IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 3520 of 2016
Pradeep Mehta
Vs.
Col. Biswajit Bhattacharya (retd.) since deceased, rep. by Susmita Bhattacharya & Ors.

For the petitioners	:	Mr. Debasish De Ms. Debanjan De
For the opposite parties	:	Mr. Chayan Gupta Mr. Rajarshi Ganguly
Heard on	:	06.10.2023
Judgment on	:	12.10.2023

Ajoy Kumar Mukherjee, J.

1. This is an application under Article 227 of the Constitution of the India, preferred against impugned judgment and order dated August 8, 2016 passed by Civil Judge (Sr. Division) 8th Court, Alipore in Misc. Case no. 1 of 2013, arising out of Title Suit no. 15430 of 2011. Petitioner's case in brief is that the opposite party herein claiming themselves as owner of the suit property, instituted aforesaid suit for eviction against the petitioner in respect of the suit property. The petitioner herein is contesting the suit by filing Written Statement. During pendency of the suit plaintiff no. 1 died on April 30th, 2012. It is alleged on behalf of the petitioner herein/defendant that no step was taken on behalf of the plaintiff no. 2 for causing

substitution of the legal heirs of the deceased plaintiff no1 within the prescribed period of limitation and as such the suit abated as against plaintiff no 1 on or about 27th September 2012.

2. It is further contended that ultimately on January 8, 2013 the legal heirs of deceased plaintiff no. 1 filed an application before the court below under Order XXII Rule 9(2) read with section 151 of the Code of Civil Procedure, for setting aside the order of abetment in respect of deceased original plaintiff no. 1 and also for substitution of the petitioners as legal heirs in place of original plaintiff no. 1. Along with the said application, the applicants also filed an application for condonation of delay in making the aforesaid application. The petitioner herein filed affidavit in opposition against said two applications and the said legal heirs also filed their affidavit in reply. Learned court below allowed the said application.

3. Mr. Debasis Dey Learned counsel appearing on behalf of the petitioner submits that there are lot of discrepancies and deficiencies in the said application for condonation of delay and in the prayer for setting aside abatement but learned court below allowed the said application going beyond the pleading of the Misc. Case in the absence of any trial on evidence. He further submits that learned court below was erred in holding that the delay and laches of the petitioner was *bonafide* and unintentional but failed to appreciate that "sufficient cause" as referred to in Section 5 of the Limitation act, 1963 can be construed liberally only when the delay is not on account of any dilatory tactics, want of *bonafide,* deliberate in action or negligence of the applicant. Petitioner's counsel further contended that although both the plaintiffs resided in the same house, as is apparent form

the cause title of the suit, the opposite party/plaintiff no 2 took no steps to cause substitution of the legal heirs of the deceased plaintiff no.1 and offered no explanation as to why he did not take steps for causing substitution of the legal heirs of deceased plaintiff no 1, even though she admittedly took legal advice from her advocate in June 2012. He further contended that the elaborate story which has been stated by the petitioner to cover up the *malafide* and negligent conduct, of opposite party No.2 herein is not believable since the daughters of the deceased were quite competent to file the application for substitution. Learned court below erroneously held that there was delay of three months when applicants themselves prayed for condonation of delay for 102 days. In fact learned court below ought to have considered that there is active nexus between the legal heirs of deceased and the opposite party no .2 and as such court below ought not to have relied upon the cause stated in the prayer for setting aside the order of abatement and/or prayer for condonation of delay and he ought to have dismissed the prayer. In this context he relied upon following judgments :-

(i) Shanti Devi and others vs. Kaushaliya Devi , (2016) 16 SCC 565.

(ii) Perumon Bhagvathy Devaswom Vs. Bhargavi Amma (Dead) by LRs. And Ors. , (2008) 8 SCC 321.

(iii) Balwant Singh Vs. Jagdish Singh and Ors. AIR 2010 Supreme Court 3043

4. Mr. Chayan Gupta learned counsel appearing on behalf of the opposite party contended that on perusal of the plaint it would appear that

the suit was filed by plaintiff no.1 and 2 and in paragraph no.1, it has been specifically stated that both the plaintiffs are co-owners in respect of the suit property. He further submitted that it is settled law that any of the co-owners can file a suit for eviction against tenant. He further submits that since plaintiff no. 2 was alive at the time of death of plaintiff no 1, entire right to suit survives, and the suit cannot be abated as a whole, but by the impugned order the suit was restored in its original file, as if the entire suit has been abated and by the impugned order he had set aside the same, which is not the truth. He further contended that on 30th April, 2012, plaintiff no. 1 died and the family was under bereavement in May 2012. In June 2012 the heirs of plaintiff no. 1 met the plaintiff no. 2 and discussed the entire matter with her and then plaintiff no. 2 met with their advocate who advised them that an application for substitution would have to be filed. However in October 2012 the application under Order XXII Rule 9(2) read with section 151 of the Code of Civil Procedure was prepared but the same could not be vetted and approved before Puja Vacation started. The application thereafter finalised and made ready for filing in December 2012 but the winter vacation of the court started. Thereafter in January, 2013 the application under Order XXII Rule 9(2) was filed before the court. In fact there was a delay of only 102 days and there was no intentional laches or negligence on the part of the opposite parties herein in preferring the said application in time and as such sufficient cause had prevented them from filing the application. After hearing both the parties and after considering submissions made by them, the court below was justified in passing the order impugned which does not call for interference.

5. On perusal of the order impugned it appears that the court below recorded the submission of the petitioner that the deceased plaintiff no. 1 in fact used to look after the suit and opposite party no.2 herein after demise of her husband suddenly became ill and feeble and due to ill health of the petitioner she could not file the application in time and in fact legal heirs of the deceased were undergoing severe bereavement and there was also Puja Vacation in the intervening period and for which Misc. Case could not be filed in time. The court below also relied upon judgment passed by this court and reported in ***2014 (2) CHN (Cal) 76*** and observed that the word "sufficient cause" appearing in Section 5 of the Limitation Act should receive a liberal construction. Considering the entire aspect of the case, the court below got satisfied that the petitioner/plaintiff was prevented by sufficient cause in not filing the aforesaid application in time and he further observed that the delay and/or latches on the part of the petitioner is *bonafide* and unintentional and as such he condoned the delay in filing the Misc. Case and further pleased to set aside the order of abatement imposing total cost of Rs. 4,000/-.

6. I have considered submissions made by both the parties.

7. It is not in dispute, when plaintiff no. 1 died plaintiff no. 2 was on record and as such suit cannot be abated as a whole. This is also because this is a suit for eviction of the defendant from the suit property and as such any co-sharer of the suit property can institute and continue with the suit unless objected by the other co-sharer. It further appears that there was a delay of more than 100 days in filing the application for setting aside

abatement and for which an application with prayer for condonation of delay was also filed, which however was allowed by the court below.

8. It is trite law that provisions of order XXII C.P.C. are not penal in nature and the provisions are basically procedural and it is also well settled that substantial rights of the parties cannot be defeated by pedantic approach by observing strict adherence to the procedural aspects of law. In ***Sital Prasad Saxena (d) by Lrs. Vs. Union of India and others*** reported in **(1985) 1 SCC 163**, it was observed that the rules of procedure under Order XXII C.P.C. are designed to advance justice and should be so interpreted as not to make them penal statues for punishing erring parties. On sufficient cause, delay in bringing the legal representatives of the deceased party on record should be condoned. Procedure is meant only to facilitate administration of justice and not to defeat the same.

9. Learned counsel appearing on behalf of the petitioner strenuously argued that the delay and latches of the petitioner is intentional which is evident from the fact that both the plaintiffs resided in the same house which is apparent from the cause title and there is no explanation as to why opposite party no. 2 did not take steps for causing substitution when he admitted that he took legal advice from his advocate in June 2012. Such contention has been controverted by the opposite party by contending that the family was in bereavement till June, 2012 and thereafter he discussed the matter with his advocates but application could not be filed as puja vacation and thereafter winter vacation interrupted in the meantime and further case of the petitioner is that there is no intentional latches or

negligence on the part for the opposite parties herein in causing delay of 102, days in preferring the said application.

10. In the case of in **N. *Balakrishnan Vs. N. Krishnamurthy*** reported in **(1998) 7 SCC 123** Apex Court observed in paragraph 11,12, 13 as follows:-

> ***"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.*
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> ***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 v. Kuntal Kumari [AIR 1969 SC 575 : (1969) 1 SCR 1006] and State of W.B. v. Administrator, Howrah Municipality [(1972) 1 SCC 366 : AIR 1972 SC 749] .*
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> ***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."*

11. Relying upon the aforesaid judgment of **N. Balakrishnan (supra)** in ***Ram Nath Sao Vs. Gobardhan Sao and others*** reported in **(2002) 3 SCC 195** Supreme Court further observed that the expression "sufficient cause" within the meaning of Section 5 of the Limitation Act or under Order XXII

Rule 9 of the code or any other similar provisions should receive a liberal construction so as to advance substantial justice when no negligence or in action or want of *bonafides* is imputable to a party. 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 court should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in overjubilation of disposal drive.

12. In the present context the court below while allowing the petitioner's prayer for condonation of delay and for setting aside the order for abatement in respect of the Misc. Case filed under Order XXII Rule 9 observed that considering the entire aspect of the case he is satisfied that the petitioners are prevented by sufficient cause in filing their substitution petition and that the delay or latches on the part of petitioner is *bonafide* and unintentional, which prompted the court below to condone the delay and to set aside the order of abatement.

13. Such finding of the court below has not resulted in any gross or manifest failure of justice nor there has been any illegality or perversity committed by the court below while passing the impugned order. The High Court in exercise of its power under Article 227 ordinarily shows indulgence in the order passed by the courts below only to keep such courts within the bounds of their authority, the object being to ensure that law is followed by such courts in exercising jurisdiction which is vested to them. It is true that by the Civil Procedure Code (amendment Act, 1999) the scope of Section 115 of the code has been curtailed but that does not mean that due to such curtailment, the High court's power of superintendence under Article 227

has been expanded. The jurisdiction under Article 227 is vast and has to be exercised sparingly. It can be exercised to correct errors of jurisdiction, but not to upset pure findings of the facts, which is within the domain of an appellate court only. Since I find no illegality, irrationality or procedural impropriety in the order impugned, I have no other option but to conclude that the present application is liable to be dismissed.

14. In view of above **C.O. 3520 of 2016** is dismissed.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)