
(1994) 11 CAL CK 0006
In the Calcutta High Court

Surendra Nath Kundu, being dead, his heirs and Legal
Representatives--Sm. Niharika Kundu and Others

APPELLANT

Vs

Kalipada Dey and Others

RESPONDENT

Date of Decision : 11-11-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 3, Order 22 Rule 3, Order 22 Rule 9
Limitation Act, 1963 — Section 5

Citation : (1995) 1 CALLT 141

Hon'ble Judges : Bijitendra Mohan Mitra, J

Bench : Single Bench

Advocate : Mrinal Kanti Roy and Sushanta Palodhy, for the Appellant; H.N.
Mukherjee and Tapas Kumar Bhattacharyya, for the Respondent

Final Decision : Allowed

Judgement

Bijitendra Mohan Mitra, J.—The instant revisional application is directed against Order No. 77 dated 3.6.94 passed by the learned Judge, Third Bench, City Civil Court, Calcutta, in Title Suit No. 162 of 1977 rejecting an application under Order 22 Rule 9 of the Code of Civil Procedure. In the said suit the plaintiff died on 10.7.84. During the pendency thereof and subsequent to the plaintiff's death a petition was filed in the Trial Court under Order 22 Rule 3 simpliciter of the Code of Civil Procedure. Against an order passed on the said parent application the matter came up to this Hon'ble Court and a learned Single Judge has passed an order in C.O. No. 20 of 1990 whereby the learned Judge has allowed conversion of the petition under Order 22 Rule 3 of the Code as one under Order 22 Rule 9 of the Code but subject to the rider clause that the same shall not be without any addition. The petition as already filed in the Trial Court as read appears to be a petition under Order 22 Rule 3 of the Code and it is needless to say without meaning any disrespect that Order 22 Rule 9 of the Code is not a substitute of Order 22 Rule 3 of the Code of Civil Procedure. When conversion of an application was allowed to be made, then such applicant if hindered by any embargo cast by this Court cannot take any pleadings in support of the same,

the application remains an application under Order 22 Rule 3 of the Code itself and by user of epithet of the nomenclature of Order 22 Rule 9 of the Code, the substantive character of the application cannot be changed. It is to be presumed that when High Court exercises its jurisdiction it exercises all the same keeping in view all the elements inhered in a particular provision and not by way of capricious manner. A reading of Order 22 Rule 9 of the CPC will make it clear in terms of clause (2) thereof that if it is proved that party was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement. In view of the embargo cast by this Court a party was prevented at the point of threshold from proving his case in aid of sufficient cause. The order as aforesaid passed by this Court has resulted in an anomalous situation which may prevent the adjudication of sufficient cause at the point of inception. It is needless to mention that the Apex Court has recently opined that no party litigant is interested to allow the party to have a walkover in a legal combat and contested proceedings are envisaged for ends of justice so that decision on an adjudication is to be preferred from that of disposal on the basis of technicalities. Here in the instant case the delay is marginal which is about 20 days from the statutory period as envisaged u/s 120 of the Limitation Act.

2. Mr. Roy, learned Advocate appearing in support of this application, has submitted that when a petition under Order 22 Rule 3 of the Code was allowed to be converted, then by implication which is to be construed is that the Court has granted consideration of all elements inhered under Order 22 Rule 9 of the Code, but the party is made tight-lipped by the orders of the Court to canvass its plea. Such anomaly, according to Mr. Roy, has resulted in failure of justice in the carriage of the proceeding. According to Mr. Roy, procedures are handmaid of justice and in this context Mr. Roy has referred to a contemporaneous decision of the Supreme Court in the case of Owners and Parties interested in M.V. "ValiPero" Vs. Fernando Lopez and Others, where the Apex Court has opined that construction of rules of procedure should promote justice and prevent its miscarriage by enabling the Court to do justice in myriad situations, all of which cannot be envisaged. Rules of procedure should not be allowed to become mistress but they should be relegated to the position of handmaid of justice. This Court is not oblivious of the canons of construction about the rules of procedure as made by the Apex Court. As regards the contention of delay for making substitution in time, this Court seems to have made some serious reality and Mr. Roy refers to a reported decision of the Division Bench in the case of State of West Bengal and others Vs. Nripendra Nath Banerjee and others, where the Division Bench has allowed even entertainment of oral application for condonation of delay which is subject to laws of limitation. The present law overwhelmingly favours condonation of delay in preferring all appeals specially under circumstances beyond the control of the parties. Mr. Roy has also strenuously argued that this Court should in a way modulate the earlier order of Rajkhowa, J., in a suitable manner and in support of his proposition Mr. Roy has referred to a Division Bench judgment in the case of Pieco Electronics and

Electricals Ltd. Vs. Smt. Tribeni Devi, in order to impress that if subsequent Bench is absolutely convinced that the decision of the coordinate jurisdiction is erroneous then the subsequent Bench is not bound by the earlier decision. A reference may also be made in this context to earlier decision of Sir Asutosh Mukherjee, Acting Chief Justice, as His Lordship then was, in the case of AIR 1921 Cal 169 wherein Sir Asutosh Mukherjee has made it clear that "the position is indefeasible on principle, that although a Judge may feel absolutely convinced that the decision produced before him is erroneous in law, he is bound to decide against his own opinion. To take such a view is to hold that the Judge may be reduced to an automaton by the production of an earlier judgment." This Court unhesitatingly with respect to the learned Judge opines that conversion of a petition simplicitor under Order 22 Rule 3 of the CPC into a petition under Order 22 Rule 9 of the Code with the rider embargo that no explanation can be allowed to be added is the resultant effect of sheer anachronism as a result of which a party litigant may have to suffer. This is a classical case where strict adherence to rules of procedure may make justice a casualty because an avenue is made open to a party to explore his remedy but he is not allowed to toddle that path to ventilate his grievance.

3. Mr. Mukherjee, learned counsel appearing on behalf of the opposite party has contended before this Court that the party is not aggrieved to such conversion with restriction and it cannot now be allowed to be permitted to turn round and say that it would offer explanation. Mr. Mukherjee has also referred to Section 120 of the Limitation Act and he has further contended that even if there is a marginal delay beyond the statutory period of 90 days that has got to be explained. He has further asserted with emphasis that there is neither any application nor any written application in support of condonation of delay and as such the learned Court below is left with no other alternative but to reject the same. Mr. Mukherjee in aid of his submissions has referred to a Full Bench decision of this Court reported in *The Corporation of Calcutta Vs. Murari Churn Law*, . In the said decision while construing a Full Bench of this Hon'ble Court has opined that the appellant was prevented from making the application for sufficient cause and the Court has also said that it is a discretionary remedy. Mr. Mukherjee has also referred *Union of India (UOI) Vs. Ram Charan and Others*, where the Supreme Court has stated that cause is to be shown but Court need not be over strict of the suggested cause. Here the delay is only about 20 days which is marginal beyond the statutory period under Article 120 of the Limitation Act. Now in order to consider the same the provision of Article 121 of the Limitation Act is also to be looked into where the date of abatement is prescribed as 60 days beyond the statutory period. Within the frame of Article 121 of the Limitation Act the connected petition has been filed and Order 22 Rule 9 of the CPC in terms of Clause (3) thereof also provides that provision of Section 5 of the Indian Limitation Act shall apply to application under Sub-rule (2) of Order 22 Rule 9 of the Code. With regard to construction of Section 5 of the Limitation Act the Hon'ble Justice Thakkar in His Lordship's oft-quoted judgment reported

in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, where not only liberal construction of Section 5 of the Limitation Act has been made but a caution has been given that the message of the same has not percolated into the domain of the pyramidal structure of judicial hierarchy. It has been stated therein that a party litigant will not definitely want a walkover by the other party and contested litigations are envisaged for proper administration of justice. After all the same does not absolve the compliance of Section 5 of the Limitation Act and if it is found that delay is mala fide and it is absolutely causeless, then such delay cannot be condoned. Here in this case the delay is marginal about 20 days but within the period of Article 121 of the Limitation Act. In the judgment reported in 96 CWN 209 (supra) a Division Bench of this Hon"ble Court has opined that the present law overwhelmingly favours the condonation of delay and if the delay is marginal and not mala fide, then most lenient construction is required to be made. Here, as indicated earlier, the learned Judge sitting in a Single Bench has converted a petition under Order 22 Rule 3 into a petition under Order 22 Rule 9 of the Code but with the rigour of the embargo that no explanation can be offered for the same. This rises to an anomalous situation where a party litigant is denied access in the gateway of justice. Much has been sought to be suggested that when the Single Bench judgment is there, then procedure must be adhered to and even if it results injustice the embargo cannot be overcome. It is needless to reiterate the proposition of the Apex Court as reported in Owners and Parties interested in M.V. "ValiPero" Vs. Fernando Lopez and Others, that procedure is meant to subserve and not rule the cause of justice. It has been further observed in the said judgment that there is no reason to discard the result simply because certain details have inadvertently omitted in a particular case and/or order. The learned Judge while exercising his discretion in the single Bench while converting a petition under Order 22 Rule 3 of the Code to that one of Order 22 Rule 9 of the Code, it can be reasonably presumed that all ingredients of Order 22 Rule 9 of the Code as inhered in the provisions have not been lost sight of. This Court repeats once again that provision of Order 22 Rule 9 of the Code is not a sheer substitute to that an Order 22 Rule 3 of the Code of Civil Procedure. The marginal delay, if unexplained, but when by Court's order party is prevented from forwarding the cause, then such omission can neither be construed as deliberate nor as purposive. A party litigant is likely to be thrown out from the arena of litigation just on pretext of technicality which will obviously result placement of the rules of procedure as mistress instead of handmaid of justice which is definitely contrary to the role attributed to in our legal system.

4. In view of the reasons as stated hereinbefore that the omission to mention reasons is unintentional and it may be due to inarticulate style of drafting by a lawyer concerned. The Apex Court has also laid down in a case reported in Smt. Manjushri Raha and Others Vs. B.L. Gupta and Others, where it has been observed that such inarticulate drafting should be liberally construed keeping in view the low level of literacy of the litigant public and also milfoil pleadings which

are due to intrinsic inability of the lawyer concerned flowing from inarticulate drafting. As such, a party litigant cannot be made to suffer either because of the omission or of commission on the part of his lawyer and he should not have been denied access to the zone of consideration in a proper adjudication on a contested proceeding.

5. Accordingly, the prayer for substitution of the legal heirs of the deceased plaintiff is allowed and the marginal delay which is within the period of Article 121 of the Limitation Act is hereby condoned keeping in view the liberal and lucid construction of Section 5 of the Limitation Act.

6. Accordingly, the present revisional application succeeds on contest, the impugned order is set aside and the substitution stands allowed on condonation of delay which is marginal under the provisions of Article 120 of the Limitation Act.

The Trial Court is hereby directed to expeditiously proceed with the suit so that it may come to a terminal stage at an early date.

There shall, however, be no order as to costs.

The learned Advocate appearing on behalf of the opposite parties prays for stay of this order for three weeks. But in view of the direction of early disposal of the suit and/or proceeding, such prayer is refused.

Let xerox copy of this order be made available to both parties on their usual undertaking.