IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

S.A 8 of 2016

With

CAN 9460 of 2019

Sri Biswanath Pal

Vs.

Sri Sankar Nath Pal & Ors.

For the appellant:	Mr. Ayan Banerjee, Mr. Soumo Chaudhury.
For the respondent No.1	Mr. Saumyen Datta, Mr. Ashutosh Mukherjee.
For the respondent Nos. 2 to 4	Mr. Saumyen Datta, Ms. Susmita Mazumder
For the respondent No.5	Mr. Sarajit Sen Mr. Tapas Singha Roy

Heard on: 24 December, 2019.

Judgment on: 7 January, 2020.

BIBEK CHAUDHURI, J. : –

1. Final decree in a Partition Suit being Title Suit No.12 of 1989 was assailed by the defendant-appellant in Title Appeal No.132 of 2010 in the Court of the learned District Judge, Hooghly beyond the statutory period of

limitation. Therefore the appeal was filed along with an application under Section 5 of the Limitation Act.

2. The learned District Judge, Hooghly by an order dated 31st July, 2015 was pleased to reject the application under Section 5 of the Limitation Act and consequently, the appeal was also dismissed being barred by limitation.

3. In the instant appeal, the defendant-appellant has challenged the order of rejection of the application under Section 5 of the Limitation Act and consequential dismissal of the appeal.

4. Vide order dated 17th November, 2015, the Division Bench of this Court admitted the instant appeal formulating the following substantial Questions of Law:

> I. Whether the learned First Appellate Court was justified in rejecting the appellant's application under Section 5 of the Limitation Act and thereby refusing to condone the delay in filing this appeal without considering that the Doctor's certificate certifying the illness of the appellant remains uncontroverted from the sides of the respondents, or not?
>
> II. Whether the learned Judge of the appellate Court below erred substantially in law by entering into and deciding upon the merits of the appeal while deciding an application for condonation of delay under Section 5 of the Limitation Act, 1963, or not?

5. I have extensively heard the learned counsels on behalf of the appellant and respondents. I have also perused the impugned judgment and order affirming Final Decree passed in Title Appeal No.132 of 2010.

6. Before dealing with the substantial question of law as formulated in ground (I), I propose to adjudicate substantial question of law formulated in

ground no.(II), viz, whether the learned Judge in lower appellate court has the jurisdiction to decide an appeal on merit after arriving at a conclusion that the appeal was barred by Limitation and the appellant failed to establish sufficient cause for condonation of delay.

7. It is pertinent, at the outset, to mention few dates from lower court record. Title suit No.12 of 1989 was decreed in preliminary form on 17th December, 1993. The defendant-appellant preferred Title Appeal No.19 of 1994 against the said preliminary decree. The appeal was dismissed on contest on 28th June, 1996 by the learned Additional District Judge, Hooghly. Second Appeal No.249 of 1997 also received the same fate vide judgment and decree of dismissal dated 28th March, 2006.

8. This court vide order dated 28th February, 1997 directed the trial court to appoint Partition Commissioner to carry on commission work for effecting partition of the suit property, but no final decree would be passed during the pendency of S.A 249 of 1997. Accordingly, the learned trial court appointed one Sri Ashim Ghosh, Advocate as a Partition Commissioner. After disposed of the second appeal, 6th January, 2007 was fixed by the Advocate commissioner for valuation of the suit property. The appellant prayed for adjournment of the proceeding which was rejected by the Advocate Commissioner. Subsequently, a series of dates were fixed by the learned Trial Court for submission of report by the learned Advocate Commissioner for drawing up of final decree. Finally, on 19th August, 2009, the learned Commissioner submitted his report. It was accepted by the learned trial court vide order dated 31st October, 2009 and on the basis of the said report, final decree was drawn on 23rd December, 2009.

9. According to the appellant, he came to know about the final decree passed in the said partition suit on 10th May, 2010 from respondent No.5 and on 29th May, 2010 applied for certified copy of the judgment and decree with a view to preferring an appeal. Finally, Title Appeal No.132 of 2010 was filed along with an application under Section 5 of the Limitation Act on 30th June, 2010.

10. Thus, the said first appeal against the final decree was filed by the defendant-appellant after a lapse of 179 days from the statutory period of limitation. The appellant pleaded in his application under Section 5 of the Limitation Act that he was suffering from acute osteo-arthritis of both knees for 6-7 months at the relevant point of time and he was advised by the doctor to take rest at home. Moreover, the trial court was vacant for long time. The appellant had no knowledge that the commission and valuation work were completed by the Advocate Commissioner and the final report was submitted by him on 19th August, 2009. He did not get any notice of hearing on Commissioner's report. Therefore final decree for partition was passed behind his back and beyond his knowledge.

11. The learned Judge in First Appellate Court refused to condone delay of 179 days in filing the appeal on the following grounds:-

(a) Osteo-arthritis is not a curable disease;

(b) It appeared to the learned Judge that the appellant was quite fit when he appeared before her in Court though he alleged that he was suffering from Osteo-arthritis.

12. After coming to such conclusion, the learned Judge in First Appellate Court observed, "**Be that as it may even assuming that the petitioner/appellant was suffering from Osteo-arthritis and could not attend court to prefer an appeal in time, but it is also the duty of the Court to see whether fruitful purpose will be served in condoning the delay in preferring the appeal by the appellant, i.e, whether there is at all any merit in the appeal for which the section 5 application requires to be allowed enabling the party to urge his grievances before this court.**"

13. Then the learned Judge went on disposing of the appeal on merit holding, interalia, that the appellant previously preferred an appeal against the preliminary decree. The said appeal was dismissed on contest. The appellant assailed the judgment and decree passed by the first appellate court in second appeal. The second appeal was also dismissed by the High court and the decree in preliminary forum was affirmed. The impugned judgment goes to suggest that the learned Judge in First Appellate Court had the occasion to peruse the judgments passed in first and second appeal against preliminary decree.

14. It is submitted by Mr. Ayan Banerjee, learned Advocate on behalf of the appellant that the lower Appellate Court committed substantial error in law in deciding the appeal on merit while rejecting appellant's application under Section 5 of the Limitation Act. In support of his contention, Mr. Banerjee refers to a decision of the Hon'ble Supreme Court in the case of **S. Ganesharaju (Dead) through L.RS and another -vs- Narasamma (Dead)**

through L.RS and others reported in **(2013) 11 SCC 341**. The following paragraphs of the aforesaid report is relevant for our purpose:-

> *"9. Not only this, the learned Single Judge has even touched the matter on merits, which was not required to be done as the basic ground on which the review was filed by the appellants was not considered by the learned Single Judge. Thus, the appellants have been put to dual hardship. On the one hand, the delay has not been condoned and on the other hand even the merits have been touched, for which no arguments had been advanced by the learned counsel for the appellants."*
>
> *"12. The expression "sufficient cause" as appearing in Section 5 of the Limitation Act, 1963, has to be given a liable construction so as to advance substantial justice. Unless the respondents are able to show mala fides in not approaching the court within the period of limitation, generally as a normal rule, delay should be condoned. The trend of the courts while dealing with the matter with regard to condonation of delay has tilted more towards condoning delay and directing the parties to contest the matter on merits, meaning thereby that such technicalities have been given a go-by."*
>
> *"14. We are aware of the fact that refusal to condone delay would result in foreclosing the suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. In fact, it is always just, fair and appropriate that matters should be heard on merits rather than shutting the doors of justice at the threshold. Since sufficient cause has not been defined, thus, the courts are left to exercise a discretion to come to the conclusion whether circumstances exist establishing sufficient cause. The only guiding principle to be seen is whether a party has acted with reasonable diligence and had not been negligent and callous in the prosecution of the matter."*

15. Mr. Soumyen Dutta, learned Advocate for the respondents No.1-4, on the other hand, submits that it is well known principle of law that when there is merit in appeal, the technicalities of limitation should not stand on the way in getting the matter heard on merit. Thus, while considering an application for condonation of delay, the court has every right to consider

the question as to whether there is any merit in the appeal, or it will be a futile exercise of judicial exercise function to admit an appeal without having any merit on condonation of delay.

16. **In State of M.P and another vs Pradeep Kumar and another** reported in **(2000) 7 SCC 372**, the Hon'ble Supreme Court held that if an appeal is time barred, the court should either return the memorandum of appeal to the appellant to submit it along with an application under Section 5 of the Limitation Act or should provide a chance to file application for condonation of delay. The court cannot, under such circumstances, dispose of the appeal on merit. In **S.V Matha Prasad vs Lalchand Meghraj** reported in **(2007) 14 SCC 722**, the Hon'ble Supreme Court clearly held that while dealing with an application under Section 5 of the Limitation Act, the court cannot dispose of an appeal on merit. In Matha Prasad (Supra), the Division Bench of the High Court not only condoned delay in filing the appeal under Section 5 of the Limitation Act, but also decided the appeal on merit. The Hon'ble Supreme Court refused to approve such course of action as not being justified.

17. In the instant case, the impugned judgment clearly shows, the relevant portion of which has been quoted above that the learned Judge in First Appellate Court did not even come to the finding as to whether the appellant/petitioner was able to establish sufficient ground that prevented him to file the appeal within statutory period of limitation. On the contrary, the application under section 5 was rejected holding, interalia, that there is no merit in the appeal.

18. Accordingly, this court is of the considered opinion that the lower appellate court has committed a material illegality by deciding an appeal on merit while considering an application under Section 5 of the Limitation Act.

19. Substantial question of law formulated in ground no.(II) is thus answered in the affirmative.

20. Now, I proceed to adjudicate substantial question of law formulated in ground no.(I).

21. On careful perusal of the application under Section 5 of the Limitation Act, it is ascertained that the appellant/petitioner prayed for condonation of delay of 179 days on the following grounds:-

> (i) The Advocate Commissioner proceeded with valuation work inspite of repeated prayers for adjournment filed by the appellant;
> (ii) The trial court was lying vacant for more than 2 years;
> (iii) The learned Advocate on behalf of the appellant refused to take any responsibility to represent him during commission work;
> (iv) The appellant is an acute patient of osteo-arthritis and at the relevant point of time he was suffering from osteo-arthritis in both knees and was advised rest by his doctor.

22. On perusal of the impugned judgment it is ascertained that the learned Judge in First Appellate court did not even consider the first three grounds set forth by the appellant/petitioner in support of delay in filing the appeal. With regard to ground no.(IV), it is observed by the learned Judge in First Appellate Court that osteo-arthritis is not a curable disease. Secondly, the appellant was found fit in open court and thirdly and mere importantly, even assuming that the appellant was suffering from osteo-arthritis, no fruitful purpose would be served by condoning delay in filing the appeal as the appeal is devoid of any merit.

23. Thus the impugned judgment passed by the learned Judge in First Appellate Court clearly shows that the learned Judge nowhere assigned any reason as why the medical certificates issued by qualified doctors and marked exhibits in course of evidence of the appellant, were not even considered and the approach of the court is too technical in nature and the finding with regard to condonation of delay is based on irrelevant considerations as well on something applicant was not required to explain under Section 5 of the Limitation Act.

24. The law on the point is no longer *res integra* that the expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which sub-serve the ends of justice. The Hon'ble Supreme Court in Collector, **Land Acquisition, Anant Nag vs. Mst. Katiji** reported in **AIR 1987 SC 1353** observed that:-

> "*It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-*
>
> *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 considerations 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 of 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.*"

25. Learned Advocate for respondent No.1-4 strenuously argues that the appellant did not annex the medical certificates with his application under Section 5 of the Limitation Act for condonation of delay in filing the appeal. Therefore, the respondents could not get any opportunity to controvert the medical certificates in their written objection. However, when the medical certificates were exhibited by the lower appellate court the respondents raised their objection and such objection was recorded in the evidence of the appellant. It is further submitted by the learned Counsel for the respondents No.1-4 relying upon a decision of the Division Bench of this Court in **Meghnath Ghosh vs. Indu Bhusan Ghosh** reported in **81 CWN 31** that a medical certificate cannot be held to be proved without examination of the Doctor. Therefore, the learned trial judge rightly refused to place any reliance on the medical certificates submitted by the appellants in course of his evidence.

26. Learned Advocate for the respondents No.1-4 as well as the added respondents in same tune submits that in construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that

the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be lightheartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. On this score decision of the Hon'ble Supreme Court in **Ramlal, Motilal and Chhotelal vs. Rewa Coalfields Ltd.** reported in **AIR 1962 SC 361** is relied upon.

27. It is also contended by the learned Counsels for the respondents that mere marking of document as exhibits do not prove the truth of the contains of the document. In order to prove the truth of the contains of the document the author of the documents must be examined. In order to substantiate this contention the decision of the Hon'ble Supreme Court in **Sait Tarajee Khimchand and Ors. vs. Yelamarti Satyam and Ors.** reported in **AIR 1971 SC 1865** was relied upon.

28. The judicial scrutiny of this Court, in view of the substantial question of law formulated in ground No.(I) is limited to consider as to whether the lower appellate court substantially erred in law in rejecting the appellant's

application under Section 5 of the Limitation Act without considering that the medical certificates certifying the illness of the appellants remained uncontroverted from the sides of the respondents. I have already recorded hereinbefore in Paragraph 21 of this Judgment that the appellant pleaded four grounds of condonation of delay but the First Court of Appeal had dealt with the question as to whether illness of the appellant from arthritis could be treated as sufficient cause for condonation of delay. I have also pointed out that the above ground was not even answered by the First Court of Appeal either in the affirmative or negative. This Court has meticulously gone through the evidence of the appellant adduced before the Court of appeal and the medical certificates submitted by him in course of hearing which were marked exhibits after objection. The appellant was initially examined medically in a local hospital. Then he was examined by one Dr. Rana Das, Orthopedic Surgeon. He advised the appellant to take rest.

29. Almost similar question came up before a Coordinate Bench of this court in C.O 54 of 2018 (**Sandip Mukherjee vs. Mr. Irshad Ali Khan and Anr.**) and this Court by its judgment dated 24th January, 2018 held as follows:-

> *The trial court dismissed the application for condonation of delay solely on the ground that though the medical certificate is annexed to the said application but the Doctor was not examined by it and further held that the delay has been not properly explained and appears to be casual in nature. The appellate court, however, observed that since the medical certificate was not marked as exhibit, therefore, because of the lack of proper prove, the delay does not appear to be convincing and affirmed the order of the trial court.*
>
> *Both the courts below appears to have been swayed by the fact that the medical certificate, which is annexed to the revisional*

application and forms part of the record, was not marked as exhibit as the Doctor, who issued the same, was not called as a witness. It further appears that an application was taken out by the petitioner so that the Doctor, who issued the said medical certificate, be examined through Commission but the said application was ultimately dismissed by the trial court and a challenge was made to this Court. While disposing of the revisional application, a liberty was given to the petitioner to withdraw the said application and to file afresh, if so advised.

Be that as it may, since the court did not take into account the medical certificate produced by the petitioner into an account, let me examine whether the aforesaid observations of the courts below can be sustained.

It is evident from the record that no written statement to the application under Section 5 of the Limitation Act has been filed by the plaintiffs/opposite parties. The objection appears to have been filed against the application under Order IX Rule 13 of the Code, which forms part of the annexure to the revisional application. It does not appear from the order passed by the trial court as well as the appellate court that the plaintiffs/opposite parties adduced any evidence on the application under Section 5 of the Limitation Act. The petitioner was examined by the court and astonishingly the trial court dismissing the said application not only on the ground that the explanation is not proper and casual in nature but also that the courts are flooded with litigation and apparently the litigants are very casual in their approach in coming before the court.

There is no finding recorded on the merit of the grounds made out for condonation of delay. In absence of any specific challenge to the medical certificate, the court should not be too hyper technical in not considering the statements made on oath, which goes uncontroverted and unchallenged. It is the satisfaction of the court, which should be paramount. Even this Court considers the stand taken in the written objection to the application under Order IX Rule 13 of the Code, the Court does not find that there is any challenge thrown on the medical certificate produced by the petitioner.

30. In the instant case also the respondents did not challenge the medical certificates duly exhibited by the appellant in course of his evidence. Except denial of the said statement in their written objection the respondents did not produce any evidence to controvert the case of the appellant on his medical evidence. Learned Judge in First Appellate Court failed to consider

such aspect of the matter and wrongly rejected the application under Section 5 of the Limitation Act.

31. For the reasons stated above this Court does not find any want of due diligence on the part of the appellant where his application under Section 5 of the Limitation Act deserved rejection.

32. Substantial question of law formulated in ground No.(I) is also answered in the affirmative.

33. Before I part with, I am of the considered view that I shall fail to discharge my judicial duty if I do not record a disturbing feature apparent on the face of the record.

34. The learned Judge in First Appellate Court while deciding the appeal on merit in course of hearing of an application under Section 5 of the Limitation Act, clearly mention that the appellant preferred an appeal against the preliminary decree passed in the suit the said appeal was dismissed against the judgment and decree of dismissal passed by the First Appellate Court. He preferred an appeal before this Court which was registered as S.A 249 of 1997 and the said second appeal was dismissed on contest on 28th March, 2006. It is pointed out by the learned Counsel for the appellant that in S.A No.249 of 1997 the learned Judge appeared as an Advocate on behalf of the respondents. It is found from the impugned order that the learned Advocate for the respondent mentioned the background of the litigation at the time of hearing of the application under Section 5 of the Limitation Act. The judgment passed in S.A 249 of 1997 is in lower court

record. Therefore, it is obvious that the learned judge had occasioned to see the judgment passed in S.A 249 of 1997 where she represented the respondents as an Advocate. Again as a judge, she heard the appeal filed by the defendant/appellant and the appeal was not admitted on the ground that it was barred by limitation. It is not only axiomatic but also considered to be a rule of judicial prudence that justice must not only be done but it must appear to have been done. The learned Advocate for the appellant has urged that the appellant does not want to raise this issue in the instant appeal but he will always feel that he was denied justice by the judge who previously represented the respondents before this Court. It could have been held that the learned Judge disposed of the appeal out of inadvertence. This Court could have come to such finding if there was no reference of second appeal against the preliminary decree passed in the suit for partition between the parties. The learned Judge, on the other hand came to a finding that in view of the decision made by this Court in S.A 249 of 1997 this appeal has no merit.

35. It will not be out of place to mention that the appeal against the preliminary decree was heard by the learned Additional District Judge cum Special Court, Chinsurah, Hooghly. Judicial propriety demands that the appeal against the final decree with application under Section 5 of the Limitation Act ought to have been transferred to the said court of the learned Additional District Judge for disposal and the learned District Judge, Hooghly should not have disposed of the appeal. I am not unmindful to note that the Hon'ble Supreme Court in number of cases deprecated that

trend of the higher judiciary of making criticism or adverse remark against a judicial officer in a judiciary pronouncement. However, the Hon'ble Supreme Court observed that unworthy conduct of subordinate judicial officer cannot be overlooked. Power of superior court to express its opinion and make even critical observations regarding the conduct of judicial function by a judicial officer is undeniable, but the power is to be exercised only when necessary for the purpose of reaching a decision on the main controversy before it. The following decisions of the Hon'ble Supreme Court may be relied on in support of my observation:-

(i) 'K' A Judicial Officer, in RE : (2001) 3 SCC 54.

(ii) A.M. Mathur vs. Pramod Kumar Gupta : (1990) 2 SCC 533

(iii) Niranjan Patnaik vs Sashibhusan Kar & Anr : (1986) 2 SCC 569

(iv) Mona Panwar vs. High Court of Judicature of Allahabad : (2011) 3 SCC 496.

36. For the reasons stated above, this Court is of the considered view that the observation of this Court made hereinabove should be placed before the Administrative Committee of this Court to consider as to whether under the facts and circumstances, conduct of the concerned learned Judge request any action on the administrative side of this Court.

37. Let a copy of this judgment be placed before the Administrative Committee forthwith through the Registrar General, High Court, Calcutta.

38. Accordingly the instant appeal is allowed. The impugned judgment and order of dismissal of the application under Section 5 of the Limitation Act is set aside delay in filing the appeal is condoned.

39. The learned District Judge, Hooghly is requested either to dispose of Title Appeal No.132 of 2010 within three months from the date of receipt of the lower court record either by herself or by the learned Additional District Judge cum Special Court who disposed of Title Appeal No.19 of 1994. Under the peculiar facts and circumstances there shall be no order as to cost.

40. Since this Court has not touched upon the merit of the appeal, it does not find any scope to deal with CAN 9460 of 2019. The appellant is at liberty to file similar application before the learned First Appellate Court if so advised.

(Bibek Chaudhuri J.)