THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

S.B. : HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

FAO No.02 of 2014

Appellant : Maita Bahadur Subba,
S/o Late Man Bahadur Subba,
R/o Kabrey Block,
Namthang,
South Sikkim.

versus

Respondents :

1. State of Sikkim,
through the Secretary-cum-Principal
Chief Conservator of Forest,
Government of Sikkim,
Gangtok,
East Sikkim.

2. The Secretary,
Land Revenue Department,
Government of Sikkim,
Gangtok,
East Sikkim.

Appeal under Order XLIII Rule 1(c) read with Clause (i) of Sub-Section (1) of Section 104 of the Code of Civil Procedure, 1908

Appearance

Mr. Zangpo Sherpa, Advocate with Mr. Jushan Lepcha, Advocate for the Appellant.

Mr. Maita Bahadur Subba, Appellant in person.

Mr. Karma Thinlay Namgyal, Senior Government Advocate with Mrs. Pollin Rai, Assistant Government Advocate for the State-Respondents.

J U D G M E N T (ORAL)

(11th June, 2015)

Wangdi, J.

1. This Appeal has been preferred against the order dated 24-08-2013 of the Learned District Judge, South and West Sikkim at Namchi, in Civil Misc. Case No.2 of 2013 arising out of T. S. Case No.2 of 2010, whereby the application filed by the Appellant under Order IX Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 (for short "CPC"), for restoration of the suit, had been dismissed for his non-appearance in terms of Order IX Rule 8 CPC by order dated 08-04-2011 in T. S. Case No.2 of 2010.

2. While disposing off the application for condonation of delay in CM Appl. No.353 of 2014, we have dealt in detail giving rise to the impugned order of the District Judge, South and West Sikkim at Namchi, dated 24-08-2013 in Civil Misc. Case No. 02 of 2013.

3. No doubt that there was a delay of 681 days on the part of the Appellant in filing the application under Order IX Rule 9 CPC for setting aside the *ex parte* order but, the Trial Court after dealing in detail the explanation given in the application for condonation of delay, appears to have rejected it on reasons extraneous to the principles governing Section 5 of the Limitation Act, 1963.

4. We find from the original proceedings of the Trial Court in T. S. Case No.2 of 2010 commencing from 19-02-2010, the the Appellant had been represented by a Counsel on all the dates except for 25-08-2010 and 04-04-2011 when he was present in person. Order dated 06-10-2010 reveals that the Appellant was not present in Court when 08-04-2011 was fixed as the next date but was represented by his Counsel. Unfortunately, it appears that neither the Appellant nor the Counsel put in appearance on that date, i.e., 08-04-2011, resulting in the *ex parte* dismissal of the suit. It can be reasonably assumed that the Counsel did not inform the Appellant of the date fixed on 08-04-2011.

5. The application for condonation of delay in filing the application for restoration of the suit, sets out in detail as to why the Appellant was unable to take steps. He has averred that his wife had fallen ill and ultimately succumbed to her illness on 21-07-2011. That due to her illness, the Appellant was completely engaged in looking after her with the confidence that the case was being taken care of by his Counsel. That on the death of his wife, the Appellant was in extreme grief and took several months to get over the loss of his wife and resettle. He was then diagnosed with diabetes and was under treatment since October, 2011, and thus, due to his ill-health, he was unable to contact his Counsel. A call made by him to his Counsel in February, 2012, also could not get through. In March, 2012, he had to undergo eye surgery requiring utmost care to be taken to avoid complication because of which he was unable to venture out. All his efforts in spite of his ailing condition to get in touch with his Counsel over the phone failed. His continued diabetic condition and other connected illness prevented him from personally meeting his Counsel. He

was also once admitted in a hospital at Kalimpong for treatment of perianal abscess.

6. The detailed account of the steps that he had taken thereafter, in my view, need not be gone into treating it as having been accepted in the finding of the Trial Court.

7. The Trial Court did not believe the grounds set out in the application for condonation of delay firstly, because the death certificate of the wife of the Appellant, Suk Maya Subba, was shown as “Devi Maya Subba” and did not specify that she was the wife of the Appellant; secondly, that the Appellant was diagnosed with diabetes and was under treatment from October, 2011 onwards, cannot be a ground for such a long delay as the illness could not have confined him at one place when people with diabetes work and travel; thirdly, the ground of the Appellant having required to undergo eye surgery and lastly, that he could not contact his Counsel at Namchi as she had left for Gangtok after her appointment as Government Advocate, also could not be accepted as

being reasonable or satisfactory or proper explanation for the delay.

8. Upon perusal of the impugned order, it appears that the Trial Court had not considered the application in its proper perspective and had rather perfunctorily rejected the application. There is no doubt that there had been a long delay of 681 days but, that alone cannot be a ground for rejection of the application.

9. In ***N. Balakrishnan*** vs. ***M. Krishnamurthy*** : ***(1998) 7 SCC 123*** where an application for condonation of delay of 883 days in filing application for setting aside *ex parte* decree was considered, the following principle was enunciated:-

> **"8.** The appellant's conduct does not on the whole warrant to castigate him as an irresponsible litigant. What he did in defending the suit was not very much far from what a litigant would broadly do. Of course, it may be said that he should have been more vigilant by visiting his advocate at short intervals to check up the progress of the litigation. But during these days when everybody is fully occupied with his own avocation of life an omission to adopt such extra vigilance need not be used as a ground to depict him as a litigant not aware of his responsibilities, and to visit him with drastic consequences.
>
> **9.** It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if

the delay is within a certain limit. 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 a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. .....

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim *interest reipublicae up sit finis litium* (it is for the

> general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.
>
> **12.** A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain* v. *Kuntal Kumari* [AIR 1969 SC 575] and State of W.B. v. Administrator, Howrah Municipality [(1972) 1 SCC 366].
>
> **13.** It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the Court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that then courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss.**"** **[underlining mine]**

Therefore, what follows from the above is that the Court should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slip-

shod order. Acceptance of explanation should be the rule and refusal an exception when no negligence or inaction or want of *bona fide* can be imputed.

10. In ***Ram Nath Sao alias Ram Nath Sahu and others*** vs. ***Gobardhan Sao and Others*** : ***AIR 2002 SC 1201*** following the decision in ***N. Balakrishnan (supra)***, it was held as follows:-

> **"11.** Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependant upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the Courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bone fide can be imputed to the defaulting party. On the other hand, while considering the matter the Courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against

> whom the list terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way.**"**
> **[underlining mine]**

11. In the light of the above, I neither find negligence nor inaction or want of *bona fide* imputable to the Appellant in view of the explanation furnished by him in his application, which in the facts of the case, I find quite satisfactory. This apart, in view of the serious questions involved in the suit raised as regards the valuable right on the land in question by the Appellant, a rustic villager and a tribal, it would be in the interest of justice to adjudicate upon the dispute on its merits and to advance substantial justice. Terminating the *lis* by taking a pedantic and hyper-technical view of the matter in rejecting the explanation for the delay in a perfunctory manner as done by the Trial Court may cause grave and irreparable injury to the Appellant.

12. For the aforesaid reasons, I find that the Learned District Judge has fallen in error and misdirected herself in rejecting the application for condonation of delay.

13. I am, therefore, of the view that the Appeal should be allowed and is accordingly allowed so. As a consequence, the impugned order is set aside.

14. The suit stand restored to its original number and shall commence from the stage when it was dismissed.

15. In the result, the Appeal succeeds.

16. No order as to costs.

17. A copy of this judgment and the original case records be transmitted to the District Judge, South Sikkim at Namchi forthwith for its due compliance.

Sd/-
(S. P. Wangdi)
Judge
11-06-2015

Approved for reporting : **Yes**

Internet : **Yes**

ds/to