

06.07.2023
Sl. No.32(ML)
srm

C.O. No. 3194 of 2022
Adhir Chandra Belel
Versus
Durgapada Parui & Anr.

Mr. Partha Pratim Roy,
Ms. Ritoprita Ghosh

...for the Petitioner.

Mr. Subhendu Bandopadhyay

...for the Opposite Party No.1/preemptor .

The revisional application is directed against an order dated August 18, 2022 passed by the learned Additional District Judge, 2nd Court at Serampore, District-Hooghly, in Misc. Appeal No.04 of 2021. The misc. appeal arose out of Misc. Case No.29 of 2017. The misc. case arose out of Pre-emption Case No.85 of 2013.

The petitioner is the preemptee. The petitioner suffered an *ex parte* decree of pre-emption dated August 13, 2015 passed by the learned Civil Judge (Junior Division), 4th Court at Serampore, Hooghly. The petitioner filed an application under Order IX Rule 13 of the Code of Civil Procedure. As the misc. case was delayed by more than two years, the learned trial Judge rejected the application for condonation of delay on the

ground that the petitioner did not sufficiently explain the cause of the delay and the contention that the talks of compromise going, on were not based on documentary evidence.

The petitioner preferred Misc. Appeal No.04 of 2021, which was heard by the learned Additional District Judge, 2nd Court at Serampore. The misc. appeal was dismissed on the ground that each and every days delay had not been explained. The learned lower appellate court came to the finding that the explanation that talks of compromise were going on, was vague. Not a single scrap of paper was filed to substantiate such claim.

Moreover, the learned lower appellate court found that the petitioner did not ever attend the court and hence finding no other alternative, the learned trial Judge decreed the misc. case *ex parte* against the petitioner on August 13, 2015, with a condition to deposit the deficit consideration amount of Rs.88,000/- within one month.

Mr. Bandyopadhyay, learned Advocate appearing for the preemptor submits that the petitioner was given ample opportunity by the learned trial court to attend the proceeding and file his written objection. That an order was passed asking the petitioner to show cause as to why the misc. case should

not be decreed *ex parte*. The petitioner failed to answer to the show cause. Thus, taking into account the conduct of the petitioner, the learned trial judge had no other alternative but to proceed *ex parte*. It is submitted by Mr. Bandyopadhyay that the learned lower appellate court took into consideration the above factors and rightly rejected the misc. appeal thereby accepting the findings of the learned trial Judge, that sufficient grounds for delay in filing the application under Order IX Rule 13 of the Code of Civil Procedure, had not been made out.

Mr. Bandyopadhyay relies on the following decisions:

i) The State of West Bengal & ors. vs. Sri Kalyan Ganguly & ors. reported in (2015) 1 Cal LJ 196.

ii) Sujit Chatterjee vs. Rita Chatterjee reported in (2001) 2 Cal LJ 308.

iii) Srimati Shila Sankari Devi vs. Sirmati Ladshirani Kailtha & anr. reported in (2014) 1 Cal LJ 500.

The grounds for delay in filing the application under Order IX Rule 13, that is, Misc. Case No.29 of 2017 were:

(a) The petitioner trusted the preemptor when the preemptor had assured him that he would withdraw the pre-emption case. As talks of compromise were going on, the petitioner did not follow up the suit.

(b) After the notice was received from the Block Land and Land Reforms Officer, the petitioner came to know about the *ex parte* decree. The petitioner applied for mutation. Being misled by the false assurance that no steps would be taken in the pre-emption case, the petitioner stayed away from the proceeding and the pre-emption case was decreed *ex parte*.

The learned courts below did not accept such contention of the petitioner that talks of compromise were going on. However, the issue as to whether there was a talk of compromise is a matter of evidence. The same cannot be negated. It is also true that every days delay is not required to be accounted for. The petitioner has explained the delay by expressing his honest belief on the assurance given by the preemptor that he would withdraw the case. There were talks of compromise. It may be so that the talks of compromise were not recorded in a written form which the learned courts have observed. But, in villages it is not unusual that parties seek to compromise their disputes with regard to land and landed property, amicably.

Delay can also be condoned if there are merits in the case. In this case, the point of law involved is, whether the preemptor would be entitled to seek pre-emption upon short deposit of the consideration money. Whether there were

merits in the case should have been taken into consideration by the court before dismissing the application under Section 5 of the Limitation Act. The case of the preemptee is arguable. At least, the preemptee should have been given a chance to get his application under Order Rule 13, heard 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."

With regard to the point of law involved, reference is made to the decision of *Barasat Eye Hospital versus Kaustabh Mondal* reported in (2019) 19 SCC 767.

Hence, the application for condonation of delay in filing the Misc. Case No.29 of 2017 is allowed upon payment of cost of Rs.20,000/- to the pre-emptor. The learned Civil Judge (Junior Division), 4th Court at Serampore, Hooghly, will hear the application under Order IX Rule 13 of the Code of Civil Procedure expeditiously and dispose of the same within a period of three months from the date of communication of this order, upon being satisfied that the amount of Rs.20,000/- has been paid to the preemtor within August 16, 2023. In case of default, the execution case will proceed.

The revisional application is, thus, disposed of.

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

(Shampa Sarkar, J.)