IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

Present:

The Hon'ble **Justice Harish Tandon**
And
The Hon'ble **Justice Prasenjit Biswas**

SAT 154 OF 2023
With
CAN 1 of 2023

Smt. Shyamali Banerjee
-Versus-
Sri. Indranil Sengupta

For the petitioners	:	**Mr. Aniruddha Chatterjee,** **Mr. Pran Gopal Das,** **Mr. Tanmoy Sett,** **Mr. Shuvojeet Gupta.**
For the respondents	:	**Mr. Probal Mukherjee,** **Ms. Shebatee Dutta**
Judgment on	:	**18.10.2023**

Prasenjit Biswas, J:-

1. This appeal arises out of the order dated 09.06.2023 passed by the First Appellate Court in connection with Title Appeal No. 195 of 2017 and by which the Appellate Court refused to condone the delay in filing the first appeal challenging the ex-parte decree passed in T.S No. 2337 dated 21.04.2017.

2. Brief facts which led to filing of this appeal are as under:-

Respondent/plaintiff filed a suit praying for recovery of possession and damages in respect of the scheduled property and the learned Trial Court was pleased to pass an ex-parte

decree of eviction against this appellant. Thereafter, an application has been preferred by this appellant before the First Appellate Court praying for setting aside the said ex-parte order along with an application praying for condonation of delay. The ground taken by the appellant is that as she is an octogenarian lady and is suffering from various ailments and was residing with her daughter at Chandigarh and for that reason she could not be able to contact with her conducting advocate. It is further contended by the appellant that on 10.11.2017 for the first time she came to know about the fate of the suit filed by the respondent when the bailiff of the Court went to the scheduled premises. Upon getting the said information this appellant and her daughter rushed to Kolkata and contacted with her learned Advocate and came to know about the ex-parte decree. Thereafter, this appellant filed appeal before the First Appellate Court causing delay of 232 days.

3. Notice was served upon the respondent (herein) and after getting notice the respondent entered appearance in that case and filed written objection denying all the contentions as made out in the said appeal. It is the stand point of the respondent that the present appellant was all along aware about the suit pending before the Trial Court, despite knowing of it with *mala-fide* intention she did not contest the case and as such ex-parte decree was passed by the Trial Court and thereafter, he got possession of the demise premises through Court after filing of the execution case bearing No. 33 of 2017.

4. The First Appellate Court took into consideration of the past conduct of the appellant i.e. before passing of the ex-parte decree by the learned Trial Court. After referring various judgments and after considering the past conduct of this appellant learned Appellate Court came into finding that this appellant was quite aware about the pendency of the suit but no inclination had been made on her part to come down to Kolkata and look after the progress of the pending suit.

5. It is undisputed that the respondent filed suit for recovery of possession and damages in respect of the case property against this appellant. It was decreed ex-parte by the Trial Court on 21.04.2017. This appellant filed application before the First Appellate Court challenging the said order causing 232 days delay and as such an application has been filed on behest of the appellant under Section 5 of the Limitation Act with a prayer for condonation of the said days of delay. By passing of the impugned order dated 09.06.2023 the First Appellate Court rejected the application filed under Section 5 of the Limitation Act preferred by this appellant.

6. A conjoint reading of Order IX Rule 13 and Section 96(2) of Code of Civil Procedure stipulates that the defendant who suffered an ex-parte decree has two remedies:-

i. Either to file an application under Order IX Rule 13 CPC to set aside the ex-parte decree to satisfy the Court that summons were not duly served or though served, he was prevented by "sufficient cause" from appearing in the Court when the suit was called for hearing and

ii. To file a regular appeal from the original decree to the First Appellate Court and challenge the ex-parte decree on merits. In terms of Section 96(2) CPC, the appeal lies from an original decree passed ex-parte. In a case where an appeal is filed under Section 96(2) of CPC, the Appellate Court has jurisdiction to go into the merits of the decree. But the scope of enquiry under the aforesaid two provisions is entirely different. Merely because the defendant pursuit the prayer under Order IX Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order IX Rule 13 CPC is dismissed.

7. We are not unmindful about the proposition of law that the right of appeal under Section 96(2) CPC is a statutory right and the defendant cannot be deprived of the statutory right of appeal merely on the ground that the application filed by her under Order IX Rule 13 CPC has been dismissed. It is profitable to quote the observations of the Hon'ble Apex Court rendered in case of **Bhanu Kumar Jain v. Archana Kumar And Another** reported in **(2005) 1 SCC 787** wherein Hon'ble Court observed that if appeal against ex-parte decree is dismissed, in the light of explanation to Order IX Rule 13 which is to be strictly construed, an application under Order IX Rule 13 would not be maintainable but the converse though is not true, that is, dismissal of the application under Order IX Rule 13 does not imply that the appeal against the ex-parte decree would not be maintainable.

8. In the above referred case of **Bhanu Kumar Jain** (supra), the Hon'ble Apex Court held at paragraphs 36 and 38, inter-alia, that

> *"36. However, it appears that in none of the aforementioned cases, the Jopestion as regards the right of the defendant to assail the judgment and decree on merits of the suit did not (sic) fall for consideration. A right to question the correctness of the decree in a first appeal is a statutory right. Such a right shall not be curtailed nor shall any embargo be fixed thereupon unless the statute expressly or by necessary implication says so. (See Deepal Girishbhai Soni v. United India Insurance Co. Ltd. and Chandravathi P.K. v. C.K. Saji).*
>
> *38. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr. Chaudhari that the "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this Court in Rani Choudhury, P. Kiran Kumar and Shyam Sundar Sarma v. Pannalal Jaiswal."*

9. It is submitted by Mr. Probal Mukherjee, learned Senior Counsel appearing on behalf of the respondent, that there is an illegality or infirmity in the findings of the First Appellate Court.

10. It is submitted by Mr. Aniruddha Chatterjee, learned Senior Counsel that the expression "sufficient cause" in Section 5 of the Limitation Act needs liberal construction so as to advance substantial justice when the

delay is not on account of any negligence or inaction or want of bona-fide or dilatory tactics on the part of the applicant.

11. It is lighted from the impugned order passed by the First Appellate Court that when the ex-parte decree was passed on 21.04.2017, at that time the present appellant who is an old aged lady had been residing with her daughter at Chandigarh. Although she engaged advocate on her behalf for conducting the case in the Trial Court, she could not be able to contact with him and as such the said ex-parte decree was passed in respect of the scheduled premises. When the bailiff of the Court went to the suit premises for execution of the decree in connection with Title Execution Case No. 33 of 2017 for the first time she came to know about the fate of the case and thereafter, she hurriedly rushed to Kolkata with her daughter and after consultation with her learned Advocate filed application for setting aside the ex-parte decree along with an application praying for condonation of delay before the First Appellate Court. The First Appellate Court disbelieved the case of the appellant and passed the impugned order dated 09.06.2023.

12. The expression "sufficient cause" used to Section 5 of the Limitation Act, 1963 is elastic enough to enable the Courts to apply the law in a meaningful manner which serves the ends of justice. No hard and fast rule has been or can be laid down for deciding the application for condonation of delay but in a catena of decisions it is repeatedly observed by the Hon'ble Apex Court that liberal approach needs to be adopted in such matter so that substantive rights of the parties are not defeated only on the ground of delay.

13. It has been observed by the Hon'ble Apex Court in case of **Balakrishnan v. M. Krishnamurthy** reported in **(1998) 7 SCC 123** wherein the Hon'ble Court held as under:-

> *"11. A 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 properly. The object of providing a legal remedy is to repair the damage caused by legal injury. The law of limitation fixes a life span for such legal remedy for the redress of the legal injury so suffered. Time is precious and wastage time would never revisit. During the efflux of time newer causes would sprout of necessitating new persons to seek legal remedy by approaching the Courts"*

14. Making a justice oriented approach from this perspective we find that there was sufficient cause for condoning the delay in the institution of the appeal. We find that the appellant was prevented by sufficient reasons from preferring the appeal within the limitation period. The Court is not supposed to look upon the explanation for each day and if there is a symmetry in the events which forms a chain, even if there is some missing link the Court should not be too technical or hyper technical in rejecting the application for condonation of delay. On the other hand the court cannot overlook the conduct of the parties and the lapses and latches attributed to their conduct in dealing with application form condonation of delay.

15. We are not unmindful about the fact 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. The word 'sufficient cause' under section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice.

16. The approach of the Court should not be such to find a fault in the explanation but to encourage the disposal of the matter on merit. The expression sufficient cause should not be confused with the length of delay as inordinate delay may be condoned upon a sufficient explanation. If the delay is a result of negligence, default or inaction on the part of the litigant such recalcitrant litigant should not get any blessings from the Court in getting away from the provisions of the Limitation Act. There is no hesitation in our mind that the explanation is offered for delay in preferring the appeal.

17. We are tempted to reproduce the following observations as rendered by the Hon'ble Apex Court in case of **B. Madhuri Goud v. B. Damodar Reddi** reported in **(2012) 12 SCC 693** wherein Hon'ble Court observed that the Limitation Act, 1963 has not been acted with the object of destroying the rights of the parties but to ensure that they approach the Court for vindication of their rights without unreasonable delay. The idea underline the concept of limitation is that every remedy should remain alive only till the expiry of the period fixed by the legislature and the Courts are empowered to condone the delay provided that "sufficient cause" is shown by the appellant for not availing the remedy within the prescribed period of limitation.

18. In the above referred case of **B. Madhuri Gaud** (supra) Hon'ble Apex Court observed at Paragraphs 6 and 7, inter-alia, that:-

> *"6. The expression "sufficient cause" used in Section 5 of the Limitation Act. 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice, No hard-and-fast rule has been or can be laid down for deciding the*

applications for condonation of delay but over the years courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that substantive rights of the parties are not defeated only on the ground of delay.

7. In Collector (LA) v. Katije this Court made a departure from the earlier judgments in which strict interpretation was placed on the expression "sufficient cause" and observed: (SCC pp. 108-09. para 3)

"3. The legislature has conferred the power to condone delay by enacting Section 5 of the Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on merits. The expression 'sufficient cause' employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice-that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realised that:

(1) Ordinarily a litigant does not stand to benefit by lodging an appeal late.

(2) Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the Parties.

(3) 'Every day's delay must be explained does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

(4) When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

(5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

(6) It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal."

19. Mr. Probal Mukherjee, the learned Senior Counsel appearing for the respondent urged that since filing of the first appeal was grossly delayed and there being no sufficient explanation for condonation of delay this Court ought not to have condoned the same, we do not find any merit in the submission. We find that the present appellant had made out "sufficient cause" for condonation of delay and as the power of condonation is discretionary, it has to be liberally construed.

20. In the facts and circumstances of the present case, the time spent in pursuing the application under Order IX Rule 13 CPC is to be taken as "sufficient cause" for condoning the delay in filing the first appeal. The impugned order passed by the First Appellate Court cannot be sustained and is liable to be set aside.

21. In the result, the impugned order dated 09.06.2023 passed by the First Appellate Court in connection with Title Appeal No. 195 of 2017 is set

aside and this appeal is allowed. The delay in filing the appeal against the exparte decree is condoned. The First Appellate Court shall take the appeal titled "Smt. Shyamoly Banerjee v. Sri. Indronil Sengupta" on file and proceed with the same in accordance with law. We make it clear that we have not expressed any opinion on the merits of the matter.

22. There will be no order as to costs.

23. Connected application if any is hereby also disposed of.

24. Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)