

**(2008) 04 CAL CK 0102**

**Calcutta High Court**

**Case No:** CAN No's. 8843 and 8844 of 2007

Probir Kumar Burman

APPELLANT

Vs

Kashi Nath Das

RESPONDENT

**Date of Decision:** April 4, 2008

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13, 151
- Constitution of India, 1950 - Article 227
- Limitation Act, 1963 - Section 5

**Citation:** (2008) 3 CHN 55 : (2008) 2 ILR (Cal) 754

**Hon'ble Judges:** Prabuddha Sankar Banerjee, J

**Bench:** Single Bench

**Advocate:** Jiban Ratan Chatterjee, Dinabandhu Chowdhury and Amal Kumar Saha, for the Appellant; Subrata Kumar Roy Karmakar and Sanjoy Bhattacharya, for the Respondent

### **Judgement**

Prabuddha Sankar Banerjee, J.

These applications u/s 5 of the Limitation Act were in connection with Review Case No. 2374 of 2007 along with Review Case No. 2375 of 2007.

2. It is to be mentioned here that the said review applications were filed for reviewing the common order passed by this Court on 12.3.2007 in connection with CO. No. 280 of 2006 which was taken up along with CO. No. 281 of 2006.

3. The fact leading to filing of the said review application may be summed up thus.

4. That the present opposite party filed one suit for eviction and for khas possession of the properties mentioned in the schedule of the plaint of T.S. No. 226 of 2006 which was filed before the learned Civil Judge, Junior Division, First Court, Chandernagar.

5. The said suit was decreed ex parte on 7th March, 2001 after the learned Trial Judge was satisfied regarding service of summons/notice upon the defendant.

6. On 2nd May, 2003 the defendant filed one application under Order 9 Rule 13 CPC read with Section 151 of CPC which was numbered as Misc. Case No. 21 of 2003 for setting aside the ex parte order.

7. As the said application under Order 9 Rule 13 read with Section 151 of CPC could not be filed within the stipulated period, one application was filed u/s 5 of the Limitation Act for condonation of delay,

8. The learned Trial Judge by his order No. 27 dated 22nd February, 2005 rejected the application u/s 5 of the Limitation Act and also rejected the said Misc. Case by Order No. 28 dated 22nd February, 2005.

9. Against the said orders, the defendant petitioner preferred two separate Misc. Appeals. The said two Misc. Appeals were dismissed by the learned Additional District Judge, First Fast Track Court, Chandernagore by order dated 29th November, 2005 and 30th November, 2007 respectively.

10. The said two orders were challenged by the defendant/petitioner before the Hon"ble Court under Article 227 of the Constitution which were numbered as CO. No. 280 of 2006 and CO. No. 281 of 2008.

11. By a common judgment dated 12th March, 2006, the said two revisional applications were dismissed.

12. Thereafter, the petitioners filed two separate applications to review the order dated 12th March, 2007 along with two separate applications for condonation of delay of 186 days.

13. The opposite party who was the plaintiff before the Trial Court contested the said applications u/s 5 of the Limitation Act by-using affidavit-in-opposition.

14. The present petitioner took the specific plea that the petitioner was suffering from various ailments and was under the treatment which started from 10th March, 2007 and continued upto 29th August, 2007. The petitioner also took the specific plea that considering such ailment which has been supported by medical papers, the petitioner was prevented from preferring the review application within the stipulated period and as such the delay in filing the application for review is to be condoned. He also took the specific plea that the delay has been explained properly.

15. The said pleas were denied by the opposite party in his affidavit-in-opposition.

16. The opposite party took the specific plea that only to delay the execution proceeding and to harass the landlord/plaintiff the present petitioner intentionally filed the review application long after the statutory period.

17. In course of his argument Sri Jiban Ratan Chatterjee, learned Senior Counsel for the petitioner contended that the approach of the Court should be liberal in condoning the delay. Mr. Chatterjee contended further that the delay in filing the

application for review has been explained properly and in support of his contention he drew the attention of the Court to the medical papers (xerox copies) which will go to show that the present petitioner was prevented from filing the review application within the stipulated period.

18. Mr. Chatterjee in course of his strenuous argument contended that as per recent judgment of the Apex Court, it has become the settled proposition of law that the approach of the Court should be liberal and if it is found that substantial justice is involved, the delay is to be condoned after payment of cost. Mr. Chatterjee in course of his argument further contended that it is the duty of the Court to see that substantial justice is done in providing relief to a litigant who applies for condonation of delay. It was the further contention of Mr. Chatterjee that if it is found by the Court that there was no wilful negligence or laches on the part of the petitioner, the Court should condone the delay even if the said period was long. It is to be mentioned that Mr. Chatterjee relied upon the following cases:

i) [Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, .](#)

ii) N. Balakrishnan v. M. Krishnamurthy reported in CLT 1999(1) SC 51.

iii) [M.K. Prasad Vs. P. Arumogam, .](#)

iv) [ICICI Bank Ltd. Vs. Garodia Vyapar Pratisthan, and](#)

v) Copy of order passed in Civil Appeal No. 2000 of 2006 passed by the Hon'ble Supreme Court.

19. On the contrary Mr. Subrata Kumar Roy Karmakar, learned Counsel for the opposite party relied upon the following cases:

i) [P.K. Ramachandran Vs. State of Kerala and Another,](#)

ii) Ashis Kumar Hazra v. Rubi Park Co-operative Housing Society Ltd. and Ors. reported in 1998 WBLR (SC) 15.

iii) [Union of India \(UOI\) Vs. Vishnu Agencies \(P\) Ltd., .](#)

iv) Mahabir Singh v. Subhash and Ors. reported in 2008(1) WBLR (SC) 591.

v) Sunil Poddar and Ors. v. Union of India reported in 2008(1) SC 150.

vi) [Binod Bihari Singh Vs. Union of India,](#)

vii) L.P. Electronics Pvt. Ltd. v. Manor Floatel Ltd. reported in 2003(2) CLJ (Cal) 74.

20. Mr. Roy Karmakar in course of his argument contended that the only intention of the present petitioner is to delay the execution proceeding. For this he contended that though the execution case was filed in the year 2001 nothing could be done regarding possession due to various proceeding pending before the higher forum. It was his further contention that the petitioner did not come with clean hands and

as such this application for condonation of delay should be dismissed in limine.

21. Mr. Roy Karmakar drew attention of the Court to the xerox copy of the prescriptions and on the basis of the same he contended that the Doctor who treated the present petitioner did not say in the said prescriptions that the petitioner was unable to move. Mr. Roy Karmakar further submitted that there is nothing on the said prescriptions that the present petitioner was advised total rest from March 10, 2007 to 29th August, 2007.

22. Mr. Roy Karmakar further contended that even assuming the fact that the present petitioner was treated from 10th March 2007 upto 29th August, 2007, no explanation whatsoever has been given for the delay since 29th August, 2007 till 5th October, 2007 i.e. the date when the application u/s 5 of the Limitation Act was affirmed.

23. Mr. Roy Karmakar on the basis of the cases as relied upon by him contended that the Court should be satisfied that the delay has been properly explained. In other words it was his contention that if there is any doubt in the mind of the Court regarding unexplained delay, the Court under no circumstances shall allow the application for condonation of delay. Mr. Roy Karmakar contended further that there is unexplained delay from 29th August, to 5th October, 2007 i.e. for 38 days.

24. However, Mr. Chatterjee contended that the Court should ignore the same and should consider whether the explanation for the delay of 186 days can be accepted by the Court.

25. On the basis of the cases relied upon by him. Mr. Chatterjee contended that the Hon'ble Supreme Court in all the cases came to the conclusion that approach of the Court should be liberal and if the Court is of opinion that substantial justice is involved, the Court should come to the rescue of the petitioner who filed the application u/s 5 of the Limitation Act. Mr. Chatterjee in course of his argument contended that he has good case for reviewing the order dated 12th March, 2007 and as such the Court should allow the application for condonation of delay.

26. Let us now consider the cases as referred by learned Counsel for the parties.

27. Let me start with the case in between ICICI Bank Ltd. Vs. Garodia Vyapar Pratisthan, where the Division Bench of this Court rejected the application u/s 5 of the Limitation Act for condoning the delay of 250 days. In that case the Division Bench came to the conclusion that inaction and sheer negligence on the part of the petitioner and his Advocate cannot be the sufficient cause to condone the delay Mr. Chatterjee contended that the said order of the Division Bench was set aside by the Hon'ble Supreme Court in connection with Civil Appeal No. 2000 of 2006. The copy of the order has been filed and it is clear from the said order that the Hon'ble Supreme Court did not find any fault with the High Court in refusing to condone the delay in preferring the appeal. However, the delay was condoned by way of

awarding compensation to the tune of Rs. 15,000/- it is to be mentioned that the Hon'ble Supreme Court used its inherent power in allowing the application u/s 5 of the Limitation Act but at the same time upheld the finding of the Division Bench.

28. In the case between [West Bengal State Electricity Board Vs. Gilloram Gouri Shankar](#), the Division Bench of this Court came to the conclusion that setting aside the ex parte decree is discretionary power which is to be exercised liberally. In that case, the explanations given in the affidavit-in-reply stand uncontested.

29. In the instant case I have already stated that though there was delay of 186 days, the delay of 38 days has not been explained. As such the said case law will not help Mr. Chatterjee's client.

30. In the case in between [M.K. Prasad Vs. P. Arumogam](#), there was delay of 554 days as the Advocate of the appellant/defendant had withdrawn from the case after framing of issues owing to death of his son and the appellant had no knowledge till he received notice regarding execution proceeding. The Court allowed the application as the Hon'ble Court came to the conclusion that the suit was decreed ex parte by unreasoned judgment. The fact of the instant case is totally different and as such I am of clear opinion that the said case law will also not help Mr. Chatterjee's client.

31. In the case in between N. Balakrishnan v. M. Krishnamurthy reported in Cal LT 1999(1) SC 51, the Hon'ble Court came to the conclusion that words "sufficient cause" u/s 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice. The Court also opined that explanation for the delay set up by the appellant was found satisfactory by the Trial Court in exercise of his discretion.

32. In the instant case the Trial Court as well as the First Appellate Court and the High Court were of the opinion that delay in filing the application u/s 5 of the Limitation Act could not be explained properly and as such the said case law will also not help Mr. Chatterjee's client.

33. In the case in between [Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others](#), there was delay for 4 days on the part of the State in filing appeal and the Hon'ble Court came to the conclusion that approach of the Court should be justice oriented and should also be liberal.

34. In that case the delay was only for 4 days which was explained and as such the said case law will also not help Mr. Chatterjee, client.

35. Let us now consider the cases as referred by Mr. Roy Karmakar.

36. In the case in between [P.K. Ramachandran Vs. State of Kerala and Another](#), the Hon'ble Supreme Court came to the conclusion that condonation of delay was not proper and judicious as proper explanation could not be given by the State.

37. In the case in between Ashis Kumar Hazra v. Rubi Park Co-operative Housing Society Ltd. and Ors. reported in 1998 WBLR SC 15, the Hon"ble Supreme Court opined that entire period of delay is to be explained. The Hon"ble Supreme Court further opined that the Court is to ensure that unless proper explanation is given for the delay, the valuable right accrued in favour of the respondent cannot be defeated.

38. In the case in between [Union of India \(UOI\) Vs. Vishnu Agencies \(P\) Ltd.,](#) the Division Bench of this Court opined that a party has to satisfy the Court that he had sufficient cause for not making the application within the prescribed time, which means that explanation has to cover the whole of the period of delay. The relevant paragraph being paragraph 23 runs as follows:

There is no material on record on which this delay is explained. Law is settled that a party has to satisfy the Court that he had sufficient cause for not making the application within the prescribed time, which means that the explanation has to cover the whole of the period of delay See [Sitaram Ramcharan etc. Vs. M.N. Nagarshana and Others,](#).

39. In the case in between Mahabir Singh v. Subhash and Ors. reported in 2008(1) WBLR (SC) 591, the Apex Court dismissed the prayer for setting aside the ex parte decree which was barred by limitation. The Apex Court also opined that the defendant for getting the ex parte decree set aside was required to establish that either no summons was served on him or he had sufficient course for remaining absent on the date fixed for hearing of the suit ex parte.

40. The case in between Sunil Poddar and Ors. v. Union of Bank of India reported in 2008(1) SC 150, will not help Mr. Roy Karmakar's client.

41. In the case in between [Binod Bihari Singh Vs. Union of India,](#) , the Apex Court came to the finding that a party should not be encouraged by rejecting the bar of limitation pleaded by opposite party and condoning the delay where false plea by the party to get rid of bar of limitation is taken.

42. In the case in between L.P. Electronics Pvt. Ltd. v. Manor Floatel Ltd. reported in 2003(2) CLJ (Cal) 74 the Hon"ble Single Judge of this Court opined that mistake or ignorance of law on the part of the Advocate concerned, even if there be any cannot be construed as sufficient cause for condoning such inordinate delay in filing the application for setting aside the ex parte decree. In the said judgment the Hon"ble Single Judge referred to the case in between [Mahant Bikram Dass Chela Vs. Financial Commissioner, Revenue, Punjab, Chandigarh and Others,](#) wherein it has been clearly laid down by the Hon"ble Apex Court that "Section 5 of the Limitation Act is a hard task-master and judicial interpretation has encased it within a narrow compass and a large measure of case laws has grown around Section 5, its highlights being that one ought not easily to take away right which has accrued to a party by lapse of time and that, therefore, a litigant who is not vigilant about his right must explain

every day's delay. Since no explanation for the entire period of delay worthy of credit is forthcoming from the defendant petitioner and utter lack of vigilance about the right of the petitioner is palpable on the face of the materials-on-record, there can hardly be any justifiable ground for setting aside the ex parte decree passed on 22nd December, 1998. Reference may also be made in this context to Sujit Chatterjee v. Rita Chatterjee reported in 2001(2) CLJ 308 a".

43. It is to be mentioned that from the xerox copy of the prescriptions which were relied upon by Mr. Chatterjee in support of his application u/s 5 of the Limitation Act it is clear that there is no whisper that the present petitioner was unable to move for the period of his treatment. There is also no whisper in the said prescriptions that the Doctor who treated the present petitioner advised him for rest.

44. It is unbelievable that the present petitioner failed to appear before this Court to affirm the affidavit during this 186 days. I have already stated that out of this 186 days there is unexplained delay of 38 days.

45. In view of the suit position and also considering the materials-on-record coupled with the decision of the Hon'ble Courts, I am of clear opinion that the present petitioner failed miserably to make out the explanation for the delay and as such the application u/s 5 of the Limitation Act for the condonation of delay stands rejected.

46. In view of the rejection of the applications u/s 5 of the Limitation Act, the review cases namely Review Case No. 2374 of 2007 and 2375 of 2007 stand dismissed.

However, there would be no order as to costs.

Interim order of stay, if any, be vacated.

47. Urgent xerox certified copy of this order be given to the parties within 10 days from the date of this order on proper application.