

(2025) 05 CAL CK 0816

In the Calcutta High Court, Original Side

Case No : APDT No. 35 Of 2024 With CS No.347 Of 1999 IA No: GA No. 1, 2 Of 2024

R.C Estate Private Limited & Ors

APPELLANT

Vs

Sashi Devi Agarwal

RESPONDENT

Date of Decision : 01-05-2025

Acts Referred:

Code of Civil Procedure, 1908 — Order 3 Rule 2, Order 3 Rule 3, Order 9 Rule 13, Order 30 Rule 4
Limitation Act, 1963 — Section 5
Indian Partnership Act, 1932 — Section 26, 27
Contract Act, 1872 — Section 45

Citation : (2025) 05 CAL CK 0816

Hon'ble Judges : Arijit Banerjee, J;Om Narayan Rai, J

Bench : Division Bench

Advocate : S.N. Mitra, Nirmalya Dasgupta, Joyjit Roychowdhury, Rohit Chowdhury, Pradip Kumar Dutta, Chanchal Kumar Dutta, K. Mullick

Final Decision : Dismissed

Judgement

Om Narayan Rai, J.

1. The instant appeal assails a judgment and decree dated April 3, 2014 passed by the learned Single Judge in a suit for specific performance being CS No. 347 of 1999, whereby the learned Single Judge has decreed the suit ex-parte and directed the defendants to execute conveyance of the suit property in favour of the plaintiff/respondent.

2. There is a delay of 3884 days in preferring the instant appeal. The appellants (who had been arrayed as the defendant nos. 1, 2 and 4 in the said suit), therefore, have taken out an application being IA/GA No. 1 of 2024 praying for condonation of delay occasioned by the appellants in preferring the appeal. Since the appeal has been presented before this Court belatedly, the Court would be first required to test the validity of the reasons assigned by the appellants for

such belated approach to the Court, prior to entering into the merits of the appeal.

3. The said application for condonation of delay (hereafter "condonation application") has been opposed by the plaintiff-respondent by filing an affidavit-in-opposition and the appellants (hereafter "petitioners") have responded thereto by an affidavit-in-reply.

4. Briefly summed up, the case run in the condonation application is as follows:

a. A suit being C.S. 347 of 1999 had been instituted by the respondent for specific performance of an agreement for sale dated August 20, 1995. The petitioners entered appearance in the suit and filed their written statement on January 04, 2000 and the petitioners had all along been contesting the suit.

b. There was no constructive development in the suit as the respondent had failed to take proper steps therefor.

c. The said suit was being looked after/conducted by the defendant no.3 (i.e. Gulab Chand Shyamsukha since deceased) on behalf of the petitioners and all the records and papers pertaining to the said case were kept with the said defendant no.3 only. When the said defendant no.3 expired on May 01, 2013 the connecting link between the learned Advocate for the petitioners and the petitioners snapped.

d. After the death of the defendant no.3, the records and papers pertaining to the said case became non-traceable and the petitioners became clueless about the same. The petitioners attempted to recover the said records and documents from the family members of the deceased defendant no.3 but they failed as the family members of the deceased defendant did not cooperate and refused to hand over the records and pleadings to the petitioners.

e. The petitioners ultimately came to know about the judgment and decree dated April 03, 2014 upon the same being disclosed to them by the learned Advocate-on-Record for the respondent under the cover of a letter dated August 24, 2022 that had been issued to the petitioners by the said learned Advocate inconnection with another suit being C.S 348 of 1999 instituted by one Raj Kumar Agarwal against the petitioners.

f. The petitioners also had no clue about the deed of conveyance that had been registered by the Registrar Original Side whereby the conveyance of the suit property was registered in favour of the respondent herein, till the same was tendered in evidence and marked as exhibit in the said other suit i.e. C.S 348 of 1999 filed by one Raj Kumar Agarwal.

g. It was only thereafter that the petitioners took steps for challenging the said the judgment and decree dated April 03, 2014 obtaining the certified copy thereof.

h. It has also been alleged by the petitioners that the petitioner no.3 i.e. Rurhmal

Chowdhary has not been keeping well since long owing to certain spine related ailments and has also undergone surgery.

i. The petitioners have alleged that the judgment and decree dated April 03, 2014 is bad in law on various grounds including limitation, non-service of notice before passing thereof and non-consideration of the petitioners' defence as made out in the written statement.

j. The petitioners have also averred that as the suit had been disposed of in the year 2014, the records of the case had been moved from the old record section of this Court to the "stockyard at Khidderpore" and the documents were not available it took a long time for the petitioners to obtain copies thereof which has contributed to the delay.

k. The petitioners took steps for presenting the appeal along with the said condonation application in December 2024, through their learned Advocate on record after holding conferences and getting the same settled by the learned Senior Counsel engaged in the matter.

l. The petitioners have therefore prayed for condonation of delay in filing the present appeal while asserting that the delay occasioned is not attributable to the petitioners but to circumstances which were beyond their control as mentioned in the condonation application.

5. The Respondent has used an affidavit in opposition to the condonation application thereby denying the material allegations contained in the said condonation application. Their positive assertion, in a nutshell, is as follows:

a. The petitioners have suppressed material facts before this Court. The petitioners were aware that the two suits being C.S 347 of 1999 and 348 of 1999 had been filed simultaneously against the petitioners. While C.S 347 of 1999 had been filed by the respondent, C.S 348 of 1999 had been filed by her husband namely Raj Kumar Agarwal.

b. After the petitioners had filed their written statement in C.S 347 of 1999, the said suit appeared in the list from time to time and the fact that the suit had been listed on February 13, 2014 had been duly intimated to the Advocate-on-Record for the petitioners by a letter of even date.

c. Upon the judgment and decree dated April 3, 2014 being passed in CS No. 347 of 1999 the Advocate-on-record of the respondent by a letter dated August 5, 2014, intimated the defendants about the same and requested them to execute the conveyance on August 22, 2014 in terms of the decree.

d. Thereafter on or about August 18, 2014, the petitioners filed an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 seeking setting aside of the aforesaid judgment and decree dated April 3, 2014 along with an application under Section 5 of the Limitation Act for condonation of delay of 140 days.

e. The said application was withdrawn by the petitioners with liberty to file afresh as recorded in the order dated September 03, 2014 passed by the learned Single Judge.

f. On September 03, 2014, the petitioners took out another set of applications being G.A. 2839 of 2014 and G.A.2840 of 2014 praying inter alia for setting aside of the decree dated April 03, 2014 passed in C.S 347 of 1999 upon declaring the same to be illegal.

g. The said two applications were also dismissed by the learned Single Judge by an order dated September 12, 2014.

h. Upon refusal by the petitioners to execute the conveyance in favour of the petitioners, a reference being Reference No.7 of 2014 was made before the Registrar, Original Side of this Court. A notice was issued from the office of the Joint Registrar, Original Side, to the petitioners to attend the reference case before the Registrar on August 28, 2014 at 3.00 pm but the petitioners went unrepresented.

i. Under such situation, the Registrar, Original Side executed the conveyance in favour of the respondent in terms of the decree dated April 03, 2014 passed in C.S 347 of 1999.

j. The petitioners never intimated about the death of the defendant no.3 to the respondent and the respondent came to learn about the same for the first time during the hearing of the applications being G.A. 2839 of 2014 and G.A. 2840 of 2014 which were dismissed by the order dated September 12, 2014. After gaining knowledge about the death of the defendant no.3 as aforesaid, the respondent through her learned Advocate-on-Record sought to know about the heirs of the deceased defendant and the same was intimated to the respondent by the learned Advocate-on-Record for the petitioners only on September 25, 2014.

k. It has been alleged that in view of the aforesaid, execution of the deed of conveyance in terms of the decree dated April 03, 2014 preceded the intimation of the names of the heirs of the deceased defendant.

l. The respondent has prayed for dismissal of the said condonation application.

6. The petitioners have rejoined by filing an affidavit-in-reply thereby mainly contending as follows:

a. No case has been made out by the respondent justifying dismissal of the said condonation application.

b. The signatures of "Rurhamal Chowdhury" appearing in the applications for setting aside the decree dated April 03, 2014 alleged to have been filed on behalf of the petitioners (that have been referred to in the respondent's affidavit-in-opposition) are not the signatures of the petitioner no.3. The same evidently differ in handwriting as also in the spelling of the name of the petitioner no.3.

c. Since the defendant No.3 namely Gulab Chand Jain had died on May 01, 2013, the said applications could not have been signed on his behalf as by the time the said applications came to be filed Gulab Chand Jain had already expired.

d. The signatures of the petitioner no.3 were forged and fabricated.

e. Neither of the letters dated February 13, 2014 and August 5, 2014 was addressed or served upon the petitioners (defendants in the suit). The same were apparently served upon learned Advocates but the petitioners have doubts as to whether the acknowledgements of receipt thereof by the addressee learned Advocates were genuine or not or as to whether the said learned Advocates were genuinely served or not. The petitioners have contended that it was unlikely that the same were served upon the said learned Advocates as alleged.

f. The petitioners have denied that they took any step for recall of the impugned judgment and decree or for setting aside thereof by filing the applications as indicated in the affidavit-in-opposition by the respondent.

g. The petitioners have also denied service of notice upon them by the Registrar, Original Side.

7. Mr. Mitra, learned senior advocate appearing for the petitioners made the following submissions in support of the said condonation application:

a) The decree dated April 3, 2014 was a joint decree as would be evident from the concluding portion thereof. The defendant no. 3 in the suit had expired on May 1, 2013 i.e. before passing of the decree. The decree passed on April 3, 2014 had thus been passed against a dead person and was (is) therefore a nullity.

b) The suit being CS No. 347 of 1999 lay in a dormant state for a substantial period of time and it suddenly appeared in the list, of which the petitioners had no notice. Inviting the attention of the Court to an order dated February 3, 2014 (at page 38 of the said application), it was submitted that the same would reveal that even the records of the suit were not available and that the same had been directed to be reconstructed by the respondent.

c) Neither of the letters dated February 13, 2014 and August 5, 2014 was addressed or served upon the petitioners (defendants in the suit). The same were apparently served upon learned Advocates but the petitioners doubted whether the acknowledgements of receipt thereof by the addressee learned Advocates were genuine or not or whether the said learned Advocates were genuinely served or not. It was contended that it was unlikely that the same were served upon the said learned Advocates as alleged.

d) The applications for setting aside of the judgment and decree dated April 03, 2014 that were alleged to have been filed by the petitioner no.3 herein were never filed by the said petitioner.

e) The purported signatures of the petitioner no.3 had been evidently forged for an oblique purpose of lending an appearance of the said applications having been

filed by the petitioner no.3.

f) Attention of the Court was invited to a copy of a certificate of possession (at page 55 of the Volume-I of the stay application) and it was submitted that the signature of the petitioner no.3 appearing thereat was the genuine signature. It was sought to be demonstrated that the name of the signatory to the said document (certificate of possession) was spelled as "Rurhmal Chowdhary" (which was (is) the correct spelling) and not "Rurhamal Chowdury" as spelled in the signatures appended to the applications alleged to have been filed by him seeking setting aside of the decree dated April 03, 2014. It was further submitted that there was an apparent mismatch between the handwritings in the two signatures professed to be of the same person at two different places. It was submitted that these aspects clearly established that the applications had never been filed by the petitioner no.3.

g) Relying on the averments made in the said application it was submitted that the petitioners came to know about the judgment and decree dated April 03, 2014 upon the same being disclosed to them by the learned Advocate-on-Record for the respondent under the cover of a letter dated August 24, 2022 that had been issued to the petitioners by the said learned Advocate in connection with another suit being C.S 348 of 1999 instituted by the respondent's husband against the petitioners.

h) Immediately upon getting knowledge about the said judgment and decree, the petitioners took steps to assail the same by way an appeal before this Court. The delay was occasioned due to circumstances beyond the control of the petitioners which include the ailing condition of the petitioner no.3/appellant no. 3, as would be evident from the averments made in the condonation application. The condonation application should therefore be allowed.

8. Mr. Dutta, learned Senior Advocate appearing for the respondent opposed the condonation application and submitted as follows:

a. The appellants had practiced fraud upon the Court by suppressing material facts.

b. This Court was taken through two applications being GA No. 2839 of 2014 and GA No. 2840 of 2014 filed on behalf of the defendant no.4 (petitioner no. 3 herein) and the orders passed thereon to demonstrate that the submission that the petitioners were prevented by sufficient cause from appearing before the Court during the hearing of the suit was negated by the learned Single Judge while observing that the illness of the defendant no.4 was unsubstantiated and there was no explanation given as to why two legal persons/entities did not appear at the time when the suit was taken up for hearing.

c. It was further submitted that the death of the defendant no. 3 was never communicated to the respondent (plaintiff in the suit) during the pendency of the suit. It was only after the decree was passed and the conveyance was executed

and registered by the Registrar, Original Side of this Court that the respondent was intimated about the heirs and legal representatives of the deceased defendant no. 3.

d. It was further submitted that since the suit property, conveyance whereof had been sought to be specifically performed in the said suit, belonged to the partnership firm (which had been arrayed as the defendant No.2 in the suit), therefore, merely because of the death of the defendant no.3 who was one of the partners of the defendant no.2 firm, the decree passed in such suit would not be rendered a nullity.

e. Sections 26 and 27 of the Indian Partnership Act, 1932, were relied on to contend that the liability of the firm remained intact even if the wrongful act challenged in the suit was attributable to any of its partners.

f. Relying on the provisions of Order 3 Rules 2 and 3 of the Code of Civil Procedure, 1908, it was submitted that the service of the notices upon learned Advocates for the petitioners was as good as service upon the petitioners themselves.

9. We have heard the learned Advocates appearing for the respective parties and have considered the material on record.

10. Before proceeding to deal with the merits of the condonation application, the first point raised by Mr. Mitra, touching upon the validity of the decree needs to be dealt with. It was submitted by him that the decree impugned in the present appeal was a nullity, inasmuch as the same was a joint decree and as on the date of passing thereof, the defendant no. 3 had expired.

11. While answering such point it needs to be recounted that the suit was one for specific performance of an agreement dated August 20, 1995 for sale of a property which was owned by the defendant no. 2 i.e. the partnership firm named M/s. Crown Commercial Corporation, registered under the Indian Partnership Act, 1932. The subject property (suit property) thus belonged to the firm and not the defendant no. 3 who expired. Thus when the firm remained a party defendant, mere death of the defendant no. 3 could not have affected the decree at all. The provisions of Order 30 Rule 4 of the Code of Civil Procedure, 1908 clarify the legal position unequivocally. The same are reproduced herein below.

4. Rights of suit on death of partner— (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872 (9 of 1872) where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

We, therefore, hold that the decree is not a nullity as contended by the petitioners.

12. We now turn to the condonation application. It hinges mainly on the death of the defendant no.3. The said defendant has been projected to be the sole contact point between the petitioners (i.e. the other defendants in the suit) and their erstwhile learned Advocate, which was lost with the death of the said defendant. It has also been alleged that all the records and documents of the case were in the custody of the deceased defendant only and the other defendants had no clue about the same. This kind of an explanation fails to appeal to us.

13. Firstly, it has neither been demonstrated nor been submitted before us that the petitioners had authorized the defendant no.3 to execute vakalatnama in favour of their erstwhile learned Advocate on their behalf as well. Ergo, the normal inference would be that each of the petitioners had individually appended signatures to the vakalatnama. Of course, since the appellant nos.1 and 2 are not natural persons they must have been represented by an authorized signatory who could have either been the petitioner no.3 or the defendant no.3 (since deceased) or any other person authorized in such regard. In such a situation it can safely be concluded that all the parties had knowledge about the learned Advocate engaged in the matter. Therefore, there is no reason for this Court to believe that the petitioners (i.e. the other defendants in the suit) had no avenue to contact their learned Advocate. If such explanation is disbelieved then the condonation application loses life at once. It would then be a clear case of sleeping over one's right to challenge the judgment and decree dated April 03, 2014 for about ten years – leaving no scope for this Court to condone the delay.

14. Secondly, even if the said explanation is believed that the deceased defendant no.3 was the only link between the petitioners and their erstwhile learned Advocate and that the petitioners did not have the records of the case with them, the same still does not justify the enormous delay occasioned by the petitioners in approaching this Court in appeal. There are more than one good reasons to disbelieve this story.

15. Firstly, the first defendant in the suit is a company i.e. a juristic person. The deceased defendant was only one of its directors. It is incomprehensible that only one of the directors of the company would have all the records of the case under his custody to the exclusion of others. It is also not understood and hence difficult to believe that the petitioner no.3 herein (defendant no.4 in the suit) who had been personally arrayed as a party would not retain a copy of the case records with him.

16. Equally inconceivable is the assertion that upon the death of the defendant no.3, when the petitioners had attempted to get the records of the case from the family members of the deceased defendant, the family members of the deceased defendant did not cooperate and refused to hand-over the same to them. At the very threshold such an assertion fails to inspire confidence of this Court in the absence of any reason cited by the petitioners like any animosity between the petitioners and the deceased defendant and/or his family.

17. In fact such assertion is belied by the fact that the son of the defendant no.3 (since deceased) himself has affirmed the condonation application, the application for stay as well as the affidavits in reply to the affidavits in opposition used by the respondent to the said applications. A look at paragraph 10 of the condonation application which contains pleadings as regards the non-cooperation of the family members of the deceased defendant is necessitated at this juncture :

"10. The petitioners state that after the death of the said Gulab Chand Shyamsukha, initially the petitioners took steps to recover the records of the said proceeding from the family members of Late Gulab Chand Shyamsukha and had visited several time the residence of Late Gulab Chand Shyamsukha, however the family members of the deceased partner and/or director did not cooperated and had denied to handover any records, pleadings, cause papers and/or documents pertaining to the present suit."

18. If indeed the deceased defendant's family members had refused to cooperate with the petitioners at the relevant point of time as pleaded in paragraph 10 of the condonation application and if they are cooperating now as would be evident from the fact that the deceased defendant's son has affirmed the pleadings now before the Court, the petitioners owe this Court an explanation as regards the change of heart over the years. To make matters worse, the pleadings in paragraph 10 quoted above have been affirmed by the deponent i.e. Ratan Lal Shyamsukha (son Late Gulab Chand Shyamsukha) as "being derived from official record". No record has been produced before us which could even feebly evince such non-cooperation by the family members of the deceased defendant as alleged. While on this, it also needs to be mentioned that the Court has noticed that in the all the affidavits filed in this Court in the present appellate proceedings, Ratan Lal Shyamsukha has been described as the "son of Gulab Chand Shyamsukha" (where the expression "Late" is absent) but at page 2 of the Power of Attorney executed by the petitioner no. 3 in favour of Ratan Lal Shyamsukha (thereby appointing Ratan Lal Shyamsukha as his constituted attorney to represent him in the present case before this Court), the said Ratan Lal Shyamsukha has been described as the "son of Late Gulab Chand Shyamsukha". Be that as it may, the meat of the matter is that the story of records being not available with the petitioners appears to be concocted and is therefore disbelieved.

19. Secondly, it needs to be remembered that the facility of uploading orders of this Court on its official website became functional by at least the year 2010. Therefore, if the petitioners had been vigilant they could definitely have got a sniff of the suit being taken up for hearing or decreed much earlier than the projected date of knowledge thereof i.e. August 24, 2022. While it is believable that the petitioners might not have felt the need to check the website of this Court to find out whether or not any order had been passed in the suit in question at any time proximate to the dates of the orders passed in the suit but

it is wholly unbelievable that a wary litigant would remain content without checking for the same for years together. To wit, the petitioners' conduct smacks of non-condonable unwariness.

20. The petitioner's own case is that they acquired knowledge of the impugned decree on August 24, 2022. Records reveal that the appeal was presented on December 20, 2024. There is no explanation worth the name as to why did the petitioners take more than 2 years even after August 24, 2022 to present the instant appeal before this Court. A segment in the condonation application has been devoted to the assertion that the petitioners did not know how to obtain certified copy of the deed of conveyance registered by the Registrar, Original Side and that they took steps to challenge the decree dated April 03, 2014 only after March 29, 2023, when they gathered knowledge about the conveyance having been registered by the Registrar Original Side and they obtained certified copy thereof. Such subplot appears to have been inserted only as a filler to justify a phase of the massive delay occasioned by the petitioners in presenting the appeal before this Court even after the petitioners having admittedly got knowledge of the decree dated April 03, 2014 on August 24, 2022. Once the petitioners had acquired knowledge about the decree dated April 03, 2014 they could have assailed the same immediately. There was no legal requirement of the certified copy of the deed of conveyance to challenge the decree. The time alleged to have been consumed in trying for and getting certified copy of the deed of conveyance is therefore time wasted without cause.

21. The dates recorded by the Section Officer at the back of the Memorandum of Appeal remove all doubts as regards the petitioners' unexplained tardiness. Despite the petitioners having got knowledge about the impugned decree on August 22, 2022 (as per the petitioners' own case) the certified copy of the decree was applied for only on February 17, 2024. The certified copy was made ready for delivery on February 20, 2024 yet the appeal was presented on December 20, 2024 i.e. after ten months after the certified copy was made ready for delivery. The dates scream too loud to allow a soft condonation of the huge delay occasioned by the petitioners.

22. Turning to the other contentions of Mr. Mitra that the signatures on the applications for setting aside of the decree had been forged and that no notice of the hearing of the suit or of the passing of the decree was given to the petitioners, this Court feels that the same need not be gone into in view of the grossly lackadaisical conduct of the petitioners as discussed hereinabove. In fact the aspect of recalling applications having been filed by the petitioners or notice of hearing of the suit having been given by the respondent and the denial thereof by Mr. Mitra while alleging fraud would have required consideration, if this Court would have been satisfied that the petitioners were otherwise vigilant and the delay stood explained but for the petitioners' knowledge evinced from the recalling applications and the notices referred to in the affidavit in opposition. In the instant case we are satisfied that even if it is assumed that the petitioners

were not given any notice by the respondent's learned Advocate and the petitioners had not filed the said recalling applications, then also the petitioners have failed to demonstrate that they were prevented by sufficient cause from approaching this Court within the time prescribed for preferring the appeal. The petitioners have failed to establish the case run in their own condonation application and the respondent's defence in the affidavit in opposition is not even required to be considered in the facts of the present case. The condonation application would itself reveal that the petitioners have remained unjustifiably sluggish right from the beginning till the end.

23. Benefit of the provisions of section 5 of the Limitation Act, 1963 is not meant to be extended to the careless and the indolent but to such vigilant who failed the statutory time frame upon being circumstantially crippled. It would be wholly unjust in the facts of the instant case to condone a delay of more than a decade without even one plausible explanation therefor. In view of the aforesaid, the condonation application being IA No: GA 1 of 2024 is dismissed. Since the condonation application has been dismissed, the appeal being APDT 35 of 2024 and the connected application for stay being G.A. 2 of 2024 also stand dismissed. No costs.

24. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance of all formalities.