

19.02.2024
Sl. No.4(DL)
srm

C.O. No. 5 of 2022

Sri Subal Chandra Giri

Versus

Sri Suresh Chandra Manna & Ors.

Mr. Amit Baran Dash,
Ms. Ankana Sarkar

...for the Petitioner.

Mr. Sounak Bhattacharya,
Mr. Manish Kumar Das,
Mr. Sounak Mandal

...for the Opposite Parties.

1. The revisional application arises out of an order dated November 17, 2021 passed by the learned Civil Judge (Senior Division), 1st Court, Contai, Purba Medinipur, in Misc. Appeal No.05 of 2018 affirming the order No.33 dated May 17, 2018 passed by the learned Civil Judge (Junior Division), 2nd Court, Contai, Purba Medinipur, in J. Misc. Case No.19 of 2015.
2. J. Misc. Case No.19 of 2015 was an application for restoration of J. Misc. Case No.36 of 2010. J. Misc. Case No.19 of 2015 was filed along with an application for condonation of delay in filing the same. The learned trial Judge was of the view that the petitioner failed to explain the delay in filing J. Misc. Case No.19 of 2015. The evidence

adduced by the petitioner was disbelieved. The petitioner failed to prove his illness. The doctor was produced as a witness for the petitioner. He deposed that he had never treated the petitioner. Statements of other witnesses with that of the petitioner were contradictory. Thus, the learned trial Judge was of the view that not only was the delay not proved, but the reason for not taking steps in J. Misc. Case No.36 of 2010 were also not acceptable to the court, in view of the insufficiency and contradiction in the evidence.

3. The petitioner suffered an *ex parte* decree of eviction in Title Suit No.175 of 2008. The petitioner filed J. Misc. Case No.36 of 2010 under Order IX Rule 13 of the Code of Civil Procedure, for setting aside the *ex parte* decree. The said misc. case was dismissed for default on February 14, 2013, as the petitioner failed to take steps within the stipulated time. The petitioner filed J. Misc. Case No.14 of 2013 for restoration of J. Misc. Case No.36 of 2010. The said J. Misc. Case No.14 of 2013 was also dismissed for default on May 19, 2013 as the petitioner failed to take steps. Thereafter, the petitioner filed J. Misc. Case No.12 of 2014 under Order IX Rule 9 of the Code of Civil Procedure, which was also dismissed for default on account of failure of the petitioner to take steps. The petitioner once again filed J. Misc. Case

No.31 of 2014 under Order IX Rule 9 for restoration of J. Misc. Case No.12 of 2014. J. Misc. Case No.31 of 2014 was rejected as the petitioner failed to take steps.

4. Under such circumstances, along with an application for condonation of delay, the petitioner filed J. Misc. Case No.19 of 2015 for restoration of the original J. Misc. Case No.31 of 2014. The ground taken by the petitioner for not being available when the J. Misc. Cases were dismissed for default, was illness. The said application being J. Misc. Case No.19 of 2015 was also filed belatedly. Thus, the petitioner prayed for condonation of delay with grounds showing cause as to why the J. Misc. Case should be restored.
5. The learned trial Judge allowed the parties to lead evidence. The petitioner has examined himself as PW1. One Asish Hatua Deposed as PW2, one Ajit Kumar Sasmal deposed as PW3, Dr. Rabindranth Jana deposed as PW4 and one Bhaktipada Shee deposed as PW5. Upon perusal of the relevant documents and the deposition, the learned trial Judge rejected the application. The court found from the deposition of Dr. Rabindranath Jana, whose prescription had been marked as exhibit 1, that the doctor he did not treat the petitioner. The PW5 had stated that the petitioner was suffering from heart disease, whereas the PW4

contradicted the same with the nature of illness. The court came to the conclusion that apart from exhibit 1 which was denied by PW4, there was nothing on record to show that the petitioner was ill at any point of time. Under such circumstances, the learned trial court did not condone the delay in filing the application in J. Misc. Case No.19 of 2015 and rejected the same along with the misc. case.

6. Aggrieved, the petitioner preferred an appeal before the learned Civil Judge (Senior Division), 1st Court at Contai, Purba Medinipur. The learned lower appellate court, upon careful consideration of the documents and submissions of the parties, arrived at the conclusion that even if the application for condonation of delay was considered leniently, the fact remained that the petitioner had been consistently negligent in pursuing his remedy. The evidence of the petitioner's witnesses contradicted the petitioner's claim. Although the ground for the delay and non-appearance was illness, the doctor who deposed as PW4, had stated in his cross-examination that he had never treated the petitioner. Thus, the learned lower appellate court found that the learned trial Judge did not commit any error in rejecting the application being J. Misc. Case No.19

of 2015 along with the application under Section 5 of the Limitation Act.

7. Learned Advocate for the petitioner urges this Court to allow one last chance to the petitioner to contest the application under Order IX Rule 13 of the Code of Civil Procedure on various grounds. He submits that the plaintiffs cannot be given a walkover and the suit should be contested. It is further submitted that the question whether the petitioner had sufficient reasons for not taking steps in the suit which was decreed *ex parte*, should be decided in J. Misc. Case No.36 of 2010.
8. Perused the orders impugned before this Court. Even if this Court is lenient in condoning the delay, the Court finds that on three occasions the petitioner's applications for restoration of J Misc. Case No.36 of 2010 had been dismissed. None of them were restored. This is the fourth application, along with an application for condonation of delay. The reasons which were assigned on each occasion, was illness of the petitioner. Through the evidence, the petitioner could not prove such illness. The only document that was filed in support of such illness was the doctor's prescription, but the doctor denied having treated the petitioner. The evidence of PW4 and PW5 were also

contradictory and the nature of illness stated by each of these witnesses was different. The learned courts, on the finding of fact that there was nothing on record to show that the petitioner was suffering from any illness, had rejected the application.

9. Under such circumstances, this petitioner does not deserve any further opportunity. For the High Court to upset the findings of facts which are based on the evidence on record, would be improper. The learned courts have appreciated the facts and materials on record, as also the deposition of the parties. The learned courts have pointed out not only the contradictions in the evidence of the parties, but also the fact that the illness of the petitioner was not proved. The prescription was doubtful as the doctor denied having treated the petitioner.

10. Under such circumstances, the order impugned, does not call for any interference.

11. The revisional application is, thus, dismissed.

12. There will be, however, no order as to costs.

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

(Shampa Sarkar, J.)