

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Supratim Bhattacharya

S. A. 62 of 2020

With

IA No. CAN 1 of 2023

Debabrata Nath & Anr.

Versus

Sri Amarnath Sinha

For the appellants : Mr. Rajdeep Bhattacharjee

Mr. Debashis Banerjee

For the respondent : Mr. Atarup Banerjee

Mr. Bapin Baidya

Heard On : 29.01.2024

Judgment Delivered On : 29.02.2024

Supratim Bhattacharya, J.:

CAN 1 of 2023

1. The application being CAN 1 of 2023 is being considered first. Through the said application the petitioner/tenant has prayed for repairing the tenanted portion.
2. The Ld. Counsel appearing on behalf of the petitioner/respondent/tenant has submitted that he is praying for allowing the petitioner/tenant to repair the portions of the entire suit

property consisting of two bed rooms, separate portion of veranda attached thereto along with kitchen, dining space, bath cum privy on the eastern portion of the ground floor situated at 8, Selimpur Lane Kasba Kolkata -700031, at the cost of the said tenant as the aforementioned tenanted portion is in very precarious condition and at any point of time there may be irreparable loss.

3. The Ld. Counsel appearing on behalf of the appellants/landlords graciously and specifically submitted that the tenants may carry out repairing of their tenanted portion without changing the nature and character of the suit property and without claiming any equity.

Considering the submissions of the Ld. Counsels and on going through the photographs furnished, this Court allows the tenant to repair the suit property at his own cost without changing the nature and character of the suit property. It is needless to mention that the tenant shall not claim any equity for the expenses borne by him.

As such the application being **CAN 1 of 2023** is **disposed of**.

4. Now this Court shall take into consideration the action that set in motion the instant dispute arose in the year 1995 with the institution of a suit being Title Suit No. 301431 of 1995 instituted before the Ld. Civil Judge Junior Division at Alipore Dist. 24-Parganas, South.

5. Background facts:

Proceeding before the Trial Court:

- i) The appellant herein that is the landlord preferred a suit being Title Suit No. 301431 of 1995 instituted before the Ld. Civil Judge Junior Division at Alipore Dist. 24-Parganas,

South praying for eviction of the respondent herein being the tenant defendant in the title suit on the ground of default in payment of rent and requirement in respect of the suit property comprising of two bed rooms, a separate portion of veranda attached thereto along with kitchen, dining space, bath cum privy having facility of electricity and water with the condition that the electric charges shall be paid by the tenant as per the bill issued by the CESC Ltd. which is situated on the eastern part of the ground floor of the premises No. 8, Selimpur lane within PS Kasba, Dist. South-24 Parganas Kolkata -700031.

- ii)** The said Trial Court after adjudication dismissed the said suit on contest without any order as to cost on two grounds, one being that the defendant/ tenant is not a defaulter in payment of rent in respect of the suit property and the other ground being that the appellant plaintiff landlord has alternative accommodation in an adjacent premises being No. 7A, Selimpur Road Kolkata -700031.

Proceeding before the First Appellate Court:

- i)** The landlord being aggrieved by and dissatisfied with the judgment and decree of the Court of first instance preferred a title appeal before the Ld. District Judge Alipore which was registered as TA No. 158 of 2017. Along with the said title appeal an application under Section 5 of the Limitation Act 1963 was also filed praying for condonation of delay of 184 days in preferring the said appeal. In

support of the said application praying for condonation of delay the landlord/appellant had submitted a medical certificate issued by a doctor wherein it has been mentioned that Debabrata Nath, the elder brother of the two brothers who are the landlords had been suffering from low back pain and was under his treatment since 13.04.2017 to 21.08.2017 and had been advised to take bed rest.

ii) The Ld. District Judge Alipore, vide order No. 10 dated 07.09.2019 after hearing both side dismissed the petition under Section 5 of the Limitation Act on contest without cost and hence the appeal being TA No. 158 of 2017 was also dismissed.

6. Against the said order of dismissal of the Ld. First Appellate Court, the landlords have preferred the instant appeal.

7. At the time of admission of the instant appeal Hon'ble Division Bench of this Hon'ble Court framed the following two substantial questions of law which are as follows:

- i)** Whether a court of law in a case where the petitioner seeks condonation of delay on the ground of his illness and the application is backed by a medical certificate is justified in holding that there is no sufficient ground without first disbelieving the said certificate;
- ii)** Whether the conclusion that there is no sufficient ground for condonation of delay in filing the appeal inasmuch as the application for the same was silent about the initiative taken by the appellant no.1 for proper follow up of the

proceedings was justified in view of the specific plea of illness taken by the appellant.

8. Submissions:

This Court has heard Mr. Rajdip Bhattacharya assisted by Mr. Debasis Banerjee for the appellants and Mr. Atarup Banerjee accompanied by Mr. Bapin Baidya, Ld. Counsels for the respondents. The contentions urged have been recorded as under.

A) On behalf of the appellants:

- i)** It has been submitted that the application filed under Section 5 of the Limitation Act praying for condonation of delay in filing the first appeal was supported by a medical certificate issued by a registered medical practitioner bearing the registration number of the said medical practitioner. It has also been contended that a certificate issued by a medical practitioner is generally taken into consideration until and unless there is question arising as to the authenticity of the said medical certificate. It has further been submitted that the Learned Judge of the First Appellate Court had not taken into consideration the said medical certificate.
- ii)** It has further been stated that Debabrata Nath one of the landlords is the elder brother of the two brothers and the said Debabrata Nath is the sole person who looks after the legal proceedings as because the co-owner of the said

property that is the younger brother namely Subrata Nath who is the appellant No. 2 herein is a physically challenged person, as such the said younger brother does not have the physical capacity to look after the legal proceedings. Thus the entire legal proceedings was/is dependant upon the appellant No.1 herein that is the elder brother and as because the said elder brother was ill so the first appeal could not be filed within time as such there was delay of 184 days.

B) On behalf of the respondent

- i) The Learned Counsel brought to the notice of the Court the order of the first appellate Court.

9. Questions for consideration

From the submissions of the Ld. Counsels and from the submissions canvassed by them this Court is to decide the fact as to whether the Judgment of the First Appellate Court has been passed in accordance with law or not.

- 10. Though this point has not been raised on behalf of the respondent/tenant but it is the incumbent duty of this Court to highlight as to whether the judgment and decree passed by the First Appellate Court is appealable or not. In this context this Court relies upon the judgments passed by three judges bench of the Hon'ble Apex Court published in AIR 2005 SC 226, wherein the Hon'ble Judges have relied upon the judgment published in AIR 1932 Privy Council 165 in the case between Nagendra Nath Dey & Another Vs. Suresh

Chandra Dey & Others and the judgment passed by the Hon'ble Supreme Court in the case between Raja Kulkarni and Ors. Vs. The State of Bombay published AIR 1954 SC 73 and also relied upon the judgment passed in Mela Ram and Sons. Vs. The Commissioner of Income Tax, Punjab published in AIR 1956 SC 367, in the said case the Hon'ble Apex Court held as follows:

“... that an appeal presented out of time is an appeal and an order dismissing it as time barred is one passed in an appeal ”.

In Sheodan Singh vs. Daryao Kunwar published in AIR 1966 SC 1332 Hon'ble four judges of the Hon'ble Apex Court in Paragraph 13 held as follows:

“ ... we are therefore of opinion that where a decision is given on the merits by the Trial Court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the Trial Court on the merits, itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for the dismissal of the appeal ”

There are catena of judgments of the Hon'ble Apex Court wherefrom it is evident that when prayer for condonation of delay is made through Section 5 of the Limitation Act, 1963 is dismissed and as a

consequence to which the appeal is also dismissed the said Judgment and decree is appealable.

11. In this aspect it is to be taken into consideration that the judgment of the Ld. Trial Court was passed on 28.02.2017 and from the record it reveals that the application for obtaining certified copy of the said judgment and decree passed by the Trial Court was made on 03.03.2017 and the certified copy was obtained on 12.06.2017 and prior to obtaining the said certified copy of the judgment and decree the first appellant fell ill from 13.04.2017 and the medical certificate issued by a registered medical practitioner which is to be taken into consideration reveals that the said appellant No 1 was under the treatment of the said doctor till 21.08.2017 while the first appeal was preferred on 01.09.2017.
12. Though there is delay of 184 days in filing the first appeal but taking into consideration the period for obtaining the certified copy of the said judgment and order and period of illness this Court is of the view that sufficient cause has been shown on the part of the appellants whereby the said delay can be condoned.
13. The Hon'ble Apex Court has time and again reiterated that the legislature has conferred the power to condone the delay by enacting Section 5 of the Indian Limitation Act, 1963 in order to enable the Courts to do substantial justice to the parties by disposing of matters on merit. The expression sufficient cause used by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice.

14. Taking into consideration the aforesaid facts of the instant *lis* giving rise to the present appeal, this Court is satisfied that sufficient cause exists for the delay. The order of the First Appellate court dismissing the appeal having been filed beyond the statutory period of limitation is set aside. Delay is condoned.
15. **S. A. 62 of 2020** stands accordingly **allowed**.
16. The matter is remitted to the First Appellate Court and the said Court will dispose of the appeal on merit after affording reasonable opportunity of hearing to both sides.
17. Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.
18. Urgent Xerox certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Supratim Bhattacharya, J.)