THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

I.A. No. 03 of 2022

(Arising out of **RFA No. 03 of 2014)**

Shri Bharat Prasad Gupta,
S/o late Ramlakhan Prasad
R/o Majhitar, P.S. Jorethang,
South Sikkim.

..... Applicant

Versus

Md Rajjak,
S/o Md. Itris,
R/o Mazigaon, Jorethang,
South Sikkim. .....Respondent

Application under Section 5 of the Limitation Act, 1963.

Appearance:

Mr. B. Sharma, Senior Advocate with Mr. B.N. Sharma, Mr. Safal Sharma and Ms. Puja Kumari Singh, Advocates for the Appellant.

Mr. A. Moulik, Senior Advocate with Mr. Ranjit Prasad, Advocate for the Respondent.

Date of hearing : 22.08.2023

Date of order : 22.08.2023

O R D E R (ORAL)

Bhaskar Raj Pradhan, J.

1. This is an application preferred under Section 5 of the Limitation Act, 1963 for condonation of delay. According to paragraph 2 of the application, there is a delay of 7 years and 11 months. However, the prayer seeks condonation of delay of 4 years and 11 months only.

2. Briefly, the applicant was the landlord of the tenanted premises - a shop, and the respondent was the tenant. During the pendency of Regular First Appeal No. 3 of 2014 before this Court, against the judgment dated 30.11.2013 passed by the learned District Judge, South Sikkim at Namchi in Eviction Suit No.01/2009 filed by the applicant against the respondent, a deed of agreement dated 26.9.2014 (deed of agreement) was entered upon. In terms of the deed of agreement, this Court disposed of the appeal making the deed of agreement part of the decree in appeal dated 27.9.2014 (decree in appeal).

3. By preferring the connected application under Order XXIII Rule 3A and section 151 of the Code of Civil Procedure, 1908 (CPC), the applicant seeks to set aside the deed of agreement and the decree in appeal.

4. The application under Order XXIII Rule 3A read with section 151 CPC was filed after considerable delay of almost 8 years. The application for condonation of delay is taken up for consideration.

5. The respondent has filed a detailed reply to the application for condonation of delay denying each of the grounds taken therein. The respondent asserts that the parties had filed a joint petition under Order XXIII Rule 3

read with section 151 CPC along with a copy of the deed of agreement. In the joint petition, the parties asserted that they had come to an amicable settlement of their differences and disputes and entered upon the deed of agreement. They had jointly prayed that the appeal pending before this Court be disposed of as compromised and decree be passed accordingly in terms thereof. Accordingly, this Court passed the decree in appeal.

6. The application under Order XXIII Rule 3A of the CPC was preferred on 12.09.2022 after eight years of the passing of the decree in appeal on 27.09.2014.

7. The application for condonation of delay is preferred on five grounds.

8. It is *firstly*, explained that the deed of agreement was entered upon in a rush in the chamber of the applicant's counsel but he was not made aware of the contents thereof. The respondent disputes this assertion asserting that the deed of agreement was entered voluntarily. The respondent states that the terms of the deed of agreement was read and explained to both the parties in the presence of their respective counsel.

8(i). The decree in appeal reflects that the applicant was represented by a senior counsel. The deed of

agreement records that the applicant was a signatory thereof. On the face of it, therefore, the ground is devoid of merit as the applicant did not think it fit to complain about it at the relevant time until he sought legal opinion in August 2022. The ground is, therefore, clearly an afterthought. The applicant provides no reason as to why he did not make any effort to understand the contents of the deed of agreement when it was executed or immediately thereafter. Besides the assertion, the petitioner has provided no other material to ascertain the correctness of the averment.

9. *Secondly*, it is stated that on 26.9.2014 the applicant was suffering from different ailments and so he was not in a peaceful state of mind when he executed the deed of agreement. The medical documents filed by the applicant do not provide any adequate reason that he was not in a peaceful state of mind when executing the deed of agreement. Besides the statement made in the application for condonation of delay after eight years of its execution there is no material to substantiate this assertion. The medical documents do not reflect any kind of disability of the applicant to understand the terms of the deed of the agreement; the decree in appeal; or the implications thereof at the time of its execution.

10. *Thirdly*, it is submitted that during the 2nd week of August, 2022 when the applicant desired to partition his self acquired properties, he applied and obtained certified copies of the case records. It was found that the recipients of the respective shares in the property were not agreeable to receive the portion involved in the deed of agreement. Thereafter, he was advised that the deed of agreement was a void agreement signed under a mistake. This, the applicant explains by stating that his children are coparceners under the Mitaksara School of Hindu Law hailing from Uttar Pradesh, and as such, the execution of the deed of agreement is in direct conflict with the rights of other coparceners of his family. It is stated that the applicant learnt that the deed of agreement suffered from legal impediments only on 10.08.2022 when he visited the office of the learned counsel with the desire to partition the properties.

10(i) The applicant, however, could not explain how this would be a ground to set aside the decree in appeal passed by this Court pursuant to a deed of agreement. Although, it is quite obvious that the idea of seeking for setting aside of the deed of agreement and the decree in appeal occurred to the applicant when his children refused to accept the property involved in the deed of agreement

and thereafter sought legal advice in the year 2022. Merely because the children of the applicant were not agreeable to receive the property involved in the deed of agreement is no ground for setting it aside. When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the part whose consent was so caused. The applicant has not asserted that the agreement was caused by coercion, fraud or misrepresentation. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. The applicant has also not asserted that both the parties were under a mistake as to a matter of fact essential to the agreement. A contract is not voidable because it was caused by a mistake as to any law in force in India. A contract is not voidable merely because it was caused by any of the parties to it being under a mistake as to a matter of fact. Thus, it is clear that the ground that the deed of agreement was void is without any merits.

11. *Fourthly*, it is submitted that the applicant was informed by his counsel on 10.8.2022 that the deed of agreement is against the intent and spirit of notification No.6326-600 H&W-B dated 14.04.1949. There is no explanation whatsoever as to why he sought opinion of his

counsel regarding the contents of the deed of agreement and the decree in appeal passed in 2014 in the year 2022 only. The 1949 notification is the applicable rules framed to regulate letting and sub-letting of premises, controlling rents thereof and unreasonable eviction of tenants. Under clause 2 thereof, the landlord may seek eviction of the tenant when whole or part of the premises is required for their personal occupation or for thorough overhauling the premises or on failure of the tenants to pay rent for four months. If any of these three grounds are available, the landlord may seek eviction of the tenant if he so desires. The deed of agreement narrates that during the course of hearing of civil first appeal bearing RFA No. 03 of 2014, the applicant as the landlord expressed his desire to reconstruct the existing suit building by demolishing it and requested the respondent – the tenant, to shift his shop from the suit building to a temporary shed on a temporary basis on payment of monthly rent until the respondent is relocated to the proposed newly constructed shop premises. It was thus agreed that the applicant shall cause the other two occupants to vacate the two shops occupied by them; after the two occupants vacate the two shops and the applicant arranges the money for construction of the new building he was required to issue a written a one month's

notice in advance to the respondent to shift his shop from the suit building to the temporary shed till the respondent tenant is relocated in the shop in the new constructed building of the same size. It was also agreed that if the applicant cannot or does not construct the shop premises of the new building to provide the shop premises to the respondent even within nine months then the respondent shall be free to reoccupy the shop premises in the earlier location by making a temporary construction to run his temporary shop and the cost of the construction of the temporary shop was liable to be adjusted from the rent to be paid to the applicant as per rate fixed.

12. The terms of the deed of agreement does not violate any of the provisions of the 1949 notification. Under the 1949 notification, if the respondent as a tenant of the applicant violates any of the three conditions, the applicant would have the necessary ground to seek his eviction. It is the landlord's choice to seek eviction or not to seek eviction.

13. Finally, according to the applicant he was constantly ill with various ailments including chronic heart problem from 2011 till date. The documents attached to the application for condonation of delay are medical

prescriptions and reports of the applicant over a period of time. These medical documents, as held earlier, do not reflect that the applicant was suffering from any disability which disabled him to understand the nature and contents of the deed of agreement and the decree in appeal. The medical documents also do not explain the delay for the period of nearly 8 years and absolutely nothing between 2014 and 2017.

14. A perusal of the decree in appeal reflects that the applicant who was the appellant was represented by a learned Senior Counsel. Admittedly, the agreement was drafted in the chamber of the applicant's counsel and in his presence. It is also clear that the applicant was fully aware that he was entering upon a compromise with the respondents on 26.09.2014 on the terms and conditions therein.

15. There is no explanation whatsoever for the entire period between the decree in appeal dated 27.09.2014 till August, 2022 when the applicant, according to the application, sought legal advice to partition his properties.

16. The learned Senior Advocate for the applicant draws the attention of the Court to Article 59 of the Limitation Act, 1963 and explains that the period of

limitation is 3 years from when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first becomes known to him. It is submitted that since he was informed by his counsel that the deed of agreement was void only on 10.08.2022 limitation would start from that date.

17. The submission of the learned Senior Counsel is devoid of merit. An attempt has been made by the applicant to mould his facts to assert that he became aware of the true nature and legal consequences of the deed of agreement only in the year 2022. However, it is apparent that the entire exercise is an afterthought. It is seen that the applicant entered into the deed of agreement voluntarily and he was fully aware of what he was doing. The deed of agreement which is sought to be cancelled is in writing and signed by the applicant. This deed of agreement was later made a part of the decree in appeal. Article 59 is a general provision and applicable to cancel or set aside an instrument or decree or for recession of a contract. Time begins to run for the applicant when the facts entitling the applicant to have the decree set aside known to him. Except for asserting that the applicant obtained a legal opinion in the year 2022, he has not asserted any facts entitling him to set aside the decree which came to be

known to him then. His failure to seek legal opinion earlier and obtain it after almost 8 years cannot be a legitimate ground to give him a cause of action. As the present proceedings seek the cancellation of the deed of agreement dated 26.9.2014 and the decree in appeal dated 27.09.2014 which he was fully aware of, the three years period would expire in the year 2017. The facts entitling the plaintiff to have the decree set aside was known to him on the date on which he voluntarily entered upon the deed of agreement and thereafter when this Court passed the decree in appeal in terms of the deed of agreement.

18. This Court having given its anxious consideration to the arguments advanced by the learned Senior Counsel for the respective parties is of the considered view that the application for condonation of delay does not explain the gross delay in approaching this Court. The application is accordingly dismissed. Consequently, the application under Order XXIII Rule 3A read with section 151 CPC is also rejected.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting : **Yes**
Internet : **Yes**

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