IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

C.O. 3819 of 2022

Atlanta Global Advisors Private Limited
Vs.
Sanjib Kumar Jain & Ors.

For the petitioner : Mr. Goutam Mitra,
Ms. Suparna Mukherjee,
Mr. Rishad Medooa,
Mr. Meghajit Mukherjee.

For the opposite parties : Mr. Naresh Balodia,
Mr. Pallav Choudhary,
Ms. Saheli Sur.

Hearing concluded on: 10.08.2023
Judgment on: 12.10.2023

Shampa Sarkar, J.:-

1. The revisional application arose out of an order dated September 15, 2022 passed in Misc. Case No.14 of 2016. The Misc. Case was an application under Order 9 Rule 9 of the Code of Civil Procedure for restoration of Title Suit No.15509 of 2013.

2. The order impugned has been passed by the learned Civil Judge (Senior Division), 2nd Court at Alipore. By order dated August 14, 2015, the suit was dismissed for default on the ground of non-appearance of the plaintiffs. The Misc. Case was filed with a prayer for recall of the said order of dismissal and for the restoration of the suit to its original file and

number. The ground for restoration was negligent conduct of the learned Advocate. The original plaintiffs filed the application for restoration.

3. Dr. Arundhati Mukherjee and Aditi Basu, as plaintiffs filed the suit against the petitioner. The suit was for recovery of khas possession and mesne profit. The plaintiffs did not appear in the suit. They failed to reply to the show cause issued by the court, explaining the reason for their absence. The suit was dismissed for default. On August 11, 2016, the original plaintiffs filed the Misc. Case No. 14 of 2016. The defendants filed their written objection. In the application for restoration, plaintiffs contended that the plaintiff No.1 was an NRI and lived in the United Kingdom and the plaintiff No.2 resided at Dehradun. It was difficult for them to conduct the suit. They were also senior citizens. Accordingly, they had entrusted their learned Advocate to conduct the case and the learned Advocate interacted with them from time to time intimating them about the status of the case. Suddenly, they stopped receiving information. They tried to contact the learned Advocate and consequently one Mr. Chhabindra Kumar Sahu was appointed as constituted attorney sometime in March 2016, to represent the plaintiffs before the learned court. The constituted attorney contacted the learned Advocate for information with regard to the status of the suit, but did not get any reply. In the second week of July 2016, the constituted attorney met the erstwhile Advocate and found that no steps had been taken in the matter. Instruction was given to the learned Advocate to make an enquiry with regard to the status of the suit. Thereafter, another learned Advocate was engaged by the constituted attorney. The learned Advocate took steps to obtain information about the suit on August 4, 2016 by

searching the records. An information slip was supplied to the subsequent learned Advocate on August 9, 2016. Upon perusal of the information slip it was found that the suit had been dismissed on August 14, 2016. The plaintiffs were keen to proceed with the said suit. It was prayed that the said suit should be restored to its original file and number. It was pleaded that there was no intentional delay in filing the application for restoration with the specific pleading and prayer that the delay be condoned. That the application for restoration was filed immediately upon coming to know of the order of dismissal and unless the suit was restored by recalling an order of dismissal, the plaintiffs would suffer irreparable loss and injury.

4. The objection to the said Misc. Case was filed by the petitioner two years later. The petitioner/defendant specifically denied the contention of the plaintiffs and stated that the plaintiffs had already sold the property to a third party and did not have any subsisting right, title and interest in the property in question. Moreover, a separate application for condonation of delay not having been filed, the Misc. Case deserved to be dismissed.

5. The records reveal that the present opposite parties were duly substituted in place of the vendors (original plaintiffs) in the Misc. Case and the application for restoration was duly amended by incorporating the opposite parties as petitioners in the Misc. Case. Such order was not challenged by the petitioner. The Misc. Case was taken up for hearing. The affidavit-in-chief and the cross-examination of P.W.1 (Sanjiv Kumar Jain/opposite party No.1) have been annexed to the revisional application. He deposed for himself and as the constituted attorney of the other opposite parties, in the Misc. Case. Upon contested hearing, the Misc. Case was

allowed. The learned court was of the view that from the evidence and the pleadings, the court was satisfied that sufficient cause had been shown for non-appearance of the plaintiffs. Whether the opposite parties (subsequent purchasers) had first-hand knowledge with regard to the causes shown by the erstwhile plaintiffs for not appearing on the dates the suit was fixed for hearing, was not relevant. An enquiry of such nature would be hyper technical. The learned court held that the suit should be decided on merits and not on technicalities. The Misc. Case was allowed by recalling the order dismissal of the suit dated August 14, 2015.

6. Mr. Mitra, learned Advocate appearing on behalf of the petitioner submits that the suit was dismissed in 2015 and restored after almost seven years. By then, the suit was a dead suit. Secondly, the subsequent purchasers could not invoke the provisions of Order 22 Rule 10 of the Code of Civil Procedure and proceed with the Misc. Case in place of the original plaintiffs. Devolution of interest would take place only if the suit was pending. Thirdly, in the deposition, the opposite party No.1 stated that the opposite parties did not have any knowledge of the reasons for non-appearance of the plaintiffs and consequent dismissal of the suit. According to Mr. Mitra, the basic principle to allow an application for restoration was that the court had to be satisfied that the plaintiffs were prevented by sufficient cause from appearing before the court on the day the suit was dismissed for default. That the court had to give justifiable reasons to restore a suit after such prolonged delay, by ascertaining the truth and veracity of the statements of the original plaintiffs. In the case in hand, whether the erstwhile learned Advocate failed to take steps, whether a

constituted attorney was appointed to look after the case, whether another Advocate had been engaged to obtain information etc., were not within the personal knowledge of the petitioners. Lack of such knowledge was also evident from the testimony of P.W.1. The PW1 was not in a position to prove the case of the erstwhile plaintiffs. Thus, the grounds for restoration did not exist as the opposite parties, who purchased the property in 2017 could not have any personal knowledge about the reasons for non-appearance of the original plaintiffs in the suit and could not vouchsafe on behalf of the erstwhile plaintiffs.

7. Mr. Balodia, learned Advocate appearing on behalf of the opposite parties, submits that the learned court had already allowed the opposite parties to pursue the proceedings on behalf of the original plaintiffs, as the opposite parties had stepped into the shoes of the original plaintiffs. The law provided them with the right to continue with the proceedings as they had acquired right, title and interest in the property from the original plaintiffs. The order by which they were substituted in the Misc. Case was not challenged. That even if the opposite parties did not have any personal knowledge about the failure of the erstwhile Advocate to take steps as pleaded in the application for restoration, sufficient cause was shown. The causes were probable causes and the Misc. Case could not be rejected on a hyper technical ground. The order impugned was well reasoned and the learned court had exercised his discretion in accordance with law. He further submitted that the petitioner could not establish any substantial injustice or prejudice that had been caused to them on account of restoration of the suit. He submitted that due to the fault of a learned

Advocate, a litigant could not suffer and hence the ground for restoration taken by the plaintiffs were sufficient grounds for restoration of the suit upon condonation of delay.

8. Referring to paragraph 13 of the Misc. Case, Mr. Balodia, submitted that the reasons for the delay had been explained, although a separate application for condonation of delay was not filed.

9. Considered the submissions made by the learned Advocates for the respective parties.

10. The learned trial court, by an order dated February 29, 2020, allowed the application dated April 24, 2018 filed by the petitioners with a prayer for substitution in the Misc. Case No.14, 2016. The opposite parties pleaded and relied on the provisions of Order 22 Rule 10 of the Code of Civil Procedure. The learned court observed that the original plaintiffs had transferred and conveyed the premises No.7 Bondel Road, First Floor, P.S. Karaya, including the suit property on as is where is basis, on November 13, 2017. By virtue of the sale deed, the opposite parties became the owner of the property. Hence, the said opposite parties were entitled to substitute themselves as the plaintiffs in the Misc. Case in place of the original plaintiffs. Accordingly, the following order was passed:-

> "That the petition filed by the petitioners dated 24.04.2018 is hereby allowed and disposed of without any order as to costs.
> The name of the petitioners be substituted as per the petition mentioned above.
> Petitioners are directed to file the fresh copy of the plaint of the Misc. Case.
> On consent of both the parties the evidence of Sanjiv Kumar Jain is taken in part and further evidence is deferred on the prayer of the petitioners.
> To 18.04.2020 for filing fresh plaint by the petitioners and further evidence of petitioner."

11. This court finds that within five months upon execution of the deed of conveyance, the opposite parties approached the learned court below with a prayer to substitute themselves in Misc. Case No.14 of 2016 and to continue the suit. They had acquired right, title and interest in the suit property and had stepped into the shoes of the original plaintiffs. The said application was allowed on February 29, 2020 and on consent of both the parties the evidence of Sanjiv Kumar Jain was taken in part and thereafter deferred. April 18, 2020 was fixed for filing a fresh plaint (restoration application) by the opposite parties and for further evidence of P.W.1.

12. The amended restoration application was filed by making appropriate deletions and insertions in the cause title, prayers and the affidavit. Thereafter, the evidence of P.W.1 continued and ultimately the Misc. Case was decided on the records and the evidence available. The order impugned was passed, by allowing restoration of the suit.

13. This court finds that the explanation with regard to the delay in filing the restoration application had already been mentioned in paragraph 13 by original plaintiffs in the Misc. Case, by the original plaintiffs. They explained the cause for the delay in some detail. The specific ground was negligence by the erstwhile leaned Advocate. Even if the incidents of the past were not within the personal knowledge of opposite parties, the opposite parties had the right to contest the suit having acquired a derivative right. They also had the right to file a fresh suit on the self-same cause of action.

14. In my opinion, a harmonious construction of Order 22 Rule 10 and Section 146 of the Code of Civil Procedure would justify the reason as to

why the opposite parties were allowed to be substituted in the Misc. Case. Moreover such order was never challenged.

15. Order 22 Rule 10 and Section 146 of the Code of Civil Procedure are quoted below:-

> "**Order 22 Rule 10-** Procedure in case of assignment before final order in suit.—(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. (2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)."
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> **"146. Proceedings by or against representatives**.—Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person then the proceeding may be taken or the application may be made by or against any person claiming under him."

16. Section 146 was introduced with the object of facilitating the exercise of rights by any person upon whom the right to sue vested by devolution of interest. The same being a beneficial provision, should be liberally construed. For the ends of justice, the substitution of the opposite parties as plaintiffs upon purchase of the suit property, was rightly allowed.

17. Reference is also made to the decision in ***Sm. Saila Bala Dassi vs Sm. Nirmala Sundari Dassi And Anr.*** reported in ***AIR1958 SC 394.***

18. The provision of Order 22 Rule 10 confers the discretion upon the Court before whom such litigation is pending to grant leave to the person in or upon whom such interest had come to vest or devolve, to be brought on record. The Court has to be, prima facie, satisfied before exercising such discretion that the property had devolved by an assignment or otherwise.

The final question with regard to existence and validity of such deed of assignment or devolution should be considered at the final hearing.

19. In this case, the Court had exercised discretion and had been, prima facie, satisfied that the subsequent transferees should not only be substituted in the suit but could also proceed with the application seeking restoration of the suit.

20. Moreover, if the erstwhile plaintiffs had the right to continue with the Misc. Case, the derivative right of the opposite parties to continue with the same, should not be denied. The relief for recovery of khas possession from the defendant and the maintainability of the suit etc., will be decided at the final trial, as issues. The opposite parties are the beneficiaries in interest of the erstwhile plaintiffs.

21. The test is whether the opposite parties have an enforceable right or not. The opposite parties, having acquired the ownership of the property, could also bring a separate suit against the defendant, without praying for restoration of the application. The restoration of the present suit had avoided multiplicity of proceedings.

22. Moreover, the suit is one under the Transfer of Property Act, for recovery of khas possession upon evicting the defendant on the ground of expiry of the period of tenancy and failure to execute a fresh tenancy agreement at an enhanced rent. A notice under Section 106 of the Transfer of Property Act was also issued asking the petitioner to quit and vacate the property. With regard to the condonation of delay in filing the application for restoration, the learned court observed that a separate application for condonation of delay under Section 5 of the Limitation Act was not the

mandate of law. Although, the general practice is to make a formal application, however, there is no bar on the part of the court to exercise discretion and condone the delay even on an oral prayer, in the absence of a formal application.

23. In the decision of ***Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd.,*** reported in ***(2021) 7 SCC 313,*** the Hon'ble Apex Court held as follows:-

> **"61.** Section 5 of the Limitation Act, 1963 does not speak of any application. The section enables the court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable the court or tribunal to weigh the sufficiency of the cause for the inability of the appellant applicant to approach the court/tribunal within the time prescribed by limitation, there is no bar to exercise by the court/tribunal of its discretion to condone delay, in the absence of a formal application.
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> **62.** A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section. Had such an application been mandatory, Section 5 of the Limitation Act would have expressly provided so. Section 5 would then have read that the court might condone delay beyond the time prescribed by limitation for filing an application or appeal, if on consideration of the application of the appellant or the applicant, as the case may be, for condonation of delay, the court is satisfied that the appellant applicant had sufficient cause for not preferring the appeal or making the application within such period. Alternatively, a proviso or an Explanation would have been added to Section 5, requiring the appellant or the applicant, as the case may be, to make an application for condonation of delay. However, the court can always insist that an application or an affidavit showing cause for the delay be filed. No applicant or appellant can claim condonation of delay under Section 5 of the Limitation Act as of right, without making an application.
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> **100.** In any case, Sections 5 and 14 of the Limitation Act are not mutually exclusive. Even in a case where Section 14 does not strictly apply, the principles of Section 14 can be invoked to grant relief to an applicant under Section 5 of the Limitation Act by purposively construing "sufficient cause". It is well settled that omission to refer to the correct

section of a statute does not vitiate an order. At the cost of repetition it is reiterated that delay can be condoned irrespective of whether there is any formal application, if there are sufficient materials on record disclosing sufficient cause for the delay."

24. Moreover, this court finds that in paragraph 13 of the said application, delay has been pleaded and in the entire application, reasons for delay has been sufficiently explained.

25. In the decision of ***Rafiq and ors. vs. Munshilal and ors.*** reported in ***AIR 1981 SC 1400***, the Hon'ble Apex Court held that after engaging an Advocate, the party may remain supremely confident that the Advocate would look after his interest. Personal appearance of a party was hardly a requirement. Therefore, the party having engaged a learned Advocate who was supposed to take effective steps in the proceedings, could be re-assured that the suit would be proceeded with diligently. The plaintiffs were not required to act as watch dogs of the advocate. Hence, for the fault of an Advocate or a deliberate omission of an Advocate to represent a party to the suit, the party could not be faulted. A litigant was usually innocent in such cases and merely because he chose a learned Advocate who was not diligent, could not be a ground not to restore a proceeding. Any view, contrary to the aforementioned view, would amount to serious injustice to a litigant.

26. In the matter of ***Sukhinder Singh and ors. vs. Gurbuk Singh and ors.*** reported in ***MANU/DE/2014/2009,*** the Delhi High Court held that the parties cannot be deprived of their right emanating from a litigation due to negligence of counsel.

27. The learned court below exercised discretion upon coming to a finding that the personal knowledge of subsequent purchasers was not relevant.

The ground for restoration of the suit was pleaded by the original plaintiffs. The ground was non-action of the erstwhile learned Advocate. Such ground was a plausible ground for restoration of the suit.

28. Thus, for the ends of justice, the learned court deemed it fit to allow the restoration of the suit. Justice was the prime consideration. Instead of relegating the opposite parties to another suit, in order to save time and also to prevent multiplicity of proceeding, the learned court exercised discretion and allowed the subsequent purchasers of the property in question, to contest the suit by restoring the same. The maintainability of the suit will be decided at the trial. It is for the opposite parties to prove their case of recovery of khas possession.

29. The order impugned does not suffer from any perversity and does not require any interference.

30. The revisional application is dismissed.

31. There shall be no order as costs.

32. Parties are to act on the server copy of this judgment.

(Shampa Sarkar, J.)

Later:-

Learned Advocate for the petitioner prays for stay. The prayer is considered and rejected.

(Shampa Sarkar, J.)