

(2015) 03 GAU CK 0063
In the Gauhati High Court
Case No : MC No. 3573 of 2014

Jain and Associates and Others

APPELLANT

Vs

Nandita Acharjee

RESPONDENT

Date of Decision : 26-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 30 Rule 4, Order 5 Rule 20, Order 9 Rule 13, 100A, 105
Limitation Act, 1963 — Section 5

Citation : (2015) 03 GAU CK 0063

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : P.K. Deka, for the Appellant; B. Banerjee,, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Suman Shyam, J—This misc. case has been filed by the applicants praying for condonation of delay of 1576 days in filing the connected first appeal challenging the ex parte decree dated 19-05-2010 passed by the Civil Judge, Nagaon in Money Suit No. 6/1996.

2. Heard Mr. P.K. Deka, learned counsel for the applicant. Also heard Mr. B. Banerjee, learned Sr. counsel assisted by Mr. R.C. Paul, learned counsel appearing for opposite party/respondent. The facts and circumstances leading to the explanation for delay in preferring the appeal as indicated in the application may be noticed as follows.

3. The respondent through her husband had instituted Money Suit No. 6/1996 in the court of Civil Judge, Nagaon against M/s. Jain & Associates a partnership firm, impleading it as the defendant No. 1, the partners Jogender Kumar Jain, Sushila Jain and Anuradha Jain as defendant Nos. 2, 3 and 4 respectively. The defendant No. 2, 3 and 4 were impleaded in their capacity as the partners of the defendant No. 1 partnership firm. The relief prayed for in the suit is that of a

decree for a sum of Rs. 48,88,822/- together with interest.

4. The original defendants had contested the suit by filing written statement. During the pendency of the Money Suit, the defendant No. 2 Jogender Kumar Jain expired as a result of which the present applicants, being his legal heirs had been substituted by an order dated 25-05-2005 at the instance of the opposite party/plaintiff. Thereafter, the defendant No. 3 Sushila Jain had also expired on 05-10-2007.

5. The applicant No. 2(a), 2(b), 2(d) and 3 are all resident of Kolkata where as the applicant No. 2(c) is the permanent resident of United Arab Emirates.

6. It is the case of the applicants that they were not involved in the partnership business at any point of time and hence are not privy to any transaction between the opposite party/plaintiff and their father late Jogender Kumar Jain. The applicant No. 2(d) who is the son of Jogender Kumar Jain is a salaried employee working in a private firm. The applicant No. 2(a), 2(b) and 2(c) are all daughters of late Jogender Kumar Jain who are living in their marital home in the addresses mentioned in the application and have nothing to do with the partnership business carried out in the name and style M/s. Jain & Associates.

7. On being substituted as legal heirs of Jogender Kumar Jain the applicant No. 2(a) to 2(d) had appear in the suit and continued in the proceeding through Mr. T.R. Nandi, Advocate, who was taking steps in the matter on behalf of the defendants. However, on 11-09-2006, the learned Trial Court called for certain document to be filed by the plaintiff and until receipt of such documents, further proceeding in the Money Suit was kept in abeyance. It appears that the proceeding in Money Suit No. 6/1996 was resumed on 22-01-2008 whereby the learned Trial Court had issued fresh summons to all the defendants. However, it is the case of the applicants/defendants that no such summons issued by the Trial Court was ever served upon them. In the meantime T.R. Nandi, Advocate had also expired which fact was not within the knowledge of the applicants. As such, they were not aware of the resumption of proceeding in the Money Suit No. 6/1996. Being busy in their respective walks of life, far away from Nagaon Town where the Money Suit was pending, the applicants were under a bona fide belief that as soon as the proceeding is resumed in Money Suit No. 6/1996, their engaged counsel will duly inform them about the same.

8. It was on 05-08-2013 that the applicants had received a notice for attachment of the moveable properties of the petitioners arising out of Money Execution Case No. 12/2010 where after the petitioners became aware for the first time about the ex parte judgment and decree dated 19-05-2010 passed by the Civil Judge, Nagaon decreeing the Money Suit No. 6/1996. Immediately having come to know about the said fact the applicants made relevant enquiry and after obtaining legal advice, approached the court of Civil Judge, Nagaon on 06-09-2013 by filing an application under Order 9 Rule 13 CPC praying for setting aside the ex parte decreed passed against them on the basis of explanation furnished by the

applicants.

9. The said application filed under Order 9 Rule 13 CPC was dismissed by the Trial Court by order dated 11-06-2014 as a result of which the applicants had to approach this Court by filing MFA No. 51/2014 challenging the aforesaid order dated 11-06-2014 passed by the learned Trial Court. Eventually, by the judgment and order dated 15-10-2014 this Court dismissed the MFA No. 51/2014 filed by the applicants as appellants on the grounds and reasons mentioned therein. After dismissal of the aforesaid appeal the applicants as appellants had preferred regular first appeal before this Court on 12-12-2014 challenging the ex parte judgment and decree dated 19-05-2010 passed in Money Suit No. 6/1996.

10. Placing reliance on the decision of the Hon"ble Apex Court in Brijesh Kumar and Others Vs. State of Haryana and Others, AIR 2014 SC 1612 : (2014) AIRSCW 1831 : (2014) 4 SCALE 50 , Mr. Deka, learned counsel appearing for the applicants submits that the applicants had no knowledge of the fact that the proceeding in Money Suit No. 6/1996 had resumed in the court of Civil Judge, Nagaon w.e.f. 22-01-2008 as neither any summons/notice, though issued by the Trial Court, was served upon them nor did they receive any information from their engaged counsel, who had unfortunately died during the period when further proceeding in the Money Suit was kept under abeyance. It is only upon receipt of the notice of attachment of property sent by the executing court at Alipore, West Bengal, which was received by them on 05-08-2013, that the applicants became aware of the judgment and decree for the first time. Immediately having come to know about the said judgment and decree passed in Money Suit No. 6/1996 the applicants took steps to challenge the same by filing appropriate application before appropriate forum without any delay or negligence. Mr. Deka, therefore, submits that it is not a case where the delay has occurred due to any willful laches or negligence on the part of the applicants but the same has happened due to the factors completely beyond the control of the applicants. He, therefore, submits that the present is a case where just a sufficient explanation has been furnished by the applicants meriting condonation of delay.

11. Mr. B. Banerjee, learned Sr. counsel on the other hand submits that the delay in preferring the appeal is squarely due to the laches and negligence on the part of the applicants who, despite being aware of the pendency of the Money Suit, had deliberately sat over the matter and did not take any remedial measures for several years after the decree was passed in Money Suit No. 6/1996. Mr. Banerjee submits that upon resumption of the proceeding in Money Suit No. 6/1996 the learned Trial Court had issued summons to the defendants. However, the said summons could not be served upon the defendants as the same were returned with the endorsement "office closed". Thereafter, as per the order of the court below, a paper publication was made through daily newspapers "The North East Times" and "Sentinel" but the same was not accepted by the court as all the defendants were residents of Kolkata. Accordingly, another notice was published

in the newspaper "The Statesman" in its issue dated 26-11-2009. It is not in dispute that the said newspaper had wide circulation in the State of West Bengal including the city of Kolkata. On the basis of such newspaper publication, service of summons by substitute method was accepted by the court below and the matter was proceed which had ultimately culminated into the ex parte decree dated 19-05-2010. Mr. Banerjee submits that since appropriate steps had been taken for service of summons upon the defendants as per the order of the court, hence, the death of their counsel T.R. Nandi would be inconsequential for the purpose of considering the explanation forwarded by the applicants.

12. Mr. Banerjee further submits that leaving aside the fact that there is no proper explanation for the delay of 1576 days in the application filed by the applicants, even the connected appeal would not be maintainable in the eye of law. Referring to the provisions of Order 9 Rule 13 CPC, Mr. Banerjee submits that the applicants as petitioners have already exhausted their remedy under the said provision by supplying explanation for default on their part in not appearing before the Trial Court in connection with the Money Suit earlier. Such explanation is substantially founded on selfsame ground as are being sought to be urged in the present application. Once the application filed under Order 9 Rule 13 has been dismissed and the said order of dismissal has been upheld by this Court in MFA No. 51/2014, in view of the provision of Section 100A of the CPC, no further appeal would be maintainable before this Court. Mr. Banerjee has assiduously argued that once the application filed under Order 9 Rule 13 CPC as ended in dismissal, that is the end of the road for the applicant/appellants and the only remedy available to them was to approach the higher forum which they have not done. As such it would not be open to the applicant/appellant to question the ex parte decree on merit by filing the connected RFA.

13. In support of his arguments Mr. Banerjee has relied upon the decision of Hon"ble Supreme Court in Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury, AIR 1982 SC 1397 : (1982) 1 SCALE 657 : (1982) 2 SCC 596 : (1983) 1 SCR 372 : (1982) 14 UJ 594 to argue that once the application under Order 9 Rule 13 CPC was rejected, there is no scope for preferring any appeal against the ex parte decree under Section 96 of the CPC. To buttress his argument as aforesaid, Mr. Banerjee has relied upon the following citations:

"(i) Salem Advocate Bar Association Vs. Union of India (UOI), AIR 2003 SC 189 : (2003) 1 DMC 73 : (2002) 9 JT 175 : (2004) 8 SCALE 115 : (2003) 1 SCC 49 : (2003) 1 UJ 1

(ii) Munassar Bin Jan Nisar Yarjung (died) his Lrs. Marian Begum and Others Vs. Fatima Begum and Others, AIR 1975 AP 366

(iii) Dr. M.K. Gourikutty and etc. Vs. M.K. Raghavan and Others, AIR 2001 Ker 398

(iv) District Collector and Another Vs. B. Suresh and Others, (1999) 9 JT 151 : (1999) 5 SCC 612

(v) P. Kiran Kumar Vs. A.S. Khadar and Others, AIR 2002 SC 2286 : (2002) 1 JT 29 Supp : (2002) 2 PLR 830 : (2002) 4 SCALE 384 : (2002) 5 SCC 161 : (2002) 3 SCR 775 : (2002) 2 UJ 877 : (2002) AIRSCW 2411 : (2002) 4 Supreme 30

(vi) Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others, AIR 2005 SC 226 : (2004) 5 CTC 274 : (2005) 181 ELT 163 : (2005) 141 PLR 92 : (2004) 9 SCALE 270 : (2005) 1 SCC 436 : (2004) AIRSCW 6513 : (2004) 8 Supreme 330

(vii) Bhanu Kumar Jain Vs. Archana Kumar and Another, AIR 2005 SC 626 : (2005) 1 CTC 368 : (2005) 1 JT 220 : (2005) 140 PLR 549 : (2004) 10 SCALE 610 : (2005) 1 SCC 787

(viii) Hope Plantations Ltd. Vs. Taluk Land Board, Peermade and Another, (1998) 7 JT 404 : (1998) 6 SCALE 19 : (1999) 5 SCC 590 : (1998) 2 SCR 514 Supp

(ix) Mangilal Rungta Vs. Manganese Ore (India) Ltd., AIR 1987 Bom 87 : (1987) MhLj 383

(x) Matiur Chouhury (Md.) and Another Vs. Nazma Khanam Choudhury and Others, (2013) 4 GLT 182 "

14. Mr. Banerjee, therefore, sums up his arguments to say that once the prayer for setting aside ex parte decree has been rejected under Order 9 Rule 13 CPC it is not open to the defendants to re-agitate the said issues in the appeal from the decree itself since such a right is not given by Section 105 of the CPC.

15. I have considered the rival submissions made by and on behalf of the parties. On perusal of the record it is evident that the summons issue by the learned Trial Court at Nagaon after resumption of trial on 22-01-2008 were not served upon any of the defendants. Notwithstanding the same the learned Trial Court proceeded further in the matter on the basis of substituted service made upon the applicants/defendants as per Order 5 Rule 20 CPC. The applicants claimed to have acquire knowledge about the ex parte decree for the first time on receipt of notice of attachment issued by the Alipore court in connection with Money Execution Case No. 12/2010 which was received by the applicants on 05-08-2013.

16. There cannot be any doubt about the fact that w.e.f. 05-08-2013 the applicants have taken all steps with sufficient promptness so as to defend their interest in the matter and the explanation available on the face of the record supported by documentary evidence is enough to draw the said conclusion. The only question that this Court will now have to consider is to whether applicants have furnished sufficient explanation for the delay that has occurred with effect from the date of passing the decree i.e. 19-05-2010 till 05-08-2013.

17. For the purpose of recording a satisfaction as to the bona fide of the stand taken by the applicants, this Court has examined the order-sheet in connection with Money Execution Case No. 12/2010 pending in the court of Civil Judge (Sr. Div.), Alipore, West Bengal wherein the ex parte decree dated 19-05-2010 was

transmitted for execution. On perusal of the records and more particularly the successive orders passed since 24-06-2010 nothing is discernable to show that any notice was ever issued to the applicants from the said court. Although, by the order dated 11-05-2013 the opposite party/plaintiff was asked to serve a copy upon the applicants/judgment debtor yet the Decree Holder/Opposite Party evidently, had failed to take any such steps. On the contrary the Decree Holder/plaintiff was found to be absent without steps on several occasions before the executing court. A perusal of the order sheet, as aforesaid, goes to show that even the notice served upon the applicant/defendant on 05-08-2013 was dehors any order passed by the executing court.

18. Beside the above, on an examination of the records nothing is discernable to show that the applicant/defendant were aware of the resumption of the proceeding in Money Suit No. 6/1996. There is also nothing available on record to show that despite having knowledge about the ex parte decree dated 19-05-2010, the applicants/defendants had deliberately sat over the matter only to adopt a dilatory tactics. Since the applicant/defendant are involved in their respective sphere of activities, not connected with the business of the partnership firm, it is probable that by the long lapse of time and due to the lack of any communication from their engaged counsel they had no occasion to keep a track of what was going on in the Trial Court at Nagaon district located in the State of Assam. Service of summons through substitute method may give a legitimate right to the Trial Court to proceed with the trial of the suit under the law but the same cannot be a ground to assume that the applicant/defendants had knowledge about the resumption of the Money Suit but have deliberately defaulted in appearing and contesting the same. The version of the applicant/defendants, in the absence of any material to the contrary, appears to be reasonable and probable.

19. There is yet another aspect of the matter that requires to be pointed out. The applicant No. 2(c), who is also a defendant in the Money Suit, is a permanent resident of United Arab Emirates where she is residing in her matrimonial home. It is the admitted position of fact that after the resumption of proceeding in Money Suit No. 9/1996 no steps were taken for service of summons upon the said applicant/defendant No. 2(c). As such the steps that were taken for substitute services of summons as mentioned above, cannot be held to be sufficient to cover the applicant/defendant No. 2(c) who was ordinarily a resident of a foreign country, namely, United Arab Emirates. Having regard to the fact that the decree under challenge is a money decree which is liable to be executed jointly and severally against all the defendants, services of summons upon all the defendants in the facts and circumstances of the case could not have been dispensed with by the court by taking casual view of the matter.

20. In the case of *G. Ramegowda, Major and Ors Vs. Special Land Acquisition Officer, Bangalore*, AIR 1988 SC 897 : (1988) 1 JT 524 : (1988) 1 SCALE 479 : (1988) 2 SCC 142 : (1988) 3 SCR 198 : (1988) 1 UJ 666 , the Hon'ble Apex

Court has observed that the expression "sufficient cause" in Section 5 of the Limitation Act must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of delay. In another decision rendered in the case of Union of India (UOI) Vs. Giani, AIR 2011 SC 977 : (2011) 2 JT 479 : (2011) 3 RCR(Civil) 341 : (2011) 2 SCALE 500 : (2011) 2 SCR 978 : (2011) AIRSCW 5789 : (2011) AIRSCW 1388 : (2011) 2 Supreme 91 : (2011) 6 Supreme 157 the Hon"ble Apex Court has observed that in dealing with an application for condonation of delay the court should decide the matter on merit by giving the expression "sufficient cause" a pragmatic, justice-oriented approach.

21. In the case of Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) 5 CTC 547 : (2013) 4 RCR(Civil) 785 : (2013) 11 SCALE 418 : (2013) 12 SCC 649 : (2014) 1 SLJ 20 the Hon"ble Supreme Court while dealing with the question of sufficient cause in the context of Section 5 of the Limitation Act, 1963 has laid down certain broad principle to be kept in mind while considering the question of "sufficient cause" in the matter of condonation of delay. In the said judgment the Hon"ble Apex Court has emphasized on the fact that a liberal, pragmatic, justice-oriented, non-pedantic approach is required to be adopted while dealing with an application for condonation of delay, for the courts are not supposed to legalize injustice but are obliged to remove injustice. The Hon"ble Supreme Court has further emphasized that the term "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

22. There is no doubt about the fact that delay in filing an appeal beyond the statutory period of limitation extinguishes the right of the party responsible for the delay whereby a valuable right accrues in favour of the opposite party which right cannot be taken away by the court lightly. However, when the applicant has succeeded in furnishing proper explanation for such delay, the court would be duty bound to adopt a justice oriented approach and condone the delay so as to pave the way for the real dispute to be adjudicated on merit.

23. Law is settled that it is not the length of delay but sufficiency of explanation that would control the outcome of an application filed under Section 5 of the Limitation Act for condonation of delay. Having regard to the facts of the case as indicated herein before as well as the principle of law enunciated by the various judicial pronouncements as mentioned above this Court is of the view that in the facts and circumstances of the case no presumption can be drawn as regards any deliberate delay on gross negligence on the part of the applicants. On the contrary the applicants/defendants have succeeded in furnishing sufficient and reasonable explanation meriting condonation of delay of 1576 days in preferring

the appeal. Accordingly, the delay of 1576 days in preferring the appeal would stand condoned.

24. As regards the arguments made by Mr. Banerjee on the question of maintainability of the appeal a reference may be made to Order 9 Rule 13 CPC which is quoted herein below:

"13. Setting aside decree ex parte against defendants.- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any or the other defendants also:

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.]

[Explanation.- Where there has been an appeal against a decree passed ex parte under the rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree.]"

25. The explanation to order 9 Rule 13 CPC makes it clear that no application shall lie under said rule for setting aside a ex parte decree if an appeal has been preferred by the defendant against the said decree and the same has been disposed of on any ground other than the ground of withdrawal of the appeal. On perusal of the said provision this Court is prima facie of the view that what Order 9 Rule 13 CPC prohibits is a challenge to the ex parte decree by taking resort to Order 9 Rule 13 CPC after an appeal filed against the said decree is disposed of on any of the aforementioned grounds. But the said provision nowhere puts a bar on an appeal being preferred against the decree after the disposal of the application under Order 9 Rule 13 CPC. The citations relied upon by Mr. Banerjee does not lay down any proposition of law which debars the applicants from maintaining the RFA on grounds which are different from those taken before the Court in the application filed under Order 9 Rule 13 CPC. The present application being one for condonation of delay, the question of maintainability of the appeal can be gone into in details at the stage of admission. Hence, the question of maintainability of the appeal is kept open to be raise by the respondents at the time of admission of the appeal.

26. Mr. Banerjee has relied upon Order 30 Rule 4 CPC to further submit that since the applicant/defendant No. 1 is a partnership firm and wife of deceased defendant No. 2, who is one of the defendants, therefore, she had knowledge about the decree passed ex parte in Money Suit No. 6/1996. Such being the position there was no further requirement to serve summons up on the legal heirs of defendant No. 2 on the resumption of the suit since one of the surviving partners had already filed written statement in the suit.

27. Once the applicants/defendants had been impleaded as parties to the suit and the Trial Court had felt the necessity to issue summons to all the defendants on resumption of the trial in Money Suit No. 9/1996, the Court was duty bound to ensure service of summons to all the defendants. As such the submission of Mr. Banerjee on the question of requirement of service of summons to all the defendants cannot be countenanced.

In view of the discussion made above, the Misc. Case stands disposed of. Registry to number the RFA and post for admission after a week.