GAHC010174322023

undefined

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(Civil)/2262/2023

SUNIT HAZARIKA
S/O LT. BIREN HAZARIKA VILL. NIZ BIHOGURI BORDUBIA GENGAR CHUBURI P.O. PITHAKHOWA DIST. SONITPUR ASSAM

VERSUS

ON THE DEATH OF JOGEN HAZARIKA HIS LEGAL HEIRS PRANITA HAZARIKA AND ORS.
VILL. NIZ BIHOGURI BORDUBIA GENGAR CHUBURI P.O. PITHAKHUWA DST. SONITPUR ASSAM PIN 784153

1.2:RAKTIM HAZARIKA
W/O JOGEN HAZARIKA VILL. NIZ BIHOGURI BORDUBIA GENGAR CHUBURI P.O. PITHAKHUWA DST. SONITPUR ASSAM PIN 784153

1.3:RITAM HAZARIKA
S/O LT. JOGEN HAZARIKA VILL. NIZ BIHOGURI BORDUBIA GENGAR CHUBURI P.O. PITHAKHUWA DST. SONITPUR ASSAM PIN 784153

1.4:RITRISHA HAZARIKA
D/O LT. JOGEN HAZARIKA VILL. NIZ BIHOGURI BORDUBIA GENGAR CHUBURI P.O. PITHAKHUWA DST. SONITPUR ASSAM PIN 784153

2:MILAN HAZARIKA
S/O LT. LAKHIRAM HAZARIKA VILL. BORDUBIA P.O. BIHUGURI DIST. SONITPUR ASSAM PIN 78415

Advocate for the Petitioner : MS. R CHOUDHURY, MR. M ISLAM

Advocate for the Respondent : MR. P. CHOUDHURY (R-1 TO 1.4, MS. B CHOUDHURY (R-1 TO 1.4,J DAS (R-1 TO 1.4

In
R.S.A. Case No. 6235/2023

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

05.05.2025

1. Heard Ms. R. Choudhury, the learned counsel for the applicant. Also heard Ms. B. Choudhury, the learned counsel for the respondents.

2. This appeal under Order XLI Rule 3A of the Code of Civil Procedure, 1908 has been filed by the applicant praying for condoning the delay of 392 days in preferring the connected Regular Second Appeal, by which the applicant has impugned the Judgment and Decree dated 12.02.2020, passed in Title Appeal No. 13/2016, wherein, it had upheld the Judgment and Decree, passed by the Trial Court in Title Suit No. 38/2010 whereby, the suit of the plaintiff/present applicant was dismissed and the counterclaim of the defendant No. 2 was decreed.

3. The learned counsel for the applicant has submitted that the applicant had filed the Title Suit No. 38/2010 praying for declaration of right, title and interest and confirmation of possession over Scheduled-B land on the basis of adverse possession and also for cancellation of the mutation of the name of the defendant No. 2 from the revenue records in respect of the land described in the Scheduled-B and other schedules to the plaint. However, the said suit was

dismissed by the Trial Court.

4. The learned counsel for the applicant has further submitted that against the Decree and Judgment of the Trial Court, the present applicant had preferred the Title Appeal No. 13/2016, which was within the period of limitation. However, the said appeal was dismissed and due to communication gap with the engaged counsel, the applicant came to know about the dismissal of the Title Appeal No. 13/2016 only after eight months of the dismissal, when the engaged counsel informed him about such dismissal.

5. The learned counsel for the applicant has submitted that there was no *mala fide* on the part of the present applicant in delayed filing of the connected appeal. She further submits that as the present applicant came to know about the dismissal of the first appeal, during the prevalence of the Covid-19. The applicant was also prevented from pursuing the further legal remedy, as he was the sole earning member of his family and it became very difficult for them to survive under that circumstance. The learned counsel for the applicant further submits that even after knowing about the dismissal, the applicant was unable to pursue legal remedies, due to financial constraint and he had to save money for filing the instant Regular Second Appeal.

6. She further submits that during this time the applicant also suffered from ailment (Jaundice) for which he took treatment at a village before a 'Bez'(uncertified/village doctor) which also prevented the applicant to prefer the instant second appeal within the prescribed period of limitation.

7. The learned counsel for the applicant has submitted that as the present applicant was himself the plaintiff before the Trial Court and as even the first appeal was filed within the period of limitation by him, there was no dilatory tactics adopted by the petitioner in not preferring the instant second

appeal within the period of limitation.

8. The learned counsel for the petitioner further submits that the petitioner was possessing the suit land since long and it is on that basis, he has prayed for declaration of his right, title and interest. However, in execution of the decree passed against him, possession has been recovered by the present respondents. However, he is hopeful of the relief of restitution in the event of a favourable result in the second appeal preferred by him.

9. The learned counsel for the applicant submits that the applicant was prevented due to circumstances as described by him in his condonation of delay application and the said circumstances constitutes "sufficient cause" so as to condone the delay of 392 days.

10. She also submits that considering the circumstances narrated by the applicant in his application for condonation of delay, the application should be considered liberally and the delay may be condoned.

11. In support of her submissions, the learned counsel for the applicant has cited the following rulings:-

1. "***Dudu Miah and Ors. Vs. Utpal Deb and Ors."*** reported in "***2012 2 GLR 23"*** and
2. "***N. Balakrishnan Vs. M. Krishnamurthy"*** reported in "***(1988) 7 SCC 123."***

12. On the other hand, Ms. M. Choudhury, the learned counsel for the respondents has objected to the prayer for condoning the delay in preferring the connected Regular Second Appeal by the present applicant beyond the period of limitation.

13. She submits that the delay of 392 days has been wrongly computed in the instant case. She also submits that, even if the period of limitation excluded

by the Judgment of the Apex Court is taken into consideration, still the delay would be only of 362 days and not as shown in the application.

14. She submits that in the instant case, the Decree which is impugned in the connected Regular Second Appeal has already been executed and the respondents are presently in possession.

15. Therefore, she submits that the case which has been settled after concurrent findings of two Courts should not be reopened, when there is a considerable delay in filing the present Regular Second Appeal, for which the applicant has failed to show any sufficient cause. She also submits that even if it is assumed that the applicant was suffering from Jaundice, it is very difficult to believe that he would be suffering for such an ailment for so long a time. She further submits that there is no averment in the petition that due to ailment, the applicant was prevented from communicating with his engaged counsel in Regular First Appeal, for which the delay has been caused.

16. She also submits that as the limitation period in the instant case has been expired long ago, the right created in favour of the decree holder to treat the decree as binding has also been settled by observations of various Courts. In this regard, she has cited a ruling of this Court in the case of "***The State of Assam and Others Vs. Shri Anil Chandra Das"*** reported in "***1990 1GLR 183.***"

17. She has also cited a ruling of this Court in the case of "***Manjit Singh Legal Heirs of Sena Singh and Anr. Vs. G.M. Assam State Road Transport Corporation And Ors."*** reported in "***2003 (3) GLT 443***" to buttress her submissions that if the applicant fails to show that due to ailments suffered by him, he was prevented from communicating with the engaged counsel during that period he would not get the benefit of condonation of delay

for the said period.

18. I have considered the submissions made by the learned counsel for both the sides and have gone through the rulings cited by both the sides in support of their case.

19. In the instant case, it appears that the prayer for condoning the delay has been filed by the applicant, mainly on three grounds, namely, that the applicant was informed delately about the dismissal of first appeal by his engaged counsel. Secondly, that the applicant was penniless due to COVID-19 and for, which he was unable to pursue further legal remedy. And thirdly, that the applicant was suffering from jaundice, which also prevented him to contact his, engaged counsel for pursuing the further legal remedies.

20. In this case, the decree, which is sought to be impugned in the connected regular second appeal has already been executed, however, the applicant is hopeful that in the event of getting a favourable judgment in the regular second appeal, then he may pursue the relief of restitution of the decreed property in his favour.

21. The Apex Court has observed in the case of "***N. Balakrishnan Vs. M. Krishnamurthy"*** (supra) as follows:-

> "*9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest*

range may be uncondonable due to want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in reversional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in

> *different situations is not because on the expiry of such time a bad cause would transform into a good cause."*

22. Though the Court cannot become oblivious of the fact that the respondent, in whose favour decree, both the Trial Court as well as the First Appellate Court has given a concurrent judgment, has acquired certain right, on the basis of the said judgment and the decree has already been executed, however, it needs to be emphasized that a liberal and justice oriented approach is required to be adopted while exercising the powers under Section 5 of the Limitation Act, 1963.

23. If the Court finds that the cause shown for the delay by the applicant does not lack *bona fide*, then it is always proper to condone such delay.

24. In the instant case, the present applicant was the plaintiff before the Trial Court and on dismissal of his suit, he had preferred the first appeal within the period of limitation. Though the first appeal was also dismissed, however, there may not be any presumption that the delay in approaching this Court in preferring the connected second appeal was deliberate as the applicant would not gain anything by such deliberate delay in approaching this Court.

25. Under such circumstances, the cause shown for approaching this Court beyond the period of limitation in preferring the connected regular second appeal by the present applicant should receive a liberal construction, so as to advance substantial justice and therefore, this Court is of considered opinion that the cause shown by the applicant may be regarded as sufficient cause within the meaning of Section 5 of the Limitation Act 1963, which had prevented the applicant in approaching this Court within the prescribed period of limitation.

26. The delay in approaching this Court in preferring the connected regular second appeal is, therefore, condoned and this Interlocutory Application is allowed.

27. The Registry shall register the connected regular second appeal and list it for admission in the next week, on a date to be fixed by it.

JUDGE

Comparing Assistant