

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present : The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
&
The Hon'ble Mr. Justice Uday Kumar

FMA No. 1454 of 2024
+
CAN 1 of 2024 (already disposed of)

Priya Dutta being died her heirs substituted by Megnad Dutta
and another
-vs-
Milli Kundu and others

For the appellant : Mr. Joydeep Kar, Senior Advocate,
Mr. Sakya Sen, Senior Advocate,
Mr. Abhishek Shaw.

Heard on : July 10, 2025.
Judgment on : July 10, 2025.

Sabyasachi Bhattacharyya, J.:

1. The present appeal arises out of an order whereby an application for condonation of delay in filing a petition under Order IX Rule 9 of the Code of Civil Procedure (in short "the

Code”), for restoration of a probate proceeding, was dismissed and, consequentially, the petition under Order IX Rule 9 was also dismissed.

2. It transpires that a probate application was filed by the original propounder/executrix which turned contentious subsequently. However, thereafter the probate proceeding was not being contested seriously. In the meantime, during the stage of adduction of evidence, the probate suit was dismissed for default on November 7, 2019 due to non appearance on behalf of the propounder.
3. Learned senior counsel appearing for the appellants submits that although certain averments have been made in the application under Section 5 of the Limitation Act which touch upon the conduct of the erstwhile Advocate of the executrix, such allegations are not of such a serious nature.
4. That apart, it is candidly submitted that in the event the court is so pleased, the appellants are willing to dilute such allegations and/or take back the same and take the blame upon themselves.
5. In that regard, learned senior counsel contends that even irrespective of the conduct of the erstwhile Advocate of the

executrix, a substantial chunk of the relevant period of delay was covered by the COVID-19 Pandemic restrictions.

6. Whereas the dismissal for default took place on February 7, 2019, the application under Section 5 of the Limitation Act as well as the application under Order IX Rule 9 of the Code were filed around February 28, 2022, till when the Covid relaxations granted by the Hon'ble Supreme Court from time to time prevailed.
7. Learned senior counsel submits that apart from the fact that the Pandemic restrictions intervened, it also ought to be considered by the Court that the nature of the *lis* is not *in personam*, but the outcome of the same would be a judgment *in rem*.
8. As such, the limited drawbacks of the executrix in not being able to pursue the probate proceeding duly ought to be diluted and looked at from a broader perspective.
9. Upon a perusal of the impugned order, we do not find as such any gross illegality in the same. The learned Testamentary Court proceeded on the premise that it has become a trend to cast blame on the Advocates. Also, it was considered that the petitioner waited for a good number of days before

approaching another Advocate. The Testamentary Court also refused to accept the contention of the petitioner to the effect that the petitioner, after knowing about the dismissal for default, had gone back to her former Advocate.

10. However, although such deductions are plausible, those also tread rather into the realm of conjecture.
11. In view of there being no written objection filed to the applications for condonation of delay and restoration, the doctrine of *non traverse* ought also to be taken note of. Even apart from that, we do not find any serious allegation of such a nature, that casts a blemish on the learned erstwhile Advocate, has been levelled.
12. Even if it is assumed that there was some negligence on the part of the petitioner/executrix in conducting the probate proceeding at the relevant juncture, we do not find any *mala fides* which can be attributed to the executrix for such lack of diligence.
13. That apart, we agree with the contention of learned senior counsel appearing for the appellants that a substantial part of the delay was covered by the Pandemic relaxations.

14. Furthermore, we have to take into account the fact that the nature of the present litigation is not one *in personam*, which would only affect the rights of the parties to the litigation, but partakes the character of an action *in rem*. In respect of considerations *in rem*, the outcome of the legal action would bind the world at large and as such, are of wider ramification that the mere fallibilities of individual parties.
15. We also take into consideration the fact that a probate proceeding is merely in the nature of seeking a ratification/sanction from a court of law for implementing the last Will and Testament of a deceased person, who is no longer in the world of the living to espouse his/her own cause. A probate, if granted, unlike a decree declaring title, would only put the seal of court to the Will, which itself is the repository of the rights created therein. It would be unbefitting of a testamentary court, which is also a court of judicial conscience, to dismiss a probate proceeding on technical grounds, thereby denuding the last wishes of the testator from reaching fruition.
16. Seen from such perspective, we find that it would be unjust to restrict our considerations merely to the limited aspect of lack of due diligence on the part of the executrix.

17. As such, in view of the above considerations, we are of the opinion that a liberal approach ought to be adopted and, applying such standard, sufficient cause for the delay has been made out.
18. Accordingly, FMA No. 1454 of 2024 is allowed, thereby setting aside the impugned order, bearing Order No. 21 dated August 28, 2024 passed by the learned Additional District Judge, Tenth Court at Alipore in Miscellaneous Case No. 90 of 2022 (arising out of O.S. No. 03 of 2007).
19. We hereby allow the application for condonation of delay in filing Miscellaneous Case No. 90 of 2022 and as a consequence, in view of our observations, allow Miscellaneous Case No. 90 of 2022 as well.
20. Accordingly, O. S. No. 03 of 2007 is restored to its original file and number.
21. The testamentary court shall now proceed to hear and dispose of the said probate proceeding from the stage which it had reached immediately prior to the dismissal for default of the same.
22. There will be no order as to costs.

23. Urgent photostat certified copies of the order, if applied for, be supplied to the parties at an early date.

I agree.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)