

(2016) 02 CAL CK 0110
In the Calcutta High Court

Case No : S.A. No. 475 of 1973 with C.A.N. Nos. 7838, 7846, 7847 of 2014

Khudiram Ghorai & Others

APPELLANT

Vs

State of West Bengal & Others

RESPONDENT

Date of Decision : 22-02-2016

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2016) 4 CalHCN 376 : (2016) 3 ICC 479 : (2016) 3 WBLR 500

Hon'ble Judges : Ashis Kumar Chakraborty, J.

Bench : Single Bench

Advocate : Mr. Aswini Kr. Bera and Mr. Arijit Bera, Advocates, for the Appellant;
Mr. Ram Chandra Guchhait, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Ashis Kumar Chakraborty, J.—Re : CAN 7838 of 2014 & CAN 7846 of 2014

1. These two applications are at the instance of the appellant no. 4 in the appeal. The first one is for recalling of the orders dated June 13, 1975 read with July 29, 1975 dismissing the second appeal. The other application is for condonation of delay of thirty-nine (39) years in preferring the first application. The facts relevant for deciding these applications are as follows:

The appellant nos. 1 to 6 filed a suit being the Title Suit No. 121 of 1969 before the learned Munsif, 2nd Court, Midnapore claiming declaration of their title, in respect of the suit property, a tank, and decree for permanent injunction against the State of West Bengal and others. The learned Trial Judge decreed the suit. However, on appeal by the defendant no. 1 State of West Bengal the 2nd Court of the Sub-Judge at Midnapore set aside the judgment and decree passed by the learned Trial Judge. It is the judgment and decree passed by the learned first appellate court, which was subject-matter of challenge in the second appeal.

2. After the admission of second appeal, the Division Bench of this Court repeatedly directed the appellants to deposit the requisite for service of the

notice of the appeal on the respondents, but the appellants did not comply with the said direction. Ultimately, by an order dated June 13, 1975 the Division Bench granted the appellants three weeks time to put in requisite for service of the notice of appeal failing which the appeal would stand dismissed. The appellants did not comply with the said order dated June 13, 1975 and consequently on July 29, 1975 the learned Additional Registrar of this Court recorded the dismissal of the appeal.

3. In the application for condonation of delay, the appellant no. 4, hereinafter referred to as the "applicant", has alleged that it is the appellant no. 1, who used to look after all the affairs relating to the second appeal died on June 26, 1972 and in the absence of the appellant no. 1 there was none to look after the affairs relating to the second appeal pending before this Court. It appears that the appellant no. 3 had died on October 15, 1971 and his heirs were duly substituted in the appeal. It further appears that after dismissal of the suit, but before this application was filed even the appellant nos. 2, 5 and 6 have died. The applicant has alleged the original advocate representing of the appellants in the second appeal also died and the subsequent advocate engaged by the appellants, namely, Siva Prasad Dey also gave up practise. According to the applicant, it was only in May 2014 when he came to know about the aforementioned order passed by this Court, dismissing the appeal.

4. On the aforementioned grounds Mr. Bera, the learned advocate appearing for the applicant contended that the applicant has made out "sufficient reasons", within the meaning of section 5 of the Limitation Act, 1963 for condonation of delay of 39 years to prefer the application for recalling of the order of dismissal passed by this Court and for restoration of the appeal. He further submitted that two further applications being CAN 7839 of 2014 and CAN 7847 of 2014 have been filed by the heirs and legal representatives of the respective deceased appellants for their substitution in the second appeal after its restoration. In support of his contention for condonation of delay, Mr. Bera relied on the decision of a learned Single Judge of Hyderabad High Court in the case of Majji Somulu alias Swamy Naidu v. Majji Nagaraju alias Nagesh and others, reported in AIR 2015 Hyderabad 203 where the delay of 789 days in preferring the appeal was condoned. In the said decision by the learned Single Judge of the Hyderabad High Court held that the Court must not be pedantic in its approach in deciding delay condonation petitions and shall not dismiss them on the mere ground that delay is too long and the criteria for acceptance or rejection of explanation for delay raised on the bona fides of the factual explanation offered by the petitioner. Thus, according to Mr. Bera, the applicant have bona fide filed these applications and he has sufficiently explained the reasons for the delay in preferring in these applications. He strenuously urged that this Court should condone the delay of 39 years and restore the second appeal by recalling the above orders.

5. However, Mr. Guchhait, the learned advocate representing the respondents State, strenuously contended that these applications should be dismissed as the

applicant has not been able to sufficiently explain the reasons for the inordinate delay of 39 years in preferring the application for restoration of the appeal. According to him, from the averments made in the applications, it is evident that the applicant was all along aware the dismissal of the suit by the learned first appellate court, as also the pendency of the second appeal at the instance of the appellants himself and others. He further submitted that after the appellant no. 3 died on October 15, 1971, his heirs and legal representatives were substituted in the appeal, but although the appellant no. 1 died on June 26, 1972 the heirs and legal representatives of the appellant no. 1 were not brought on record in the second appeal within the prescribed period of limitation of ninety days from June 26, 1972, and, therefore, the appeal stood abated so far as the appellant no. 1. Mr. Guchhait further submitted that even no application was filed for setting aside of the abatement of appeal so far as the appellant no. 1, within the prescribed period of sixty days from the date of abatement of the appeal so far as the deceased appellant no. 1. He contended that in the present case the decree passed by the learned first appellate court is a joint decree and in view of the abatement of the appeal so far as the appellant no. 1, the entire appeal stood abated long before passing of the order dated September 29, 1975 recording the dismissal of the second appeal. In support of his said contention, Mr. Guchhait relied on the decision of the Supreme Court in the case of Rameshwar Prasad v. Shambahari Lal Jagannath reported in AIR 1963 SC 1901, where it was held that in case of a joint decree passed by the learned Court if all the plaintiffs or all the defendants prefer appeal from the decree, then in case of abatement of the appeal so far as one of the deceased appellants for his heirs being not substituted in the appeal within the prescribed period of limitation, the entire appeal will stand abated.

6. I have considered the rival contentions of both Mr. Bera and Mr. Guchhait. In the present case the appeal was filed by all the appellants, who were the plaintiffs before the learned Trial Judge and the decree for dismissal of the suit filed by the learned first appellate court was a joint decree, against all the plaintiffs appellants. Admittedly during pendency of the appeal, the appellant no. 1 died on June 26, 1972 and no step was taken to bring his heirs and legal representatives on record of the second appeal within the prescribed period of limitation and consequently as per the law laid down by the Supreme Court in the case of Rameshwar Prasad (*supra*) the entire appeal stood abated.

7. It is the well settled principle of law that for the purpose of condonation of delay under section 5 of the Limitation Act what is relevant is not the length of the delay but the sufficiency of a satisfactory explanation. It is further settled principle of law that there is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted and that apart, the first one warrants strict approach to interpret "sufficient cause" whereas the second calls for a liberal delineation. In a case where the actions of the applicant under section 5 of the Limitation Act is grossly negligent, the Court should not condone

the delay for an inordinate delay to take away the valuable right which has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause. For these views, authorities can be found in the decisions of the Supreme Court in the cases of Balwant Singh (Dead) v. Jagdish Singh and others reported in (2010) 8 SCC 685 and H. Dohil Constructions Company Private Limited v. Nahar Exports Limited and another reported in (2015) 1 SCC 680 (para 23).

8. In the present case it is evident that the applicant was all along aware of the pendency of the present appeal and the deaths of the appellant no. 1 and no step was taken for substituting heirs of the deceased appellant no. 1 within the prescribed period of limitation and consequently as already held the entire appeal stood abated way back in the year 1972. Further the appellant had knowledge of pendency of the appeal, the death of the appellant no. 1 and he was also aware of both the learned advocates who were representing him in the present appeal but he did not keep any contact with any of them.

9. In the facts of the present case, I find that Mr. Guchhait, learned advocate appearing for the respondents, was justified in his submission that the action of the applicant is utterly negligent. The applicant has failed to make out any explanation to constitute "sufficient reason" within the meaning of Section 5 of the Limitation Act, 1963 to condone the delay of 39 years in preferring the application for restoration of the appeal which already stood abated in the year 1972.

10. For all the above reasons, I find no merit in the applications to condone the delay for recalling the order dated September 29, 1975 or to restore the appeal. Consequently, both the applications, being CAN 7838 of 2014 and CAN 7846 of 2014 stand rejected. However, there shall be no order as to costs.

Re : CAN 7839 of 2014 and CAN 7847 of 2014.

11. These are the applications for setting aside of the abatement of the appeal on the ground of not bringing the heirs and legal representatives of the deceased appellant nos. 1, 2, 5 and 6 on record within the prescribed period of limitation, after condonation of delay.

12. In view of my decision in the above applications, being CAN 7838 of 2014 and CAN 7846 of 2014, these applications have become infructuous and the same also stand dismissed as infructuous. However, there shall be no order as to costs.

13. Certified website copies of the order, if applied for, be urgently made available to the parties, subject to compliance with all requisite formalities.