

26.02.2024

Sl no. 106

Ct no. 652

P.M.

C.O. 782 OF 2020

Smt. Payel Chakraborty

- Vs -

Smt. Nibedita Lahiri.

Mr. Pathik Bandhu Banerjee,

Mr. Arindam Banerjee

... for the petitioner

Mr. Ayan Banerjee

Mr. Dhiman Banerjee

.... for the opposite party.

The father of the petitioner namely Pradip Kumar Chakraborty filed an application under Order IX Rule 13 of the Code of Civil Procedure against the opposite party herein for setting aside the ex-parte decree passed against him on 05.09.2007 in Ejectment Suit No. 4 of 2006 which was registered as Misc. Case No. 20 of 2007.

It is submitted on behalf of the petitioner that learned Court below heard argument in full in connection with the said Misc. Case under Order IX Rule 13 on 02.08.2014 and fixed next date for passing order. Unfortunately before passing order by the court in aforesaid misc case no. 20 of 2007 petitioner Pradip Kumar Chakraborty died on 26.11.2014 and after his death court passed order in the said Misc. Case on 22.06.2015 whereby aforesaid Misc. Case was dismissed.

Since the said Misc. Case was rejected on 22.06.2015 petitioner herein was required to prefer Misc. appeal before the Court below by 21st July, 2015.

However, the said Misc. Case was filed after a delay of seventy five days. In support of such delay, the petitioner in her petition has taken certain grounds which inter alia discloses that due to sudden demise of the original petitioner his widow and the only daughter became helpless and were passing their days with the help of their relative and friends and that deceased pradip kumar used to conduct said case personally and never discussed the matter with his wife or daughter and as such they did not have idea about number of said case and where it is pending. They came to know about the fate of the case in the last week of July 2015, when land lady threatened them to dispossess. Thereafter they obtained certified copy and made contact with their lawyer and lawyer took sometime to prepare documents and thereafter she filed the appeal. Accordingly they prayed for condonation of delay by filing an application under Section 5 of the Limitation Act but learned Trial Court after hearing both the parties dismissed the said prayer for

condonation of delay by the impugned order dated 27.11.2019.

Being aggrieved by that order Mr. Banerjee, learned counsel appearing on behalf of the petitioner submits that Court below had acted illegally in rejecting the prayer for condonation of delay and he had acted beyond his jurisdiction relying upon xerox copy of one information slip from which it appears that the substitution petition has been allegedly filed with vakalatnama by the petitioner herein on 22.12.2014, though such documents admittedly were not found in the record to prove the said contention.

He further submits that the learned Court below has erred in not considering the fact that the petitioner has no knowledge regarding whereabouts of the case pending before the Trial Court before obtaining the certified copy of the case. Accordingly the order impugned has resulted manifest injustice upon the petitioner rendering the situation remediless. Furthermore, the order is a cryptic one and not supported by reason and accordingly the order impugned is liable to be set aside.

Mr. Ayan Banerjee, learned counsel appearing on behalf of the opposite party submits that delay might be for seventy five days and such applications

for condonation of delay are usually dealt by the courts with leniency but in the present case the Court below was justified in rejecting the petitioner's payer for condonation of delay, since the petitioner has suppressed the material fact that they filed vakalatnama and application for substitution before the Court below on 22.12.2014. Accordingly it is apparent that they were aware about the pendency of the Misc. Case but they have not intentionally taken steps within the statutory period in preferring the appeal before the Court below. Accordingly the order impugned is justified and does not call for interference by this court.

I have considered the submissions made by both the parties.

On perusal of the order impugned it appears that learned Court below has relied upon xerox copy of the information slip and had believed the contention of the opposite party that the petitioner herein, after her father's death had filed application for substitution along with vakalatnama on 22.12.2014, in spite of the fact that the said vakalatnama or the application for substitution is not with the record. He further held that the P.W. 1 is the sole daughter of deceased Pradip Kumar Chakraborty

and she was fully aware about the pendency of the Misc. Case proceeding which was filed by her father because she was residing with her parents in the suit property at the relevant period.

The mere fact of getting information through a Xerox copy of document could not be made a basis for rejecting petitioners' claim holding that she was all along aware of the case, specially when existence of such document could not be traced in the record. The court below has adopted a very narrow and technical approach in dealing with an issue of condonation of delay in filing appeal for about 75 days, despite the fact that she had put a reasonable defence. Even if she was found to be negligent, the opposite party herein could have been compensated by costs and the delay ought to have been condoned. Due to unrealistic and technical approach adopted by the courts, the matter pertaining to an eviction proceeding is pending since 2006.

The settled principle is that there is no presumption that delay is always deliberate. Supreme Court has time and again held that the words "sufficient cause" under section 5 of the limitation Act should receive a liberal construction so as to advance substantial justice. If the

explanation for delay does not smack of malafides or it is not put forth as part of a dilatory strategy, the court must show utmost, consideration to the suitor. **(N. Balakrishnan Vs. M. Krishnamurthy, (1998) 7 SCC 123).**

In the present case it appears that there is no such observation by the Court below that the application for condonation of delay filed by the petitioner is *malafide* one nor there is any observation that it was filed as a part of dilatory tactics with an object of delaying the judicial proceeding.

Accordingly the delay in filing the Misc. Appeal before the Court below being Misc. Appeal No. 74 of 2015 is hereby condoned and in consequence Misc Appel is admitted and the learned Court below is directed to dispose of the said Misc. Appeal after giving opportunity to both the parties to contest within a period of ten weeks from the date of communication of this order, without giving any unnecessary adjournment to either of the parties and without being influenced by any observation made herein.

C.O. 782 of 2020 is accordingly disposed of.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)