

**(2012) 07 GAU CK 0001**  
**In the Gauhati High Court**  
**Case No : C.R.P. No. 179 of 2011**

|                                   |            |
|-----------------------------------|------------|
| Matiur Chouhury (Md.) and Another | APPELLANT  |
| Vs                                |            |
| Nazma Khanam Choudhury and Others | RESPONDENT |

**Date of Decision :** 18-07-2012

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 9 Rule 13, Order 9 Rule 7, 115, 151  
Constitution of India, 1950 — Article 227  
Limitation Act, 1963 — Section 5

**Citation :** (2013) 4 GLT 182

**Hon'ble Judges :** Arup Kumar Goswami, J

**Bench :** Single Bench

**Advocate :** B. Ullah and Mr. I. Hussain, for the Appellant; D. Choudhury, Ms. A.K. Choudhury and Mr. U.K. Das, for the Respondent

## Judgement

Arup Kumar Goswami, J.—By this application u/s 115 of the CPC, 1908 and under Article 227 of the Constitution of India, the petitioners have challenged the order dated 5.5.2011, passed by the learned Munsiff No. 1, Kamrup, Guwahati, in Misc. (J) Case No. 213/10 rejecting the application for condonation of delay of 412 days and the order dated 5.5.2011 passed by the learned Munsiff No. 1, Kamrup, Guwahati in Misc. Case (J) No. 212/2010, dismissing the application under Order 9 Rule 13 of the CPC for setting aside the ex-parte judgment and decree dated 18.3.09 passed in Title Suit No. 580/06 as a consequence of rejection of the application for condonation of delay. The opposite parties as plaintiffs filed the suit in the Court of Civil Judge, Sr. Division No. 1, Kamrup, Guwahati against the present petitioners and others for declaring right, title and interest in respect of the land described in the schedule and for recovery of possession by evicting the defendants and for permanent injunction. The suit was transferred to the Court of learned Civil Judge (Sr. Division) No. 2, Kamrup at Guwahati, wherein the same was registered as Title Suit No. 69/2000.

2. The case of the plaintiffs, shortly, as set out in the plaint, is that the husband

of plaintiff No. 1 and father of plaintiff Nos. 2 and 3 had purchased an area of 1 bigha of land covered by dag No. 204 of periodic patta No. 27 by a registered sale deed dated 29.6.93 and he died on 7.8.97. At that point of time, the plaintiff Nos. 2 and 3 were minors. The present petitioners, who were defendants Nos. 3 and 4 in the suit, along with defendant Nos. 1 and 2, who were owners of land in the western side of the land of the plaintiffs, defendant No. 5, who is the owner of the adjacent land in the southern side of the land of the plaintiffs and defendant Nos. 6 to 11, who were neighbours of the adjacent land of the plaintiff in the eastern side, collusively, illegally and forcibly occupied an area of 1 katha 18 lechas of land from 3 sides on 28th and 31st of January 2000 and started to construct boundary walls and private paths.

3. The suit was transferred to the Court of Civil Judge, Junior Division No. 1, Kamrup, Guwahati, now re-designated as Munsiff No. 1, due to increase of pecuniary jurisdiction of the Munsiffs and on transfer, the suit was registered as Title Suit No. 580/2006. The defendant No. 1 had filed written statement in which it is contended that the vendors of the predecessor-in-interest of the plaintiffs did not have saleable right in respect of 1 bigha of land and defendant Nos. 1, 3 and 4 were enjoying possessory rights after purchase of the said right from Ataur Rahman, Majidul Rahman, who had been possessing the land for last 50 years.

4. The plaintiffs examined 5 witnesses but the defendants neither cross-examined the witnesses nor adduced any evidence on their behalf. The learned trial Court had appointed a Commissioner and he had submitted a report. He was also examined during trial. By judgment dated 18.3.09, on consideration of the evidence on record, the learned trial Court declared right, title and interest of the plaintiffs over 4 K-10 L of land and also held that the plaintiffs are entitled to recover 11 L of land from the possession of defendant Nos. 1, 2, 3, and 4 on western side and 5 L of land on the southern side from the possession of defendant No. 5.

5. The petitioners filed an application under Order 9 Rule 7 and Order 9 Rule 13 read with Section 151 of the CPC, 1908 for setting aside the orders dated 5.5.04 and 18.5.04 fixing the case for ex-parte hearing and also for setting aside the ex-parte decree dated 18.3.09, passed in Title Suit No. 580/06. The said application was registered as Misc. (J) Case No. 212/10. An application u/s 5 of the Limitation Act, 1963 read with Section 151 of the CPC, registered as Misc. (J) Case No. 213/10, was also filed for condonation of delay of 412 days in filing the application registered as Misc. (J) Case No. 212/10.

6. In Misc. (J) Case No. 212/10, it is stated that by an order dated 18.3.06, the learned Civil Judge, (Sr. Division) No. 2, Kamrup at Guwahati transferred the suit to the learned District Judge, Kamrup directing the parties to appear before him on 12.2.06 to receive further instructions and by an order dated 5.7.06, the learned District judge transferred the same to the Court of Civil Judge, Junior Division No. 1, Kamrup for disposal. It is stated that the petitioners had entered

appearance by executing a vakalatnama on 15.12.03 i.e. prior to transfer of the suit. It is pleaded that they came to know about the ex-parte judgment and decree dated 18.3.09 only on 9.3.10 when the bailiff and other staff of the Court went to the suit property to give delivery of possession to the plaintiff and prior to that, they had no knowledge about the ex-parte decree dated 18.3.09 that was passed against them. Averments are made that after transfer of the suit, no summons were issued or served upon the petitioners and as a consequence thereof, after transfer of the suit, they had no knowledge about the date fixed for their appearance in Court and of the dates fixed for hearing of the suit. It is stated in the said application that the counsel for the defendants including the present petitioners, by filing a petition being Petition No. 5160/03 dated 15.12.03, prayed for time for filing written statement and accordingly, 2.2.04 was fixed by the Court for filing written statement with a direction to the plaintiffs to furnish copy of the plaint to the petitioners. 2.2.04 being a holiday, case record was put up on 5.2.04 and the Court fixed 31.3.04 for supply of copy of the plaint. On 31.3.04, the counsel for the defendants filed a petition being Petition No. 2030/04 praying for further time to file written statement along with a prayer to direct the plaintiffs to furnish a copy of the plaint. It is stated that the Court fixed 5.5.04 as the next date and the learned counsel for the defendants did not appear after 31.03.04 in court as a result of which the learned trial court passed orders dated 5.5.04 and 18.5.04 to the effect that suit will proceed ex-parte. It is asserted that because of the fault of the learned counsel to inform the progress of the suit, the petitioners were prevented from appearing in Court after 31.3.04 and due to fault of the counsel, the litigants should not be penalised.

7. In the application for condonation of delay, similar stand as is taken in Misc.(J) Case No. 212/10 is taken. It is also asserted that after transfer of the suit to the Court of learned Civil Judge, Jr. Division, Kamrup at Guwahati, no notice was issued to the petitioners. It has also been stated that the learned counsel intentionally did not inform the petitioners about the orders passed on 5.5.04 and 18.5.04 and he did not appear in Court on all subsequent dates after 31.3.04.

8. An objection was filed in Misc. (J) Case No. 213/10 by the opposite parties. In the objection, it has been highlighted that the defendants had been appearing all through in the suit proceeding and in presence of both the parties, order dated 10.10.07 was passed appointing Settlement Officer, Guwahati as the Commissioner for ascertaining the actual physical possession of the suit land. The Commissioner had issued a notice dated 1.3.08 to all the parties fixing 7.3.08 as the date of physical measurement of the suit land and survey of the suit land was carried out in presence of all the parties on the date fixed. The allegation of default on the part of the learned counsel was also contested and issue was raised regarding the petitioners not tiling any complaint against him. It is highlighted that the plea that the defendants did not have any knowledge of the progress of the suit, demonstrates laches on the part of the petitioners. The said objection proceeded on the basis that written statement was filed by all the

defendants. It is stated that even after transfer, the learned counsel for the defendants had appeared on various dates till the submission of the report by Court appointed Commissioner on 21.6.08. It is pleaded that the application for setting aside the ex-parte decree was filed after long delay of 412 days with the sole intent and object of frustration the execution of the decree. The petitioners were having knowledge about the various stages of the suit and therefore, the application for condonation of delay as well as the application for setting aside ex-parte decree was liable to be dismissed.

9. Heard Mr. B. Ullah, learned counsel for the petitioners and Mr. D. Choudhury, learned counsel appearing for the opposite parties.

10. Mr. B. Ullah, learned counsel for the petitioners, by relying upon:

(i) Union of India (UOI) and Others Vs. T.L. Angami and Others, ,

(ii) Upendra Kumar Debnath Vs. State of Tripura and Another, ,

(iii) Rafiq and Another Vs. Munshilal and Another, ,

submits that the instant case depicts gross negligence on the part of the learned counsel for the petitioners in not taking appropriate steps before the learned trial Court and in not informing the petitioners the progress of the suit as a result of which, the petitioners were not aware of the progress of the suit and the suit proceeded ex-parte against them. It is also submitted by him that only when the decree was sought to be executed, the petitioners came to know about the ex-parte decree passed against them and as such delay ought to have been condoned by the learned trial Court. He has also submitted that after transfer, no summons were served upon the petitioners and the same has also vitiated the proceedings of the learned trial Court and to substantiate his argument that it is obligatory on the part of the transferee Court to issue summons, the learned counsel places reliance on Kanak Chandra Boro and Others Vs. Kankaria Tea Company and Others, . The learned counsel submits that only because the petitioners had not filed any complaint against the counsel conducting the case on behalf of the petitioners, negligent conduct of the counsel was ignored by the learned trial Court. The learned counsel submits that in the facts and circumstances of the case, the petitioners have been able to show sufficient cause for condoning the delay in filing the application for condonation of delay as well as the application under Order 9 Rule 7 and Order 9 Rule 13 read with Section 151 CPC, and the learned Court below failed to exercise jurisdiction vested in it by law, requiring interference at the hands of this Court.

11. Mr. D. Choudhury, learned counsel for the opposite parties, however, submits that the allegation of negligence attributed to the learned counsel for the petitioners is wholly unfounded, and baseless allegations have been levelled only to cover their own negligence in not taking requisite steps during the trial of the suit. The learned counsel submits that counsel was taking steps even after the orders dated 5.5.04 and 18.5.04 were passed. He submits that the petitioners

had devised a clever ploy to frustrate the execution of decree by filing the applications which, however, came to be rejected by the learned trial Court. He has also submitted that the counsel for the petitioners appeared on behalf of the defendants even after transfer of the suit to the Court of the learned Civil Judge, Jr. Division and as such there is no merit in the contention of the learned counsel for the petitioner that by reason of not serving summons afresh after transfer, an incurable defect has crept in the proceedings. The learned counsel relies on

(i) A. S. Singh & Ors. Vs. Elangopkyi CCF Society Ltd., reported in 1999 (1) GLJ 416

(ii) Salil Dutta Vs. T.M. and M.C. Private Ltd., ,

(iii) Ningthoujam Biramangol Singh Vs. Yengkhom Ningol Ningthoujam Ongbiu Sakhi Devi and Others, .

12. Before proceeding further, it will be appropriate to consider the propositions laid down in the above referred cases.

13. In Rafiq (supra), the Apex Court set aside the order of dismissal on the ground of default on the part of the learned counsel for the appellant and restored the appeal to file with a direction to hear the appeal in accordance with law. The Supreme Court noted that the appellant, who was an innocent party, cannot suffer injustice merely because his chosen advocate had defaulted.

14. In T.L. Angami (supra), this Court allowed the condonation of delay of 59 days on the ground that delay had occurred due to inaction on the part of the learned Senior Central Government Standing Counsel in intimating the petitioners about the judgment and decree.

15. In Opendro Kumar Debnath (supra), delay of 215 days was condoned on the ground that the engaged counsel had lost track of his file in the process of shifting of his chamber and therefore, the applicant cannot be saddled with the consequence of act of negligence, if any, on the part of his counsel.

16. In Salil Dutta (supra), the Supreme Court distinguished Rafiq (supra) in the facts of the case on the ground that it was not an appeal preferred by an outstation litigant but a suit which was posted for final hearing 7 years after institution of the suit and that the defendant being a company having Head Office at Calcutta are not rustic villagers. It was noted that observations made in Rafiq (supra) must be understood in the facts and circumstances of the case and cannot be understood as an absolute proposition. In paragraph 8 of Salil Dutta (supra), Supreme Court stated as follows:

8. The advocate is the agent of the party. His acts and statements, made within the limits of authority given to him, are the acts and statements of the principal i.e. the party who engaged him. It is true that in certain situations, the Court may, in the interest of justice, set aside a dismissal order or any ex-parte decree notwithstanding the negligence and/or misdemeanour of the advocate where it

finds that the client was an innocent litigant but there is no such absolute rule that a party can disown its advocate at any time and seek relief. No such absolute immunity can be recognised such an absolute rule would make the working of the system extremely difficult. The observations made in Rafiq must be understood in the facts and circumstances of that case and cannot be understood as an absolute proposition. As we have mentioned hereinabove, this was an ongoing suit posted for final hearing after a lapse of seven years of its institution. It was not a second appeal filed by a villager residing away from the city, where the Court is located. The defendant is also not a rustic ignorant villager but a private limited company with its Head office at Calcutta itself and managed by educated businessmen who know where their interest lies. It is evident that when their applications were not disposed of before taking up the suit for final hearing they felt piqued and refused to appear before the Court. Maybe, not. But one thing is clear they chose to non-cooperate with the Court. Having adopted such a stand towards the Court, the defendant has no right to ask its indulgence. Putting the entire blame upon the advocate and trying to make it out as if they were totally unaware of the nature or significance of the proceedings is a theory which cannot be accepted and ought not to have been accepted.

17. In N.B. Singh (supra), it was observed that the view taken by the learned trial Court that there was no sufficient cause for condoning the delay is a possible view and not a perverse view and if there are two possible views on a matter, interference with the order impugned on ground of there being another view is not permissible in a revision petition.

18. In A.S. Singh (supra), this Court, following Salil Dutta (supra), reiterated the proposition that there is no such absolute rule that a party can disown its advocate at anytime and seek relief.

19. In Kanak Chandra Bora (supra), after dismissal of an appeal arising out of vacating an ad interim injunction, the records were sent back to the learned trial Court and on receipt of the records, the learned trial Court issued notice to the counsel for the parties. The counsel for the defendant refused to accept the notice with certain endorsement. The Court did not issue any notice to the defendants and ultimately, suit was decreed ex-parte. It is in this backdrop, this Court held that when the counsel for the defendants refused to accept the notice, it was the duty of the Court below to issue notice to the defendants and as the Court below failed to discharge the solemn duty, the ex-parte decree was set aside and the suit was restored to file.

20. Perusal of the records indicates that defendants Nos. 1, 3, 4, 5, 6, 7, 8, 9 and 10 executed vakalatnama in favour of a learned counsel to represent their case and the learned counsel filed a petition No. 5160/03 dated 15.12.03 praying for a direction to the plaintiffs to supply copy of the plaint. An order was passed to supply copy of the plaint fixing 2.2.04 and as the Court was closed on 2.2.04, by an order dated 5.2.04, the case was fixed on 31.3.04 for supply of copy of the

plaint. On 31.3.04, on the ground that copies of the plaint were not furnished, once again a prayer was made to direct the plaintiffs to supply copy of the plaint. The lower part of the order sheet of the learned trial Court containing the order dated 31.03.2004 is torn and it does not reflect the next date fixed. However, from the subsequent orders passed, it appears that 5.5.04 was the next date fixed by order dated 31.3.04. By the said order dated 31.3.04, a prayer for directing to supply copy of the plaint was accepted. On 5.5.04, while the plaintiff was present, there was no representation on behalf of the defendants. By order dated 5.5.04, 18.5.04 was fixed for submission of written statement failing which it was indicated that the case would proceed ex-parte against the defendants. On 18.5.04, defendants were absent without steps and the plaintiff prayed for another date for hearing and accordingly, 9.6.04 was fixed for ex-parte hearing. On 9.6.04, a petition under Order 9 Rule 7 read with Section 151 CPC was filed by the defendants (Petition No. 1478/04) for vacating the ex-parte order dated 18.5.04 and to allow the defendants to submit their written statement. It was stated that the learned counsel for the defendants was unable to appear before the Court on 5.5.04 and 18.5.04 because of his mother's sudden cardiac arrest requiring the counsel to look after his mother, being the only son. It appears that defendant No. 1 had also filed a written statement on 9.6.04. The word No. 1 has been scratched out without initials and letter's was added to the word defendant. In the first page of the said written statement, 2 other handwritten words were there, namely, "not" and "form", both without any initials. In the other pages of the written statement, there were some hand written additions under initials. By the said written statement, prayer was also made to file additional written statement since the plaintiff had not supplied the necessary document/copy. By order dated 09.06.2004, the ex-parte orders dated 5.5.2004 and 18.5.2004 were set aside only in respect of defendant No. 1 and he was allowed to file written statement. By the said order, 01.07.2004 was fixed for filing additional written statement. The plaintiffs were also directed to supply copy of the plaint to the defendant within three days.

21. On 1.7.04, the learned counsel for the defendants, by filing Petition No. 1742/2004, prayed for dismissal of the suit in view of the fact that the plaintiffs had not taken the requisite steps regarding supply of copy of the plaint. The learned trial Court appears to have overlooked the contents of the said petition and considered the said petition to be a petition for grant of time for filing written statement. A perusal of the order dated 1.7.04 indicates that on that date the plaintiffs had supplied copies of documents to the defendants. Accordingly, while allowing the said petition, the trial Court fixed 2.8.04 for written statement. On 2.8.04, a prayer was made vide petition No. 2170/2004 on behalf of the defendants to grant time to file additional written statement on the ground that 4 defendants are residing in their permanent places of residence and unable to come because of the floods.

22. A perusal of the said petition indicates that the defendants were harbouring under an illusion that all the defendants were allowed time to file additional

written statement The said petition came to be rejected and it was also noted that the suit will proceed ex-parte against other defendants and that defendant No. 1 had already filed written statement On 13.9.04, which was the date fixed for documents and issue, a petition was filed by the defendants being Petition No. 2714/04, indicating that on 9.6.04, the defendant No. 1, 3, 4, 5, 6, 7, 8, 9, 10 had filed written statement and that on 2.8.04, defendants prayed for some time for filing additional written statement and it was asserted that the written statement filed on 9.6.04 was on behalf of all the defendants, who had signed the vakalatnama and therefore, the ex-parte order is required to be vacated permitting the defendants to file additional written statement The said petition came to be rejected on the ground that the Court had already noted in the order dated 9.6.04 that the written statement was signed only by the defendant No. 1 and the said written statement was filed on his own behalf and therefore, the written statement cannot be accepted as written statement filed on behalf of all the defendants. The order also indicates that the learned counsel for the defendants verbally prayed for allowing the defendants to amend the written statement which was not entertained as there was no provision for allowing amendment on verbal prayer. On the same day after passing of the said order, defendants filed another petition, being Petition No. 2736/04, indicating that the defendants were under the impression that they will be allowed to file additional written statement. By this petition, it was prayed that they may be permitted to file petition seeking permission to file amendment petition on the next date fixed. The learned trial Court passed order to put up the petition on the next date fixed.

23. The defendant No. 1 filed an application under order 6 Rule 17 of the CPC read with Section 151 CPC vide petition No. 3193/04 on 14.10.04, which was registered as MC No. 182/05. Apart from others, by the said amendment petition, the following two amendments were sought for - (1) above the paragraph 1 and below the Title of Suit No or name of the defendants, after the word "defendants", No. 1, 3, 4, 5, 6, 7, 8, 9 and 10 to be added and (2) the paragraph 1 of the affidavit filed with the written statement may be read as:

That I am one of the defendants and authorised to swear this affidavit on behalf of the other defendants also and as such I am competent to swear this affidavit.

24. By an order dated 17.9.09, the aforesaid two prayers were rejected. However, the other amendments proposed vide paragraphs 2 and 3 of the petition under Order 6 Rule 17 CPC read with Section 151 CPC was allowed.

25. It appears that after rejection of the prayer for amendment to the written statement filed, the said defendants did not agitate the matter by challenging the said order in any forum and the said position seems to have been accepted that the written statement was filed only by the defendant No. 1. It appears that there is a common interest on behalf of all the said defendants and that is why amendment was prayed for to treat the written statement filed on 09.06.04 to be written statement on behalf of defendant Nos. 1, 3, 4, 5, 6, 7, 8, 9 and 10. It is also noted that the written statement was allowed to be amended by the order

dated 17.9.05 on material points by allowing paragraphs 2 and 3 of the amendment application to be added in paragraph 11 of the written statement.

26. From the above discussion, it becomes apparent that the plea taken by the petitioners that the counsel did not inform the petitioners about the orders passed on 5.5.04 and 18.5.04 and that he did not appear in Court on all subsequent dates after 31.3.04 is not borne out of records. It also appears from the materials on record that defendant No. 1 was all along taking steps for the petitioners also. Even the application under Order 6 Rule 17 of the CPC read with Section 151 CPC, praying for amendment, amongst others, for insertion of No. 1, 3, 4, 5, 6, 7, 8, 9 and 10, which include the petitioners, was filed by the defendant No. 1 only. After the aforesaid application was filed on 14.10.04, the petitioners cannot take the plea that the counsel did not inform them about the orders passed on 5.5.04 and 18.5.04. In the circumstances, this Court is unable to accept the argument of the learned counsel for the petitioners that the petitioners have been undone because of the negligence of the counsel. It is also noticeable that the ex-parte judgment and decree came to be passed only on 18.3.09 and in the intervening period of almost four and half years after disposal of the application for amendment, no steps have been taken by the petitioners. The petitioners are city dwellers and it will be highly unrealistic to assume that they are unaware of the significance of the proceedings. The petitioners are also required to take appropriate steps in an ongoing suit and cannot shift the entire burden on the shoulder of the counsel by attributing perceived negligence.

27. This Court is of the considered opinion that the principles laid down in *Salil Dutta* (supra) is squarely applicable in the facts of this case. The learned trial Court is, however, not correct in attaching undue importance in filing of a complaint against the counsel while making out a case of negligence of the counsel. If the facts eloquently demonstrate negligence of counsel, non-filing of a complaint may not be determining factor in accepting a plea of negligence on the part of the counsel. However, in the instant case, it has been found that on the basis of the materials on record, negligence of the counsel is not borne out. The other contention of Mr. Ullah that the transferee Court ought to have issued summons to the petitioners after transfer of the suit is mentioned only to be rejected. The facts of *Kanak Chandra Boro* (supra) on which reliance have been placed by Mr. Ullah, was, in no way similar to the facts of the present case. In the instant case, even after transfer of the suit, learned counsel had appeared in the transferee Court for the defendants and therefore, there could not have arisen any occasion for the Court to issue summons once again to the defendants.

28. In view of the above, I find no merit in this application and accordingly, the petition is dismissed.

29. No costs. Send back the LCR.