

23-11-2023
Court No.3
Sh/53.

**In The High Court At Calcutta
Jalpaiguri Circuit Bench**

C.O. 20 of 2023

Rakhal Ch. Biswas @ Rakhal Biswas & Ors.
-Vs-
Sri Nepal Ch. Biswas.

Mr. Arijit Ghosh.

For the petitioners.

Mr. Kalipada Das.

For the Opposite Party.

1. Affidavit-in-opposition filed by the opposite party is taken on record.
2. This application under Article 227 of the Constitution of India has been preferred against Order no.2 dated 25th November, 2022 passed by the Learned Additional District Judge, Alipurduar in connection with Misc. Appeal No.15 of 2022 arising out of an order dated 25th August, 2022 passed by the Learned Civil Judge, (Junior Division) at Alipurduar in connection with an application under Order IX rule 13 of the Code of Civil Procedure in Misc. Case No. 38 of 2014 in connection with Title Suit No. 74 of 2012.
3. The petitioners' case in brief is that opposite party and petitioner no.1 are full-blooded brothers and inherited their father's property but the opposite party herein filed aforesaid suit for recovery of khas possession contending that their father before his death gifted his portion to the opposite party herein. The copy of the plaint was served upon the petitioners who appeared through their advocate on 05-06-2012 in the said suit and

prayed for time for filing written statement but the same was rejected by the Trial Court who heard the matter ex parte on 16-12-2013 and was pleased to pass an ex parte decree against the petitioners. According to the petitioners the decree is not executable in absence of partition.

4. Being aggrieved and dis-satisfied with the said ex parte order dated 16-12-2013 the petitioners preferred the Misc. Case being aforesaid Misc. Case No.38 of 2014 under Order IX Rule 13 of the Code of Civil Procedure for restoration of the suit after setting aside the ex parte order and they have also filed an application under Section 5 of the Limitation Act, 1963 seeking condonation of delay.
5. Learned Trial Court after contested hearing was pleased to reject the aforesaid Misc. case.
6. Being aggrieved by the aforesaid order of dismissal, the petitioners preferred the aforesaid Misc appeal being Misc. Appeal No.15 of 2022 before the learned Appellate Court along with an application under Section 5 of the Limitation Act for condonation of delay contending that petitioner no.1 was the tadbirkar of the case and he went to Gauhati, Assam where he stayed from 20-08-2022 to 28-10-2022 and after returning home the petitioner no.1 filed an application for obtaining certified copy of order dated 25-08-2022 on 31-10-2022 and he obtained the certified copy on 04-11-2022. As a matter of fact the petitioner no.2 is the wife of petitioner no.1 and petitioner no.3 is the daughter of petitioner no.1, who are female folk. The said application under Section 5 of the Limitation Act seeking condonation of delay came up for hearing before the Court below and the

Learned Court below by the order impugned rejected the petitioners/appellants application under Section 5 of the Limitation Act.

7. Mr. Arijit Ghosh, learned counsel appearing on behalf of the petitioners submits that the Court below acted illegally and with material irregularity by not considering the fact that petitioner no.1 and the opposite party is full blooded brother and they got the property by way of inheritance and that there was no intentional latches in preferring the appeal within the statutory period of time. In fact Learned Court below did not apply her judicial mind and as such caused miscarriage of justice. It is also submitted that the impugned order is bad in law and based on surmises and conjectures and is liable to be set aside.
8. Mr. Kalipada Das, learned counsel appearing on behalf of the opposite party submits that there was latches on the part of the defendants/opposite parties in preferring the application under Order IX Rule 13, for which the Court below rightly rejected the application under Section 5 of the Limitation Act for condonation of delay. Against the said order when the defendants preferred Misc. appeal again there was latches in preferring the appeal within time and for which the court below rightly did not entertain the defendants/appellants' prayer seeking condonation of delay and as such the order impugned does not call for interference as the delay caused before the Trial court as well as before the Court below was intentional.
9. I have considered the submissions made by both the parties. On perusal of the order impugned it appears that the Order is cryptic and Learned

Court below did not assign any reason as to why the prayer for condonation of delay was rejected. Relevant portion of the order impugned runs as follows:

" Considered.

In my considered view, the cause shown by the appellant for condoning the delay in preferring the instant appeal is not at all satisfactory and it cannot be accepted.

Hence the petition u/s 5 Limitation Act is hereby rejected.

Accordingly, delay is not condoned.

Consequently, the instant Misc.Appeal is not admitted.

The instant Misc. Appeal is thus disposed of."

10. There is no reflection in the order as to why the cause shown by the appellants for condonation of delay is not at all satisfactory and why it cannot be accepted. It is well settled that 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. (Collector, Land Acquisition, Anantnag, Vs. Katiji, AIR 1987 SC 1553).

11. In **N. Balakrishnan Vs. M.Krishnamurthy, (1987) 7 SCC 123**, Supreme Court in this context observed in paragraph 12&13 as follows:-

"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 : AIR 1972 SC 749].”

“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. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss.”*

12. The defendant/appellant has assigned reason that he went to Assam at the relevant point of time and after returning therefrom he applied for obtaining certified copy and thereafter he filed the Misc. appeal after obtaining certified copy of the order impugned. Unfortunately the court below did not deal with the explanations given in the petition and merely observed that cause shown is not at all satisfactory and cannot be accepted. The court below was required to examine the correctness of the explanations given by the petitioner, keeping in mind the principles laid down by the Apex Court in several cases including the above-mentioned case. On perusal of the causes shown by the

petitioner, it appears to me that the explanations offered were plausible and deserves to be accepted. This is also because it is settled law, so far as practicable, a litigant ought not to be denied a hearing on merit.

13. In such view of the matter, I find that the order impugned is perverse and the Learned Court below has failed to exercise his jurisdiction vested on it. Thus, Order No.2 dated 25-11-2022 passed by the Learned Additional District Judge, Alipurduar in Misc. Appeal No. 15 of 2022 is hereby set aside. The delay in filing the Misc. appeal being Misc. Appeal No.15 of 2022 is hereby condoned and thereby Misc. Appeal is admitted. The Court below is directed to dispose of the Misc. Appeal No.15/2022 preferably within a period of two months from the date of communication of this order.

14. C.O. 20 of 2023 is accordingly, disposed of.

15. Urgent Photostat website certified copy downloaded from official website of this Court be supplied to the learned advocates for the parties subject to compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)

