HIGH COURT OF ORISSA, CUTTACK

F.A. O. No. 237 OF 2014

From the order dated 23.09.2013 passed by the learned 1st Additional District Judge, Puri in C.M.A. No. 80 of 2004 arising out of Title Appeal No. 10 of 1988.

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Sk. Mohiuddin ..... Appellant

Versus.

Begum Jikrun Nissa & others. ..... Respondents

For Appellant : M/s. Samir Kumar Mishra,J.Pradhan, D.K.Pradhan, advocates.

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For Respondent: M/s. N.C.Pati, M.R.Dash, B.Dash, Miss. B.Pati, B.Pati, advocates

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PRESENT :

THE HON'BLE MR. JUSTICE D.DASH

Date of hearing : 17.06.2015 : Date of judgment: 30.06.2015

This appeal has been filed against an order passed by the learned 1st Additional District Judge, Puri in C.M.A. No. 80 of 2004 arising out of Title Appeal No. 10 of 1988 in the matter of an application under order 41, rule 19 of the Code of Civil Procedure along with a petition under section 5 of the Limitation Act. By the said order, the prayer of the appellant has been rejected by the court below refusing to condone the delay.

2. The facts necessary for the purpose of this appeal are as under:-

The appellant with others were the defendants in Original Suit No. 121/207 of 1984/82-I in the court of the learned Additional Subordinate Judge, Puri (as it was then). The said suit had been filed by the respondent no.1 as the plaintiff. The suit was for permanent injunction restraining the defendants from interfering with the peaceful possession of the plaintiff and for enjoyment of the suit property. The said suit had been decreed on contest against all the defendants which include the present appellant. The appellant with other unsuccessful defendants in the said suit had carried Title Appeal No. 12/32 of 1986 to the court of learned District Judge, Puri. By order dated 07.07.1989 the appeal stood dismissed for default.

When the matter was continuing, this C.S. No. 201 of 2003 came to be filed in the court of learned Civil Judge (Senior Division), Puri wherein present appellant figured as defendant no.1. It is stated that only during the said suit, he could come to know that the said title appeal had been dismissed for default when certified copy of the judgment passed in the earlier suit were filed. It is only thereafter, the appellant made inspection of the record and being confirmed about factum of dismissal of the Title Appeal for default, filed a petition for readmission of the appeal under order 41 rule 19 of the Code along with a petition under Section 5 of the Limitation Act for condonation of delay of about fifteen years.

The move was resisted by the respondents. It is stated that the petition under order 41, rule 19 of the Code is hopelessly barred by

law of limitation when the dismissal having been made on 07.08.1989, the readmission is sought for in the year 2004. It is further stated that no sufficient cause surfaces to say that the appellant was prevented by those in not filing the petition for readmission of the appeal in time. It is further asserted that the order of dismissal of the title appeal being within full knowledge of the appellant and when deliberately no further action was taken for such long period, after lapse of about fifteen years, the prayer merits no consideration.

3. The learned District Judge in that proceeding has given due opportunities to the parties to lead evidence. The appellant has examined four witnesses including himself whereas the respondents have examined two witnesses. The documents have also been proved from the side of the appellant which will be referred to if so felt necessary in course of discussion to follow. The learned District Judge taking into account the rival pleadings as regards the sufficient cause which prevented the appellant to file the petition for readmission of title appeal filed in time and for having filed after lapse of fifteen years and having further considered the evidence led by the parties has finally refused to accept the case of existence of sufficient cause preventing the appellant from filing the petition for readmission of title appeal in time, and for having filed after about fifteen years. Thus the prayer for readmission of the appeal by condoning the long

delay having been rejected, the same is now called in question in this appeal.

4. The learned counsel for the appellant submits that this appellant was fighting out the litigation with other defendants in the earlier suit and being aggrieved by the judgment and decree, they had carried the appeal together and when the appeal had been dismissed, no information was given to this appellant, for which he could not take any step in time and the moment, he learnt about it from the documents filed by the adversary, after due verification of the records, the petition for readmission has been filed with petition for condonation of delay. It is his submission that in the earlier suit for permanent injunction, the specific issue has been framed about the son ship of the appellant and that has been answered against him and therefore this finding though was challenged in the appeal which could not be adjudicated on merit by the first appellate court because of the dismissal of the appeal for default. He further submits that the said findings may operate as res judicata in the second round of the litigation, and that may practically prevail upon the decision that would be rendered in the subsequent suit and therefore, it is the question of right of the appellant being taken away for ever as the said finding has practically gone un-assailed though it was sought to be assailed. He also contends that no doubt, the delay is of considerable period but a balance has to be struck up in the matter on the face of the explanation given by the appellant for the delay vis-

a-vis the likelihood of the appellant being stripped of his valuable right.

5. Learned counsel for the respondents submits in favour of the impugned order. According to him, such prayer after lapse of fifteen years should not be entertained as here it is not the case that events have happened behind the back of the appellant. He further draws the attention of this Court to the materials available on record that this appellant had earlier filed two mutation cases in the court of Tahasildar, Pipili and there this judgment of the earlier suit and also the order of dismissal of the appeal deciding the status of the appellant as claimed to be the son of Sk. Latifuddin in the negative and accepting him to be the son of Sk. Mubarak were placed. Banking upon this, he contends that knowledge of this appellant about the order of dismissal of the title appeal at least can date back to the date of filing of the mutation case in the year 1993. So thereafter when even no step was taken for all these period, the court below has rightly refused to entertain the prayer. As regards the submission of the learned counsel for the appellant that the valuable right of the appellant would be affected for ever, he contends that in that way it can also be said that the valuable right that has already accrued in favour of the respondents would get affected after a period of fifteen years, when such status of being successful in the earlier suit has continued for all these period. So according to him, that has to be viewed and should not be so lightly interfered with, simply in

the name of furtherance of the cause of substantial justice. It is submitted that the appellant has miserably failed to show any such sufficient cause for such delayed submission of the petition for readmission of the appeal.

6. It is the settled position of law that in such matters of condonation of delay, the Court should not adopt a rigid approach keeping in mind that a party should not be made to suffer for the reasons not attributable to him and instead of dismissing the matter on such technical ground, endeavour would be for disposal on merit to advance the cause of substantial justice. It is also the trite law that the words 'sufficient cause' no doubt should receive liberal construction so as to advance substantial justice when the delay is not on account of any dilatory tactics, lack of bona fides, deliberate in action or negligence on the part of the applicant/s. At the same time, it is also to be seen that if the delay is for a quite considerable period and when for the said reason a right has accrued in favour of the adversary being in enjoyment of the fruit of the litigation for a long period, the Court should be slow to disturb the said status. A balance is thus required to be maintained depending on the facts and circumstances of each given case.

7. In the instant case, the delay is for a period of about fifteen years and it is said that the appellant was prevented by sufficient cause i.e. his ignorance about disposal of the appeal and remaining in dark for all these period. However, the fact remains that after the said order, the appellant appeared in the subsequent suit and contested the same. After further lapse of time, this application has been filed for readmission of the earlier appeal dismissed for default by condoning the delay. In the

meantime, the appellant had contested the mutation proceeding which were founded upon the result of the suit and the order of dismissal of the appeal leading to the attainment of the finality of the judgment and decree passed in the suit. So the appellant's knowledge about such order of dismissal of the appeal can very well be inferred from the year 1993. The said aspect cannot be lost sight of and the knowledge of the appellant to the said order of dismissal of the title appeal in the facts and circumstance has to be inferred. Furthermore, the judgment and decree passed in the earlier suit has remained in force for about one and half decade after having attained finality so also the status of the respondents of being successful in the said lis. In view of the fact that the judgment and decree passed in the earlier suit having remained in force all through during the period, valuable right has already accrued in favour of the successful party and that cannot be so lightly stripped off.

For the aforesaid, this Court is not in a position to differ with the finding of the court below that there was no sufficient cause which prevented the appellant from filing the application for readmission of the appeal in time and for filing the same after lapse of fifteen years.

8. In the wake of aforesaid, the appeal stands dismissed and in the peculiar facts and circumstances of the case without cost.

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D. Dash, J.

Orissa High Court, Cuttack
The 30th June,, 2015/Routray