IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : CODE OF CIVIL PROCEDURE

Date of reserve : 02.7.2007

Date of decision : 09.7.2007

FAO 421/1998

1.Mr.Nadir Shah
2.Ms.Shamshad Sultana
3.Mrs.Munwar Sultana
4.Mrs.Tajwar Sultana .... Appellants

Versus

Mrs. Shashi Rajan .... Respondent

Advocates who appeared in this case :

For the appellants : Ms.Gurmeet Bindra, Advocate

For the respondent : Mr.B.B.Gupta, Advocate

J.M. MALIK, J.

1. Vide order dated 17th September, 1998, the trial court dismissed the application under Order 22 Rule 3 CPC for impleadment of legal heirs of the plaintiff and other applications under Section 5 of the Limitation Act read with Order 22 Rule 4(5) and Section 151 CPC for condonation of delay in filing the above-said application and under Order I Rule 10 CPC moved by applicant Nadir Shah. Adumbrated in brief, the facts of the case are these. Secunder Shah expired on 7th February, 1994, leaving behind him, his wife, Gulshan Ara Begum, three daughters, Shamshad Sultana, Munwar Sultana and Tajbar Sultana and one son, Nadir Shah. According to the plaintiffs/applicants, the right to sue survived in their favour and therefore, they moved the above-said applications on April, 1996. There was a delay of 739 days in filing the application under Order 22 Rule 3.

2. The appellants have explained the delay as follows. Secunder Shah purchased the suit property for the benefit of his family including himself. The respondent/defendant illegally occupied the above-mentioned property. In order to recover the possession of the property from the said trespassers, a suit for recovery of possession was filed. Secunder Shah was a resident of North Lakhimpur, Assam. He was unable to personally look after his interest in the property, therefore, he handed over the original title deed and other documents to Aimil Shah, his son-in-law with the instructions to proceed with the above-said litigation and look after his interest in the suit property. Nadir Shah, his son, due to his pre-occupation in his business in Assam also requested Aimil Shah to proceed with the above-said litigation on behalf of his father-in-law. Initially, the suit was filed before the Hon'ble High Court.

Thereafter, due to enhancement of pecuniary jurisdiction of the District Court, it was transferred to the District Court. Since the case was dragging for more than 10 years, therefore, Aimil Shah lost track of the above litigation. Secunder Shah gave Power of Attorney dated 6th January, 1994, whereby he granted authority to Aimil Shah to prosecute the above-said matter and depose facts on his behalf before the Court. However, Aimil Shah misplaced the above-said power of attorney dated 6th January, 1994. With the bona fide intention of not to display the above-said matter, another Power of Attorney dated 30th August, 1995 was prepared. In the meantime, original Power of Attorney dated 6th January, 1994 was traced out but due to inadvertence power of attorney dated 30th August, 1995 was filed before this court at the time of recording of evidence. It is also explained that Secunder Shah suffered burn injuries and ultimately succumbed to those on 7th February, 1994.

3. Shamshad Sultana, daughter of Secunder Shah was suffering from kidney disease and her both kidneys were not functioning. She was in Delhi along with her mother for her treatment in Ganga Ram Hospital. The doctors had advised to keep her away from any kind of tension and mental pain. The certificate issued by the doctors was annexed with the application. Nadir Shah with the benevolent intention to not to cause any pain to her sister, Shamshad Sultana and for her welfare had quiet funeral of his father. He did not inform about the death of his father to Aimil Shah with the bona fide intention that he might inform the death of their father to Shamshad Sultana and Gulshan Ara his sister and mother respectively, who would not be able to tolerate the shock and pain as Aimil Shah was looking after Shamshad Sultana staying in Delhi for continuous treatment/dialysis. Neither Aimil Shah nor his wife, Munwar Sultana attended the funeral of Secunder Shah.

4. Again, during the settlement talks for the sale of the case property between Aimil Shah and defendant it was agreed that on the next date of hearing, Secunder Shah would also be present. On 18th February, 1996, Aimil Shah called the counsel for the plaintiff and informed her that due to his preoccupation he could not visit Lakhimpur and requested her to take a short date. He also asked her that he was leaving for Lakhimpur on 19th February, 1996 and will bring Secunder Shah to Delhi somewhere in the next week. On 20th February, 1996 when the matter was called for hearing, defendant himself informed the Court about the death of Secunder Shah and the case was adjourned to 17th May, 1996. On 20th February, 1996 Aimil Shah reached Lakhimpur and apprised Nadir Shah of the status of the present matter and enquired him about Secunder Shah. At this stage, Nadir Shah informed him about the death of Secunder Shah. Aimil Shah called counsel for the plaintiff on 27th February, 1996 and informed her about the death of Secunder Shah. Counsel for the plaintiff informed Aimil Shah that legal heirs of Secunder Shah were required to be brought on record and told him that he should bring Nadir Shah to Delhi to discuss the matter. On 6th April, 1996 Aimil Shah and Nadir Shah visited the counsel for the plaintiff and gave all the details with regard to the legal heirs of Secunder Shah. On 8th April, 1996 an application for impleadment of legal heirs and condonation of delay was given to Nadir Shah for getting the signatures of other legal heirs. Nadir Shah left for Assam on 13th April, 1996 for getting the signatures of other legal heirs. On 16th May, 1996, counsel for the plaintiff received the papers signed by the legal heirs and accordingly, the application was filed on 17th May, 1996. It is prayed that under these circumstances the delay in filing the application for impleadment of legal heirs should be condoned.

5. In the meantime, an application under Order 1 Rule 10 CPC was moved by Nadir Shah. It was averred that Nadir Shah is a co-owner of the suit property and therefore, he is necessary and proper party to be impleaded as plaintiff in

the above said suit so as to protect the rights of other legal heirs in the suit property and to bring all necessary facts before this Court to adjudicate the above matter. Again, his right as co-owner is independent and continuing right in the suit property and therefore, there lies no legal impediment in impleading applicant as plaintiff in the above-said suit. He also cited authority of Privy Council in Mahmmedally Vs. Safiabai, AIR 1940 SC 215 and authority by the Supreme Court in Bhagwan Swaroop and Others Vs. Mool Chand and Others, AIR 1983 SC 355.

6. The respondent contested this application tooth and nail. The respondent made payment of rent in the sum of Rs.26,000/- through cheques dated 17.12.1994 to October 1995, in the name of Secunder Shah. These cheques were duly encashed though Secunder shah died on 07.02.1994. On 20.11.1995 Aimil Shah appeared in the Court as general power of attorney of Late Secunder Shah and made statement as PW-I. In his statement he stated :
" I have brought the power of attorney dated 30.09.1995. At point 'A' I, identify the signatures of the plaintiff. This power of attorney has been attested by First Class Magistrate, Kamrup, District Guhati. This document has been attested by Magistrate as no notary public is available in Guhati. The power of attorney is Ex.PW I/I."

The trial court observed:

"From a perusal of Ex. PW I/I. It is clear that Late Secunder Shah and Aimil Shah are both residents of North Lakimpur. The signature of Secundar Shah at point A are absolutely different from the signatures of Secunder Shah on the plaint, verification and vakalatnama. It is also clear that the attesting Magistrte has attested this power of attorney on 30th day of August 1995 with the endorsement that Secundar Shah has signed this deed on 30th day of August 1995 in his presence."

7. On 9th February, 2005, my learned brother Justice (Retd.) O.P.Dwivedi ordered, "Let appellant file affidavit of widow and the three daughters of deceased Secunder Shah regarding the knowledge of his death and delay." Accordingly, all the above-said legal heirs of Secunder Shah filed their affidavits.

8. I have heard the learned counsel for the parties. The learned counsel for the respondent vehemently argued that the stands set up by the appellant from time to time are poles apart and hetrogenous. In his affidavit dated 29th April, 2005, Nadir Shah stated that he did not inform his relatives, who were in Delhi, about the death of his father, Secunder Shah. He also stated that he requested his sister Munwar Sultana not to tell about the death of their father to her husband Aimil Shah, who frequently visited Delhi to see Shamshad Sultana, who was hospitalised.

9. Now, I advert to the affidavit of Tajwar Sultana. She has also supported the case put forward by Nadir Shah. She also pointed out that as the situation demanded, Nadir Shah informed his sister Shamshad Sultana and mother Gulshan Ara about the death of his father in April 1996. She stated that as apprehended, her mother could not take the death of her father and after having heard about his death, her health deteriorated and she also expired on 19th August, 1998. Shamshad Sultana and Munwar Sultana, have supported the above said story in their respective affidavits.

10. The learned counsel for the respondent vehemently argued that there is gross negligence on the part of the appellants. He also pointed out that the story propounded by the appellants is not worthy of credence. He submitted that this story is made out of whole cloth and deserves no consideration. He

argued that it stands proved the Aimil Shah had forged power of attorney dated 30.09.1995. In order to buttress his case, he has cited a number of following authorities.

(a) In Ram Kala Vs. Deputy Director (Consolidation) and Others, [JT 1997(8)SC8], the Supreme Court observed that they are not at all satisfied with the reasons given in the application for condoning the delay of 5 years in bringing on record the legal representatives of the deceased. It was pointed out that reasons were neither satisfactory nor reasonable and no sufficient cause had been formulated for condoning the delay.

(b) In State of Gujarat Vs. Sayed Mohd. Baquir El Edross, 1982 (1) SCR 551, it was held that no grounds for condonation of delay were made out and the Apex Court refused to set aside the abatement order.

(c) In Nandi Verdhan Jain Vs. Chander Kanta Jain and Another, 2002 (9) SCC 471 it was held that delay of 394 days is not satisfactorily explained and the review application was dismissed.

(d) In K Sreedharan vs. Chief Security Commissioner and Others, JT 2000 (10) SC 195, it was held that delay of 589 days is not satisfactorily explained.

(e) In Ajay Saxena Vs. Rachna Saxena, 135(2006) Delhi Law Times 314 (DB), the delay of 35 days in filing the appeal in respect of grant of medical reimbursement to wife was not condoned.

(f) In Escorts Finance Ltd. Vs. Nielcome Ltd. And Anr., 85(2000) Delhi Law Times 773, there was a delay of 33 days in appearance which was not condoned. It was a case of leave to defend.

(g) In Rama Krishna Exports and Others (M/s) Vs. Sh. Bharat Kumar Seth and Others, 2007 III AD (Delhi) 727, the ex parte decree was not set aside due to lack of sufficient ground.

(h) In Municipal Corporation of Delhi Vs. Babu Ram, 2007 III AD (Delhi) 563, the appeal itself was filed after more than five years. An application for condonation of delay was filed claiming ignorance of judgment of First Appellate Court, restraining the MCD from demolishing the room filed by the appellant. The court held that the appellant has failed to prove that it has sufficient ground for condonation of delay.

(i) In Satish Yadav and Others Vs. Vijay Pal and Others, 2007 III AD (Delhi) 525, an application under Section 5 of the Limitation Act was dismissed. It was held that no sufficient cause was pleaded at all.

(j) Lastly, the counsel for the respondent also drew my attention towards Satish Yadav and Others Vs. Vijay Pal and Others,[2007 III AD (Delhi) 525], wherein the Tribunal dismissed the claim on the ground of delay and laches. There was a delay of 13 days. The court held that no justification or explanation was put forward. The order passed by the Tribunal was confirmed.

11. I see force in these arguments in a measure. This is a peculiar case. Prima facie it appears that power of attorney, who happens to be the son-in-law of the deceased adduced false evidence before the Court. The concerned SDM, in case his signatures are genuine, worked in cahoots with the said power of attorney. This is a serious matters, which cannot be dismissed out of hand. It is too early to speak my piece on this knotty problem. It cannot be said in which way the wind will blow. This matter requires evidence and investigation. The trial court is directed to decide the application moved under Section 340 Cr.P.C. as per law and take action against all the concerned parties including the SDM in case his involvement stands proved.

12. However, there is not even an iota of evidence which may goes to show that the real legal representatives were aware of the abovesaid proceedings concerning production of false evidence before the court or the same were done at their instance. The Court is bound to take a down to earth view. Certain harsh realities of life cannot be glossed over. The evidence discussed above

that one of the legal representatives was suffering from kidney problem and was to be put on dialysis every now and then does not give a flavour of suspicion or doubt. This version is admittedly supported by medical evidence. All the legal representatives appear to have no quile. Their story has an aura of dependability. It is difficult to fathom as to why the legal representatives should suffer for the omissions and commissions of a power of attorney particularly when the law leans in their favour. No fault can be attributed on the part of Nadir Shah, and wife of Aimil Shah who were keeping this fact a secret in order to save their sister. Under these circumstances, the court would assume that they had no knowledge about the death of their father. It must be borne in mind that if the court accepts the plea that suit stands abated, it would cause an irreparable loss to the legal representatives of Secunder Shan and unlawful gain to the respondent. Should a trespasser or a tenant be permitted to become the absolute owner of the suit property?

13. In Collector, Land Acquisition Vs. Katiji, 1987 Rajdhani Law Reporter, it was held,

"3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matter on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts."

It was further held :-

(1) Ordinarily a litigant does not stand to benefit by lodging an appeal late; (2) Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties; (3) "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner; (4) When substantial justice and technical consideration are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because a non-deliberate delay; (5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk; (6) It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

14. In Bhagwan Swaroop and others Vs. Mool Chand and others, AIR 1983 SC 355, the facts were these. In a suit for partition one of the respondents died on Feb 10, 1977. Application Under Order 22 Rule 4 CPC was moved on September 4, 1981. It was held :

"6. Having meticulously examined the contention advanced by the learned counsel on behalf of respondent No. 2 Mool Chand, who is the only contesting respondent, we are satisfied that the application made by the appellants as well as the one moved by the heirs and legal representatives of deceased respondent No. 1 should have been allowed and the heirs and legal representatives of deceased should have been substituted after setting aside abatement and condoning the delay in making the application."

15. In N. Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123, it was held,

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 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.
xxxxx
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 republic up sit finis lithium (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 ment 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 and State of W.B. v. Administrator, Howrah Municipality.
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 when courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss."

16. In Mithailal Dalsangar Singh and Others Vs. Annabai Devram Kini and Others, AIR 2003 SC 4244, it was held, "In as much as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally."

17. In K.Rudrappa Vs. Shivappa, 2004 (7) Scale 293, the appellant was not aware of the pendency of the appeal. In this case, the Supreme Court held,
"10...........In such circumstances, in our opinion, the learned counsel for the appellant is right in submitting that a hyper-technical view ought not to have been taken by the District Court in rejecting the application inter alia observing that no prayer for setting aside abatement of appeal was made and there was also no prayer for condonation of delay. In any case, when separate applications were made, they ought to have been allowed. In our opinion, such technical objections should not come in doing full and complete justice between the parties. In our considered opinion, the High Court ought to have set aside the order passed by the District Court and it ought to have granted the prayer of the appellant for bringing them on record as heirs and legal representatives of deceased Hanumanthappa and by directing the District Court to dispose of the appeal on its own merits. By no doing so, even the High Court has also not acted according to law.
11. Very recently, almost an identical case came up for consideration before us. In Ganeshprasad Badrinarayan Lahoti (D) by LRs. v. Sanjeevprasad Jamnaprasad Chourasiya and Anr., Civil Appeal No. 5255 of 2004, decided on August 16, 2004, the appellants heirs and legal representatives of deceased Ganeshprasad were not aware of an appeal filed by the deceased in the District Court, Jalagaon against the decree passed by the Trial Court. When the appeal came up for hearing, the advocate engaged by the deceased wrote a letter to Ganeshprasad which was received by the appellants find immediately, they made an application for bringing them on record as heirs and legal representatives of the deceased. The application was rejected on the ground that there was legal representatives of the deceased. The application was rejected on the ground that there was no prayer for setting aside abatement of appeal nor for condonation of delay. The appellants, therefore, filed separate applications which were also rejected and the order was confirmed by the High Court. We had held that the applications ought to have been allowed by the courts below. We, therefore, allowed the appeal, set aside the orders of the District Court as well as of the High Court and allowed the applications. In our opinion, the present case is directly covered by the ratio in the said decision and the orders impugned in the present appeal also deserve to be set aside."

18. In Ram Nath Sao Vs. Gobardhan Sao & Ors, (2002) 3 SCC 195, it was held,
12. 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."
(emphasis supplied)

19. In Malik Bhupinder Singh and Others Vs. Raj Gupta and Others [2006 (88) DRJ 590], the legal representatives of one of the co-owners of the property were not brought on record within the stipulated time in a suit for recovery for specific performance of contract. It was held that that was not a sufficient ground for declining the condonation of delay and holding that the suit had abated in its entirety. It was further held that no motive or gross negligence on the part of the plaintiff could be attributed. The delay was found to be free from mala fide intent. The delay was condoned.

20. In Bhag Mal (alias) Ram Bux and Others Vs. Munshi (Dead) by Lrs. And Others, JT 2007 (4) SC 14, it was held, "The provisions of statute of limitation cannot be construed in a pedantic manner. This is now a well known principle." In this case, the court read liberal trend on setting aside the abatement and the issue of finality of decision on abatement together. It was held that considerable leeway has been accorded to proceedings to set aside abatement because abatement leads to serious consequences and the emphasis on ample opportunity to set aside abatement has been laid down.

21. In Niamat Kaur Vs. Union of India, 1973 Rajdhani Law Reporter, it was held that the petitioner could not file regular first appeals in the High Court within the period of limitation. She made miscellaneous application for condonation of delay giving plausible reasons which cause the delay in filing the appeals. It was further held on consideration of AIR 1925, Lah. 439; AIR 1972 Lah. 49; AIR 1960 S.C. 375; 1970(2) S.C.R. 90; I.L.R. 1971 Delhi 358; 1972(1) S.C.R. 336 that the word sufficient cause' in section 5 of the Limitation Act should be given a liberal construction so as to advance the substantial justice when no negligence nor inaction, nor want of bona fide is imputable to the appellant. The explanation given by the appellant was found sufficient and applications were allowed.

22. In view of the abovesaid discussion and in the interests of justice, I allow FAO No. 421/1998 and set aside the order passed by the trial court. The application under Order 22 Rule 3 CPC for impleadment of legal heirs of the plaintiff and another application under Section 5 of the Limitation Act read with Order 22 Rule 4 (5) and Section 151 CPC are hereby allowed subject to payment of Rs.10,000/- as costs, to be paid by the appellants to the respondent before the trial court on the date, to be fixed hereinwith.

23. In view of the peculiar facts and circumstances of this case, the request made by the appellants to enhance the rent/mesne profits is not being considered for the time being. However, nothing in this order would debar the appellants to move another application with this prayer before the trial court after the expiry of one year from the date of this order.

24. The appellants are directed to file the amended memo of parties before the trial court. The trial court is directed to decide the case as well as application under Section 340 Cr.P.C. on merits. Both the parties are directed to appear before the trial court on 1st August, 2007. The trial court record along with a copy of this order be sent back forthwith.

Sd/-
J.M. MALIK, J.