
(2009) 06 GAU CK 0050

In the Gauhati High Court

Case No : Misc. Case No. 2008 of 2007 in Regular Second Appeal No. 41 of 2000

Rabindra Chakraborty and Others

APPELLANT

Vs

Nivaadhikari and Others

RESPONDENT

Date of Decision : 25-06-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 5
Limitation Act, 1963 — Section 5

Citation : (2010) 1 GLT 609

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : C.K. Sharma Baruah, A. Dey and J. Devi, for the Appellant; A.D. Choudhury, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Musahary, J.—Heard Mr. C.K.S. Baruah, learned Senior Counsel, assisted by Ms. A. Dey and Ms. J. Devi, learned Counsel for the Applicants and also heard Mr. A.D. Choudhury, learned Counsel for the opposite parties.

2. This is an application u/s 5 of the Limitation Act, praying for condonation of delay in filing the application for setting aside abatement on the death of Respondent No. 1, Radhapada Adhikari.

3. From the averments made in this application it is found that the aforesaid Respondent No. 1 expired on 18.01.2001, leaving behind the following legal heirs/ representatives:

I. Smti Niva Adhikari (Widow)

II. Sri Rajat Adhikari (Son)

III. Sri Rupak Adhikari (Son)

IV. Miss Nanda Adhikari (Un-married daughter)

V. Smt. Nibedita Adhikari (Married daughter)

VI. Smt. Nandita Adhikari (Married daughter)

4. The aforesaid second appeal came up for hearing before the Court on 09.04.2007, on which date the learned Counsel for the deceased/Respondent No. 1 submitted before the Court that the said second appeal has abated on account of the non-substitution of the legal heirs of the deceased/Respondent No. 1. Having come to know about this fact, the learned Counsel for the Petitioners/Appellants prayed for adjournment of hearing and the same was granted to enable the Petitioners to file necessary applications. Thereafter, the counsel for the Petitioners/Appellants Sri Suman Shyam wrote a letter to Petitioner/Appellant No. 3 Sri Ramendra Chakraborty, who was taking steps in the abovementioned second appeal on behalf of the Petitioners/Appellants, for furnishing the names and addresses of the legal heirs and representatives of the deceased/Respondent No. 1 for the purpose of filing an application for substitution. The Petitioner/Appellant No. 3 Sri Ramendra Chakraborty, unfortunately did not receive the said letter of the counsel and as a result the application for substitution of legal heirs aforesaid could not be filed.

5. Mr. C.K.S. Baruah, learned Sr. Counsel submits that the limitation would run from the date of knowledge that is from the date of receipt of information about the death of the deceased/Respondent No. 1 although, he died on 18.01.2001. From the date of death of Respondent No. 1 till the filing of the substitution petition on 31.05.2007, there is a delay of 5 (five) years and 11 (eleven) months but if the limitation is counted from the date of knowledge that is 09.04.2007, the delay is only 1 (one) month and 22 (twenty two) days. He submits that Courts should adopt liberal approach in condoning the delay on the basis of principle laid down in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, The Petitioners/Appellants have shown the sufficient cause for condoning the delay in question and the Court may condone the same for the sake of rendering substantial justice by way of disposing the appeal on merit.

6. The opposite parties/Respondents filed an objection petition for condonation of delay aforesaid and for setting aside abatement of RSA No. 41/2000. Denying the statements made by the Petitioners/Appellants made in the Misc. Case No. 2008/2007, it has been contended inter alia, that the Petitioners and the Respondent No. 1 are close relatives and are residents of the same village namely Karnamadhu (Dirpara) in the District of Karimganj, and in fact they are neighbours. It is also contended that the Respondent No. 1 (Defendant No. 4) is the brother-in-law of their late father and therefore, the Respondent No. 1 is their maternal uncle and the disputed land is adjacent to the plot of land where the Petitioners reside. A categorical statement has been made in para 5 of the objection that the Petitioners are well aware of the fact the date of death of the Respondent No. 1 on 18.01.2001 and therefore the statements that they were unaware/ignorant of his death is false and liable to be rejected.

7. Mr. Choudhury, learned Counsel for the opposite parties submits that the Petitioners/ Appellants, being the neighbours of the opposite parties/ Respondents were very much aware about the death of the Respondent No. 1 and they were negligent in intimating the same to their counsel for filing application for substitution of legal heirs of Respondent No. 1 within the period of limitation. The Petitioners/Appellants were well aware of the fact of death of Respondent No. 1 and inspite of being aware about the same, they have preferred not to make an application for substitution of his legal heirs. The present petition for condonation of delay is liable to be rejected inasmuch as the Petitioners/ Appellants have failed to prove that they were ignorant of the date of death of the Respondent No. 1, and the causes shown by them for not making the application within the period specified cannot be considered as sufficient and acceptable causes. In this regard Mr. Choudhury places reliance on Govind Rao and Another Vs. Mahadev, wherein, it is held that condonation of delay is not permissible on grounds of age and deteriorated mental condition when the Appellant is a close relative of the co-Appellant and was aware of death and had adult sons. In Para 2 of the said judgment it is observed as follows:

(2) The parties are close relations and it is admitted that the first Appellant was present for the funeral of the second Appellant. What is more, the Respondent had filed an application to declare that the appeal had abated as early as February 8, 1975 and still no application was filed by the first Appellant for setting aside the abatement in time.

8. For the disposal of this application for condonation of delay, it would be appropriate to refer and quote the provisions under Order 2, Rule 5 of the CPC below:

(5) Where --

(a) the Plaintiff was ignorant of the death of a Defendant, and could not, for that reason, make an application for the substitution of the legal representative of the Defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the Plaintiff applies after the expiry of the period therefore in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application u/s 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act.

The Court shall, in considering the application under the said Section 5, have due regard to the fact of such ignorance, if proved.

9. The aforesaid provision of law, for the purpose of condonation of delay, refers only to ignorance of the death of Defendant and sufficient cause for not making an application within the period specified in the Limitation Act. The opposite parties/Respondents, in their objection as stated above, had made specific

averments that they are neighbours of the Petitioners/Appellants and therefore there is no reason for not knowing or being ignorant about the death of the Respondent No. 1. These averments of the opposite parties/ Respondents have not been denied or controverted by the Petitioners/Appellants by filing any rejoinder and as such it can be accepted that the Petitioners/Appellants are in fact related to and neighbours of the opposite parties/Respondents and they were quite aware or had the knowledge of the death of Respondent No. 1. Once it is proved and found that the Petitioners/Appellants are not ignorant about the death of Respondent No. 1, it is incumbent upon the Petitioners to show sufficient cause for not making the application within the period of limitation.

10. Referring again to averments made in paragraphs 6,7,8 and 9 it may be noted that the Petitioners/Appellants suppressed the fact that they are co-villagers and neighbours of the opposite parties/Respondents and they took the plea that they came to know about the date of death of Respondent No. 1 only on 09.04.2007 when the second appeal came up for hearing. The Petitioners/Appellants have been trying to explain the cause of delay in paragraphs 7 and 9. In para 7 it is stated that the Petitioner/Appellant No. 1 Sri Rabindra Chakraborty is working in Police Department and he is posted in Meghalaya. The Petitioner/Appellant No. 2 is also an employee of NEEPCO and he is posted at an interior place in Arunachal Pradesh. The Petitioner/ Appellant No. 4 Smt. Amala Devi is an aged lady of about 90 years. The Petitioners/ Appellants No. 5 and 6 are married daughters and residing with their respective families far away from Karimganj while, the Petitioner/ Appellant No. 3 Sri Ramendra Chakraborty, who is the only male member residing at Karmganj is a person read only up to Class - VIII and he was unaware about the necessity of filing application for substitution of legal heirs and representatives of the deceased Respondent No. 1. In para 9 it is stated that the counsel for the Petitioners/Appellants addressed a letter to the Petitioner/Appellant No. 1 on 11.04.2007, asking him to furnish the date of death of Respondent No. 1 and the names and addresses of the legal heirs. It was delivered to the Petitioner/Appellant No. 3 at Karimganj on 20.04.2007. On receipt of the same he proceeded to Shillong to meet his brother Petitioner/Appellant No. 1 Sri Rabindra Chakraborty. Thereafter both Petitioners/Appellants No. 1 and 3 came down to Guwahati to meet their counsel and furnished the required information on 26.05.2007 and ultimately they could file the second appeal only on 31.05.2007.

11. What is to be noted is that from the date of knowledge i.e. 09.04.2007 and the date of filing of the appeal i.e. on 31.05.2007, there is a gap of 51 days. Two of the Petitioners, after receiving the letter from their counsel, came down to Guwahati only on 26.05.2007 and furnished the required informations to their counsel who took 6 (six) days for filing the condonation petition on 31.05.2007.

12. No doubt the Apex Court in Katiji's case (supra) mandated the Courts to take liberal approach for condoning the delay in filing the appeal. It has also in N. Balakrishnan Vs. M. Krishnamurthy, held that the delay would not be condoned if

the explanation smacks mala fide or it is not put-forth as part of a dilatory strategy and there is reasonable ground to think that the delay was caused by the party deliberately to gain time. It is also observed that while condoning the delay the Court should not forget the interest of the opposite party altogether and it must be borne in mind that he is a loser and he too would have incurred quite a large litigation expenses. In the said judgment it has also been observed that length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. In the present case, it has already been found and established that the opposite parties besides being relatives, are neighbours of the Petitioners and there are no reason for not knowing the date of death of Respondent No. 1. It cannot be accepted as correct and true that during a long period of about 6 (six) years from the date of death of Respondent No. 1, between the date of death on 18.01.2001 and the date of knowledge on 09.04.2007, the Petitioners did never feel it necessary to inform their counsel about the death of Respondent No. 1 or for that matter they have never met their counsel on any occasion during the said period. The attitude of the Petitioners demonstrates sheer negligence or laches in Moring their counsel about the death of Respondent No. 1. If they are not negligent, their conduct smacks mala fide intention or dilatory strategy in disposal of the appeal. It is to be noted that the Petitioners/Appellants instituted the Title Suit No. 12 of 1989 for declaration of right, title and interest, confirmation of position, recovery of khas possession by evicting the Respondent No. 1 Late Radhapada Adhikari and for other reliefs. The said suit was decreed but the First Appellate Court in Title Appeal No. 1 of 1997 partly allowed the appeal and modified the judgment and decree passed by the Trial Court in the title suit. The Petitioners/Appellants preferred the present second appeal against the judgment and decree passed by the First Appellate Court. This Court while admitting the second appeal on 03.05.2007 directed maintenance of status-quo in respect of the land and houses described in schedule 3 of the plaint till disposal of the appeal. The aforesaid order for maintenance of status-quo is still in force to the advantage of the Petitioners/Appellants. This may be the reason why the Petitioners/Appellants resorted to dilatory tactics by way of remaining silent all these years without taking any step for condoning the delay in spite of their knowledge about the death of Respondent No. 1.

13. The conduct and attitude of the Petitioners/Appellants cannot be treated as fair and bonafide to give any benefit to them applying the principle of liberal approach under the principle enunciated by the Apex Court in Katiji's case (supra). In the facts and circumstances of the case, I find the principle laid down by the Apex Court in Balakrishnan case (supra) is more appropriate and applicable to the present case inasmuch as explanation for condoning the delay are not found bona fide rather smacks of mala fides and dilatory strategy to reap the benefit of status-quo order aforesaid for an indefinite period of time to the

disadvantage of the other party whose interest the Court should not forget and make them sufferer.

14. For what has been discussed and considered, I find that the explanations offered by the Petitioners/Appellants for condoning the delay are not sufficient and satisfactory and as such the same are rejected. Consequently, this petition for condonation of delay stands dismissed.

15. No order as to costs.