Maita Bahadur Subba Vs State of Sikkim and Others

FAO No. 02 of 2014

Court: Sikkim High Court

Date of Decision: June 11, 2015

Acts Referred:
Civil Procedure Code, 1908 (CPC) - Order 22 Rule 9, Order 9 Rule 8, Order 9 Rule 9, 151#Limitation Act, 1963 - Section 5

Hon'ble Judges: Sonam Phintso Wangdi, J

Bench: Single Bench

Advocate: Zangpo Sherpa, Jushan Lepcha, Advocates and Party-in-Person, for the Appellant; Karma Thinlay Namgyal, Senior Government Advocate and Pollin Rai, Assistant Government Advocate, Advocates for the Respondent

Final Decision: Allowed

Judgement

Sonam Phintso Wangdi, J.
This Appeal has been preferred against the order dated 24-08-2013 of the Learned District Judge, South and

West Sikkim at Namchi, in Civil Misc. Case No. 2 of 2013 arising out of T.S. Case No. 2 of 2010, whereby the application filed by the Appellant

under Order IX Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 (for short ""CPC""), for restoration of the suit, had been

dismissed for his non-appearance in terms of Order IX Rule 8 CPC by order dated 08-04-2011 in T.S. Case No. 2 of 2010.

2. While disposing off the application for condonation of delay in CM Appl. No. 353 of 2014, we have dealt in detail giving rise to the impugned

order of the District Judge, South and West Sikkim at Namchi, dated 24-08-2013 in Civil Misc. Case No. 02 of 2013.

3. No doubt that there was a delay of 681 days on the part of the Appellant in filing the application under Order IX Rule 9 CPC for setting aside

the ex parte order but, the Trial Court after dealing in detail the explanation given in the application for condonation of delay, appears to have

rejected it on reasons extraneous to the principles governing Section 5 of the Limitation Act, 1963.

4. We find from the original proceedings of the Trial Court in T.S. Case No. 2 of 2010 commencing from 19-02-2010, the Appellant had been

represented by a Counsel on all the dates except for 25-08-2010 and 04-04-2011 when he was present in person. Order dated 06-10-2010

reveals that the Appellant was not present in Court when 08-04-2011 was fixed as the next date but was represented by his Counsel.

Unfortunately, it appears that neither the Appellant nor the Counsel put in appearance on that date, i.e., 08-04-2011, resulting in the ex parte

dismissal of the suit. It can be reasonably assumed that the Counsel did not inform the Appellant of the date fixed on 08-04-2011.

5. The application for condonation of delay in filing the application for restoration of the suit, sets out in detail as to why the Appellant was unable

to take steps. He has averred that his wife had fallen ill and ultimately succumbed to her illness on 21-07-2011. That due to her illness, the

Appellant was completely engaged in looking after her with the confidence that the case was being taken care of by his Counsel. That on the death

of his wife, the Appellant was in extreme grief and took several months to get over the loss of his wife and resettle. He was then diagnosed with

diabetes and was under treatment since October, 2011, and thus, due to his ill-health, he was unable to contact his Counsel. A call made by him to

his Counsel in February, 2012, also could not get through. In March, 2012, he had to undergo eye surgery requiring utmost care to be taken to

avoid complication because of which he was unable to venture out. All his efforts in spite of his ailing condition to get in touch with his Counsel

over the phone failed. His continued diabetic condition and other connected illness prevented him from personally meeting his Counsel. He was

also once admitted in a hospital at Kalimpong for treatment of perianal abscess.

6. The detailed account of the steps that he had taken thereafter, in my view, need not be gone into treating it as having been accepted in the

finding of the Trial Court.

7. The Trial Court did not believe the grounds set out in the application for condonation of delay firstly, because the death certificate of the wife of

the Appellant, Suk Maya Subba, was shown as ""Devi Maya Subba"" and did not specify that she was the wife of the Appellant; secondly, that the

Appellant was diagnosed with diabetes and was under treatment from October, 2011 onwards, cannot be a ground for such a long delay as the

illness could not have confined him at one place when people with diabetes work and travel; thirdly, the ground of the Appellant having required to

undergo eye surgery and lastly, that he could not contact his Counsel at Namchi as she had left for Gangtok after her appointment as Government

Advocate, also could not be accepted as being reasonable or satisfactory or proper explanation for the delay.

8. Upon perusal of the impugned order, it appears that the Trial Court had not considered the application in its proper perspective and had rather

perfunctorily rejected the application. There is no doubt that there had been a long delay of 681 days but, that alone cannot be a ground for

rejection of the application.

9. In N. Balakrishnan Vs. M. Krishnamurthy, (1998) 6 AD 465 : AIR 1998 SC 3222 : (1998) 2 CTC 533 : (2008) 228 ELT 162 : (1998) 6 JT

242 : (1999) 121 PLR 462 : (1998) 5 SCALE 105 : (1998) 7 SCC 123 : (1998) 1 SCR 403 Supp : (1998) AIRSCW 3139 : (1998) 7 Supreme

209 where an application for condonation of delay of 883 days in filing application for setting aside ex parte decree was considered, the following

principle was enunciated:--

8. The appellant''s conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not

very much far from what a litigant would broadly do. Of course, it may be said that he should have been more vigilant by visiting his advocate at

short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an

omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with

drastic consequences.

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 a 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 revisional 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 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.

11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek

their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a

lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux

of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed

for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is

thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to

litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics

but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay

in approaching the court is always deliberate. This Court has held that the words ""sufficient cause"" under Section 5 of the Limitation Act should

receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain Vs. Kuntal Kumari and Others, AIR 1969 SC 575 :

(1969) 1 SCR 1006 and The State of West Bengal Vs. The Administrator, Howrah Municipality and Others, AIR 1972 SC 749 : (1972) 1 SCC

366 : (1972) 2 SCR 874(1) : (1972) 4 UJ 449 .

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to

turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory

strategy, the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by

the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the Court should

not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It

would be a salutary guideline that then courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite

party for his loss.

[underlining mine]

Therefore, what follows from the above is that the Court should not proceed with the tendency of finding fault with the cause shown and reject the

petition by a slip-shod order. Acceptance of explanation should be the rule and refusal an exception when no negligence or inaction or want of

bona fide can be imputed.

10. In Ram Nath Sao @ Ram Nath Sahu and Others Vs. Gobardhan Sao and Others, (2002) 2 JT 349 : (2002) 2 SCALE 334 : (2002) 3 SCC

195 : (2002) 2 SCR 77 : (2002) AIRSCW 978 : (2002) 2 Supreme 143 following the decision in N. Balakrishnan (supra), it was held as follows:-

-

11. Thus it becomes plain that the expression ""sufficient cause"" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any

other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide

is imputable to a party. In a particular case whether explanation furnished would constitute ""sufficient cause"" or not will be dependant upon facts of

each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing

is clear that the Courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in

over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or

inaction or want of bone fide can be imputed to the defaulting party. On the other hand, while considering the matter the Courts should not lose

sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly

defeated by condoning delay in a routine like manner. However, by taking a pedantic and hyper technical view of the matter the explanation

furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and

irreparable injury to the party against whom the list terminates either by default or inaction and defeating valuable right of such a party to have the

decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the

parties either way.

[underlining mine]

11. In the light of the above, I neither find negligence nor inaction or want of bona fide imputable to the Appellant in view of the explanation

furnished by him in his application, which in the facts of the case, I find quite satisfactory. This apart, in view of the serious questions involved in the

suit raised as regards the valuable right on the land in question by the Appellant, a rustic villager and a tribal, it would be in the interest of justice to

adjudicate upon the dispute on its merits and to advance substantial justice. Terminating the lis by taking a pedantic and hyper-technical view of the

matter in rejecting the explanation for the delay in a perfunctory manner as done by the Trial Court may cause grave and irreparable injury to the

Appellant.

12. For the aforesaid reasons, I find that the Learned District Judge has fallen in error and misdirected herself in rejecting the application for

condonation of delay.

13. I am, therefore, of the view that the Appeal should be allowed and is accordingly allowed so. As a consequence, the impugned order is set

aside.

14. The suit stand restored to its original number and shall commence from the stage when it was dismissed.

15. In the result, the Appeal succeeds.

16. No order as to costs.

17. A copy of this judgment and the original case records be transmitted to the District Judge, South Sikkim at Namchi forthwith for its due

compliance.