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**Shri Biman Kumar Nath and Others Vs Shri Ajit Kumar Nath and 4 Others**

**C.O. 2789 of 1987**

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**Court:** Calcutta High Court

**Date of Decision:** March 14, 1988

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) " Section 80#Limitation Act, 1963 " Section 5

**Citation:** (1988) 2 CALLT 264

**Hon'ble Judges:** Samir Kumar Mookherjee, J

**Bench:** Single Bench

**Advocate:** B.M. Mitra and A.K. Sengupta, for the Appellant; B.K. Banerjee and Miss Shila Sarkar, For Opposite Parties Nos. 1 to 5, for the Respondent

**Final Decision:** Dismissed

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**Judgement**

Samir Kumar Mookherjee, J.

This Revisional application is directed against Order No. 5, dated 2nd of March, 1987, passed by the

learned District Judge, Burdwan in Title Appeal No. 230 of 1986, rejecting an application for condonation of delay, on behalf of the plaintiffs, in

preferring the said appeal.

2. The facts, which are not in dispute, are that the suit was dismissed on contest on 12th of October, 1985, the hearing having been concluded on

10th of October, 1985; the plaintiffs in the said suit were the sons of one Kalyan Kumar Nath and the defendants were the successors in interest of

late Harendra Nath and the State of West Bengal, being represented by the Collector, Burdwan.

3. In the suit, the substance of the plaintiffs allegations was that the suit properties were purchased from Harendra Nath, predecessor-in-interest of

the private defendants for a consideration of Rs. 10,000 and the plaintiffs were in possession of the same; but the State respondent, claiming the

suit lands as vested, had been trying to throw the plaintiffs out of possession and consequently, a decree for declaration of title and permanent

injunction had been prayed for on behalf of the plaintiffs.

4. In the suit, in their written statement, the private respondents contended that their predecessor-in-interest was merely a benamdar of the plaintiffs

and the question of execution of a deed of sale or passing of consideration of Rs. 10,000 was accordingly wholly unnecessary and uncalled for.

5. As witness in the suit, the plaintiff No. 3 deposed, since at the relevant time, the said Kalyan Kumar Nath the father of the plaintiffs was claimed

to be ill.

6. It is significant to note at this stage that the appeal was ultimately filed by Tarun Kumar Nath, the said witness, as a constituted attorney of the

plaintiffs. The trial court dismissed the suit, inter alia, finding that there was no evidence of purchase by Charuprova, grandmother of the present

plaintiffs and the mother of Kalyan Kumar Nath, of the disputed property at a consideration of Rs. 10,000 ; that the administration of the property

in terms of Charuprova's will had not been even pleaded on behalf of the plaintiffs; that the plaintiffs failed to prove that they were in possession

and lastly, that there was no sufficient evidence, substantiating the service of a notice u/s 80 of the CPC by the plaintiffs, though the Trial Court

refused to reject the plaint on that ground because of the delay in taking such objection. It further appears that the Civil Court vacation commenced

on and from 13-10-1985 and re-opened on 15-11-1985 (wrongly stated as 18-11-1985). The certified copy of the judgment and decree was

applied for on 19-11-1985 and became ready for delivery on 25th of April, 1986, but delivery was taken only on 12th of May, 1986. The appeal

in question was filed on 14-11-1986.

7. There is some dispute about the number of days constituting delay in filing the appeal. According to the plaintiffs-petitioners, the same was 169

(one hundred and sixty nine) days but according to the private defendants-opposite parties, the same was 241 ( two hundred and forty one) days.

8. The learned Judge dismissed the application u/s 5 of the Limitation Act, inter alia, with the following findings :

(i) The contention of the appellants that their father had been entrusted to look after the litigation and file the appeal was belied; (ii) there is no

explanation as to why the certified copy could not be applied for before 19-11-1985; (iii) it is difficult to believe that the appellants did not have

any knowledge about delivery of judgment on 12-10-1985; (iv) there is no explanation as to why the delivery of the certified copy had not been

taken before 12-5-1986 and (v) there is no explanation as to why the appeal could not be filed before 14-11-1986.

9. In support of the Revisional application, Mr. Mitra has placed a great emphasis on the principles laid down by the Supreme Court in the case of

State of Karnataka Vs. Kuppaswamy Gownder and Others, and the guidelines for consideration of an application for condonation of delay, as

indicated by the Supreme Court therein. According to Mr. Mitra, the said decision has really reoriented the entire approach of Courts in the matter

and has considerably relaxed the strict interpretation so long being put on Section 5 of the Limitation Act. Applying the said principles, Mr. Mitra

has contended that the impugned Order calls for an interference in Revision, as, from the materials on record it is clear that by hearing out the

appeal, the cause of justice will not be jeopardized, but will really be advanced, since the plaintiffs derive no benefit in allowing their appeal to get

barred by limitation; secondly, according to Mr. Mitra, the approach of the lower appellate court, based upon the earlier guidelines of explanations

being required for every day's delay, is no longer tenable in the context of the guidelines indicated in the aforesaid latest Supreme Court decision.

Thirdly, according to Mr. Mitra, it cannot be said that the appeal will be without any merit and fourthly, though not averred in so many words, the

real case of the appellants appears to be that the certified copy of the decree being an integral part of the documents to be filed with the

Memorandum of appeal, the application for the same was made on 19-11-1985. These are facts, which Mr. Mitra has contended, go to the rest

of exercise of discretion or jurisdiction by the Lower Appellate Court and as such, deserve re-consideration even in Revision by this Court. Upon

a consideration of such facts, Mr. Mitra has finally invited me to set aside the impugned order and allow his clients' application u/s 5 of the

Limitation Act.

10. Mr. Banerjee, appearing on behalf of the contesting private opposite parties, has, however, pointed out that in view of the social advancement,

law cannot remain static but has to be dynamic and as such, in the present day's context, the guidelines laid down by the Supreme Court correctly

fit in with the said dynamic element of law. But even applying the said principles, according to Mr. Banerjee, it cannot be said that the requirements

u/s 5 of the Limitation Act have been given ago by, though have been considerably relaxed and liberalised. In the facts of the case cited by Mr.

Mitra, Mr. Banerjee has pointed out, that the delay was only for four days in filing a special leave application and the stake of litigation was nearly

fourteen lacs of rupees. In the facts of that particular case, Mr. Banerjee has submitted that the Supreme Court condoned the delay of four days.

In the facts of the present case, according to Mr. Banerjee, occasions of default or negligence on the part of the appellants are galore; the findings

of fact made by the Lower Appellate Court amply substantiate the propriety of the said submission; therefore, even following the principles laid

down by the Supreme Court decision as cited, the appellants cannot claim to be successful, but their application should be found to have been

rightly rejected by the Lower Appellate Court.

11. Considering the respective submissions of the contesting parties, it appears that in the instant case the plaintiffs went to court, praying for

condonation of the delay of at least 169 days, assuming the plea of the appellants to be correct, substantially on the basis of a case that the illness

of their father, who was entrusted to look after the case on their behalf and take steps for filing of the appeal, impeded timely filing of the appeal.

The period of illness in the application u/s 5 of the Limitation Act was alleged to be commencing from the third week of April 1985. The medical

certificate relied on by the plaintiffs appellants in the court below, however, only shows the period of illness to be confined to 28th of May, 1986

and 9th of November, 1986. Admittedly, the certified copies became ready for delivery on 25th of April, 1986 and there is no explanation as to

why, though the appellants' father was not ill at the relevant point of time, as found by the lower appellate court, delivery of the certified copies

could not be taken and necessary steps for filing the appeal were not initiated. In this context even the case of the appellants that their father was

entrusted with the duty of looking after the case on their behalf and filing the appeal also has been disbelieved by the lower appellate court and in

my view, that too on reasons to which, no exception can be taken. Admittedly, from the averments in the application u/s 5 of the Limitation Act it

appears that the witness who deposed on behalf of the appellants in the court below was the appellant, petitioner No. 3, who was the constituted

attorney also duly authorised to file appeal on behalf of the appellants. It is, therefore, not correct to say that the illness of the appellants father

could in any way prevent the filing of the appeal in time. Secondly, the period of illness, continuing upto 9th of November, 1986 does not also

appear to have been correctly made out, as it appears from the Section 5 application itself that the petitioners father went to Burdwan to take

delivery of the certified copy on 4-11-1986, an inconsistency, which very materially prejudices the justness of the prayer for condonation. It is

significant to bear in mind that the appellants did not make out a case of having applied for the certified copy on the 19th of November, 1985 with

an impression that without the decree being drawn up, the application for certified copy of the decree would be infructuous. The alleged imposition

of obligation on the father to take steps for filing of the appeal and to look after the suit is also not warranted on the materials produced as referred

to above. Bearing in mind the aforesaid facts, even applying the principles laid down by the Supreme Court in the decision cited by Mr. Mitra, the

appellants are not entitled, in my view, to condonation of delay of 169 ( one hundred and sixty nine) days. If the delay is condoned in such a case

where the judgment under appeal, a copy of which has been produced by Mr. Mitra before me, does not suffer apparently from any serious

infirmity any serious legal error, it would really not subserve the cause of justice nor would it be a pragmatic approach but, on the contrary, it

would be a pedantic approach to divest the defendants of the benefit conferred on them by the Statutory provision of limitation. Court's anxiety as

revealed in the Supreme Court decision to mete out justice unfettered by technicalities must not be abused to give Premium to an undeserving

party. I am conscious in not adopting hypertechnical approach in the matter. The findings of fact by the Lower Appellate Court, which have not

been challenged except for reappraisal in the light of the Supreme Court judgment, amply justify the manner of exercise of discretion by it against

the Plaintiffs appellants and in view of the reasonings given by me hereinabove, do not call for any interference.

12. The Revisional application, therefore, fails and is dismissed with costs, assessed at 3 G.Ms.