whether the property in question is a secular property or a Waqf property, shall be decided on merit after contested hearing, once for all.

In the Esha Bhattacharjee case (Supra), Hon'ble Apex court has laid down guidelines in paragraph 21, where Apex court reminded that the concept of liberal approach in such case has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play and that there is a distinction between inordinate delay and a delay of short duration. It is further held that through conduct, behavior and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration but at the same time no presumption can be attached to deliberate causation of delay. The court emphasized that the entire gamut of facts are to be

carefully scrutinized and the approach should be based on paradigm of judicial discretion, which is founded on objective reasoning and not on individual perception. On perusal of order impugned, it does not appear to be that the reasoning given by the Tribunal in support of restoration is based on individual perception.

Referring M. Periasamy case (supra) petitioner contended that requirement of “good cause” is complied with on a lesser degree of proof than that of a “sufficient cause” in the context of two proceeding under order IX, rule 7 and order IX rule 9. In this context Hon’ble apex court in a case of **Collector Land Acquisition Anantanag and another Vs. Katiji and others** reported in **AIR 1987 SC 1353** passed to 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.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the "State" which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step-motherly treatment when the "State" is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file-pushing and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time-barred, is therefore, set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides.

Here in the present context it is not the case of petitioner that the case is hopelessly without merit. On the contrary since the suit has got dismissed under

Order IX, rule 8, plaintiff is precluded from bringing a fresh suit in respect of the same cause of action and as such issue raised by plaintiff in the suit shall remain unresolved on the ground of technicalities, unless the suit is restored in its original file. In view of such matter, ultimate finding of the Waqf Tribunal does not call for interference.

CO 3271 of 2019 is accordingly dismissed. However the Waqf tribunal is hereby directed to make expeditious disposal of the proceeding and to conclude the entire proceeding within a period of one year from the date of communication of the order without granting any unnecessary adjournment to either of the parties.

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.)