
(2018) 09 GAU CK 0007

In the Gauhati High Court

Case No : Civil Revision Petition No. 47, 52 of 2018

Dhekiajuli Marowari Panchayat And 2 Ors.

APPELLANT

Vs

Bhuban Borah

RESPONDENT

Date of Decision : 04-09-2018

Acts Referred:

Limitation Act, 1963 — Section 5

Code of Civil Procedure, 1908 — Section 151, Order 9 Rule 13, Order 3 Rule 4

Constitution of India, 1950 — Article 227

Citation : (2018) 09 GAU CK 0007

Hon'ble Judges : PRASANTA KUMAR DEKA, J

Bench : Single Bench

Advocate : S. Sahu, P. Sundi

Final Decision : Disposed Off

Judgement

1. Heard Mr. S. Sahu, the learned counsel for the petitioners. Also heard Mr. P. Sundi, the learned counsel for the respondent.

2. The present respondent is the defendant in Title Suit No.88/2011 which was preferred by the present petitioner society for declaration of right, title

and interest and for recovery of possession against the sole defendant/respondent. The said suit was decreed ex-parte on 12.06.2012. Subsequent

thereto, the said ex-parte decree was put into execution in Title Execution Case No.6/2016 in the Court of learned Munsiff No.1 at Tezpur. Notice

was issued to the respondent as the judgment debtor and the same was served in the second week of May, 2016. Having received the said notice the

petitioner contacted the learned counsel to make an enquiry and after enquiry it came to the knowledge of the respondent that the said Title Suit was

decreed ex-parte and an execution proceeding is pending. Thereafter two separate applications were filed by the present respondent, one under Order

9 Rule 13 of the Code of Civil Procedure, 1908 (CPC) for setting aside the ex-parte decree and the other one for condonation of delay of more than 4

years under Section 5 of the Limitation Act, 1963. The delay condonation petition was registered as Misc (J) Case No.74/2016 and the other

application under Order 9 Rule 13 of the CPC was registered as Misc (J) Case No.73/2016. The learned Executing Court took up the delay

condonation petition and vide the impugned order dated 19.12.2017 condoned the delay by imposing a cost of Rs.2,000.00. However, the other

application under Order 9 Rule 13 of the CPC is yet to be decided. The present petitioners being aggrieved by the said order dated 19.12.2017

preferred this revision application challenging the same.

3. Mr. Sahu submits that the order impugned is liable to be set aside inasmuch as on one hand the learned court below held that the respondent was

negligent in conducting the suit and on the other hand, the same court, in the interest of justice, allowed the prayer for condonation of delay of more

than 4 years. Further it is submitted that from the contents of the delay condonation petition it is apparent that the respondent was negligent in

conducting the suit and as such the learned court below ought to have confined its finding that the petitioner is negligent without condoning the said

delay. It is further submitted that from the delay condonation petition it is clear and apparent that there is an imputation of not informing the progress

of the suit to the present respondent by the counsel conducting the suit at Tezpur. However, the said counsel is not made party in the said delay

condonation petition in order to prove the veracity of the imputation made against the said counsel who is not even named in the petition. Mr. Sahu

further referring to the written objection filed by the present petitioners submits that the negligent conduct of the respondent was very much raised

before the learned court below but the same was not even considered by the learned court below while passing the said impugned order. Under such

circumstances Mr. Sahu submits that the impugned order is liable to be set aside.

4. Mr. Sundi, on the other hand objecting vehemently to the submission of Mr. Sahu submits that there was no communication between the counsel

conducting the suit at Tezpur and the respondent. The respondent having no knowledge with respect to law and/or procedure for conducting any suit

was expecting information from the learned counsel engaged at Tezpur and

immediately on receipt of the notice of the Executing Court was active enough to collect the information that no written statement was filed and as a result the ex-parte decree was passed, immediately thereafter preferred the application both under Order 9 Rule 13 of the CPC along with the application for condonation of delay.

5. The learned court below considering the dispute between the parties to the suit and in the interest of justice condoned the delay after holding that the petitioner was negligent in conducting the suit. As the delay was condoned in the interest of justice, under such circumstances this Court under

Article 227 of the Constitution of India has no role to dissuade the act of applying the discretion by the learned court below.

6. Considered the submission of the learned counsel. Mr. Sahu is specific that once the court has come to a finding that the respondent was negligent

in conducting the suit, the learned court below ought not to have further exercised its jurisdiction under Section 151 of the CPC and condoned the

delay. In my opinion Section 5 of the Limitation Act, 1963 is specific and the satisfaction of the explanation of the causes for the delay lies with the

court condoning the delay inasmuch as a space is given to the court concerned by the said Section 5 of the Limitation Act to examine the sufficiency

of the causes shown by the petitioner with elasticity impregnated in it subject to the factual matrix. It is true that for condonation of delay the act of

acquiescence is to be looked into by the court of the party seeking condonation of delay. The act of acquiescence is to be looked into after the right of

the person seeking for condonation of delay is violated and after the process of violation of the right of the person seeking condonation of delay is

completed if he remains idle without any active role in getting the delay condoned then such act of remaining inactive falls within the term

“acquiescence”.

7. In the present case in hand, the respondent blamed his counsel conducting the suit at Tezpur. It is true Mr. Sahu has rightly pointed out that in order

to bring such allegation the advocate ought to have been made a party to the said petition thereby giving a chance to the said advocate to disown the

said imputation of negligence on the part of the said advocate. However, it is also a general principle that in a civil suit the presence of the party is not

required on each and every date unlike a criminal trial. However, the said liberty

cannot be granted to the respondent or any person seeking condonation of delay as of right. A duty is also cast upon the said respondent to be vigilant to his right. In such a factual matrix like the one in hand, the counsel concerned is also equally to be blamed inasmuch as he has also a duty cast upon him to send requisite notice under Order 3 Rule 4 of the CPC to withdraw the authority given by his client to represent him in the suit duly informing the court the negligent conduct of the person client whom he represents. The said authority shall be deemed to be in force until determined by the leave of the court by a writing signed by the client or the pleader as the case may be and filed in the court.

8. Herein the present case, petitioners failed to bring to the notice of this Court any such leave under Order 3 Rule 4 of the CPC obtained by the counsel representing the respondent at Tezpur that too from the court. Under such circumstances even without such imputation against the said advocate, at least conclusion can be drawn that there was no intimation from the learned counsel engaged at Tezpur to the present respondent informing about the various stages of the suit. In my considered opinion, the impugned order is not liable to be interfered inasmuch as though there is negligence on the part of the respondent but equally there was negligence on the part of the counsel representing the respondent before the court at Tezpur. The respondent should not suffer due to default on the part of the counsel and if the said principle is applied the act of acquiescence cannot be attributed to the respondent as, on receipt of the notice from the executing court the respondent took steps for remedial measures. However, keeping in view that the present petitioners filed the suit way back in the year 2011 it would be proper to compensate to some extent, the loss which would befall on them in allowing the said delay condonation petition and in conducting the suit further by enhancing the cost component from Rs.2,000.00 to Rs.10,000.00 which I accordingly do. The enhanced amount is to be deposited by the present respondent in the learned court below within a period of one week from the date fixed for appearance by this Court which the learned counsel have decided to inform their respective parties to appear before the court below on 27.09.2018.

9. It is submitted and observed that the other petition under Order 9 Rule 13 of the CPC which is pending shall be disposed of at the earliest as per

law after appearance of the parties on the date so fixed.

10. Accordingly this revision petition partially succeeds and the same stands disposed of.