IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.62 of 2019

A.F.R.

(From the order dated 1st March, 2019 of learned District Judge, Khurda at Bhubaneswar in RFA No.100 of 2018.)

Nrusingha Behera .... ***Appellant***

-versus-

Brajaraj Das and Another .... ***Respondents***

Advocate(s) appeared in this case:-

For Appellant : Mr. Banshidhar Baug, Advocate

For Respondents : Mr. Jitendra Kumar Naik, Advocate for Caveat Respondents

CORAM: JUSTICE B.P. ROUTRAY

JUDGMENT
6th January, 2023

B.P. Routray, J.

1. Present appeal is directed against order dated 1st March, 2019 of the learned District Judge, Khurda at Bhubaneswar passed in RFA No.100 of 2018 arising out of C.S. No.366 of 2009, wherein the appeal was dismissed on the ground of limitation as learned District Judge refused to condone the delay of 7 years 291 days in preferring the appeal.

2. The facts in brief are as follows;-

Late Kulamani Behera had three sons, namely Nrusingha Behera (present Appellant), Brajaraj Das (present Respondent No.1) and Nabaghana Behera. Tulasi Behera is the wife of Kulamani. Kulamni died on 7th November, 2008. C.S. No.366 of 2009 was filed by Brajaraj praying to declare him as one of the sons of Kulamani Behera and the name of Rajkishore Das, as his father, mentioned in his School certificate is an error since he was never adopted by Rajkishore Das, his maternal grandfather. In the said suit, Brajaraj did not implead other sons of Kulamani and only impleaded Tulasi (his natural mother) as sole defendant. Tulasi agreed to the claim of Brajaraj and the suit was decreed in plaintiff's (Brajaraj) favour on 9th September, 2010 by declaring that his father's name was wrongly written as Rajkishore Das in place of Kulamani Behera. Following the decree, a declaration was published by Brajaraj in two daily local newspapers namely "The Samaj" and "Dharitri" on 27th October, 2010.

3. Kulamani had self-acquired as well as ancestral properties, which was in jointness with other co-sharers.

4. One of the co-sharers namely Bhagyadhara Behera filed Civil Suit No.938 of 2008 praying for partition wherein Nrusingha, Nabaghana, Brajaraj and many others were arrayed as parties. Further

Civil Suit No.1531 of 2012 was filed by Nrusingha against Nabaghana, Brajaraj and others praying for some declaration and injunction. In both the suits Brajaraj was described as son of Kulamani. In C.S. No.1531 of 2012, Brajaraj filed his written statement on 17th August, 2013 disclosing about the declaration decreed in his favour in C.S. No.366 of 2009.

5. RFA No.100 of 2018 was filed by Nrusingha on 28th June, 2018 impleading Brajaraj and Tulasi as Respondents with a prayer to set aside the decree passed in C.S. No.366 of 2009. Along with the appeal, a petition for leave to appeal and another petition under Section 5 of the Limitation Act were filed. The ground taken by the Appellant to condone the delay of 7 years 291 days is that, passing of such a decree on 9th September, 2010 by the Civil Judge (Jr. Division) Bhubaneswar in C.S. No.366 of 2009 in favour of Respondent No.1 was not within his knowledge earlier and he subsequently came to know about the same in January, 2018 and thereafter he got the date of disposal of the suit, applied for certified copy and got the same on 26th June, 2018 through his counsel, and ultimately filed the appeal.

6. The appeal was contested by Respondent No.1. The learned District Judge in the impugned order refused to condone the delay and dismissed the appeal on the ground of limitation. The reasons assigned in the order by the District Judge are that the Appellant had the knowledge of such a declaration given in favour of Respondent No.1 in 2013 as per the written statement filed therein and even prior to that in C.S. No.938 of 2008. Further, the Appellant had enough source of knowledge from the paper publication made in the local newspaper in the year 2010 after the declaration made by the Civil Court.

7. Admittedly Brajaraj is the natural son of Kulamani. C.S. No.938 of 2008 for partition was filed prior to C.S. No.366 of 2009 and C.S. No.1531 of 2012. In the partition suit, the parties had claimed their respective shares with respective objections. It also remains undisputed that, neither Nrusingha nor the other son, namely Nabaghana were arrayed as parties in C.S. No.366 of 2009. This means Respondent No.1 tried to get the benefit of declaration through the Civil Court Decree behind the back of present Appellant and Nabaghana, and thus his intention appears dubious. It is because the relief prayed for is regarding his status as the son of Kulamani and therefore, the other LRs of Kulamani are necessary parties therein and it is not that simple

to correct his father's name only since it has a deep consequential effect. Nevertheless, this court is not opining on the merits of Plaintiff's case in C.S. No.366 of 2009 nor on the decree passed by the learned Civil Judge on merit.

8. The present appeal is limited on the substantial question that, whether the dismissal of the 1st appeal, i.e. RFA No.100 of 2018 by the learned District Judge on the ground of limitation, is justified or not?

9. The law of limitation to condone the delay is no more *res integra*. By application of Section 3 of the Limitation Act, no suit, appeal or such other proceeding can be entertained after the prescribed period of limitation. Further Section 5 prescribes for condonation of the period of limitation on the satisfaction of the court that the party applying for had the sufficient cause for not preferring the suit, appeal or such other proceeding within said period. The term 'sufficient cause' should be understood with proper spirit and purpose in the context of the facts of each case where the conduct, behaviour and attitude of the parties relating to action, inaction and negligence are relevant considerations.

10. In ***Postmaster General and Others. V. Living Media India Limited and Another, (2012) 3 SCC 563,*** the Supreme Court reproduced the observations made in ***Collector (LA) v. Katiji's*** case, i.e. (***1987) 2 SCC 107***. The same is reproduced below:-

> "13. The learned Additional Solicitor General heavily relied on the following principles:
>
> (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 male 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 legalise injustice on technical

grounds but because it is capable of removing injustice and is expected to do so."

11. In the case of ***Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai, (2012) 5 SCC 157,*** the Supreme Court has observed that, *"what colour the expression sufficient cause would get in the factual matrix of a given case would largely depend on bonafide nature of explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."*

12. In ***N. Balakrishnan v. M. Krishnamurthy, (1998) 7 SCC 123***, the Supreme Court have held that, *"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 there is a looser 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."

13. In ***Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) AIR SCW 6158***, the Supreme Court after referring to number of decisions have culled out the principles as follows:-

> "15. From the aforesaid authorities the principles that can be broadly be culled out are:
>
> (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.
>
> (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

(vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

(xii) The entire gamut of facts are to be carefully scrutinized and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.

(xiv) An application for condonation of delay should be drafted with careful concern and not in a half hazard manner harbouring the notion that the courts are required to condone delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.

(xv) An application for condonation of delay should not be dealt with in a routine manner on the base of individual philosophy which is basically subjective.

(xvi) Though no precise formula can be laid down regard being had to the concept of judicial discretion, yet a conscious effort for achieving consistency and collegiality of the adjudicatory system should be made as that is the ultimate institutional motto.

(xvii) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisically propensity can be exhibited in a non-challant manner requires to be curbed, of course, within legal parameters."

14. In the case at hand, admittedly Respondent No.1 filed the suit for such declaration in his favour that has a deep consequence regarding his status as son of Kulamani without impleading other sons of Kulamani. This raises a negative impression on the conduct of

Respondent No.1. It is true that Respondent No.1 has been described as the son of Kulamani in C.S. No.938 of 2008 & 1531 of 2012. It is also true that the declaration was published in local newspapers soon after the delivery of decree in C.S. No.366 of 2009 and Respondent No.1 has stated about such declaration given in his favour by the Civil Judge in his WS in August, 2013. But all those cannot take away the effect of non-impleadment of the Appellant in C.S. No.366 of 2009 as a necessary party and the inference leading to the conduct of Respondent No.1 to get a decree behind other LRs of Kulamani. It may be argued that the prayer in the said suit was only for correction of the father's name of Respondent No.1 and therefore Nrusingha and Nabaghana are not necessary parties thereto. But then why Tulasi is impleaded as a party alone against whom the same logic also applies. If Respondent No.1 chose to implead Tulasi as a Defendant then same reasoning also applies to Nrusingha and Nabaghana to be impleaded as Defendants. Thus according to the facts of the case, the substantial right of Nrusingha to raise his objection / contention in C.S. No.366 of 2009 has been infringed by Respondent No.1 for non-impleading him as the Defendant.

15. Next coming to the knowledge of the Appellant, according to him, it came to his knowledge in January, 2018 when Respondent No.1 disclosed his status as son of Kulamani and not adopted son of Rajkishore, with claim for share in the properties of Kulamani. So far as the knowledge of appellant prior to that as alleged by Respondent No.1 in the year 2013 when he filed WS in C.S. No.1531 of 2012 and by way of paper publication in October, 2010, is concerned, though the same is not untrue but weighing the same vis-à-vis the substantial right of Appellant in C.S. No.366 of 2009, the delay needs to be condoned. Moreover, the contention of Respondent No.1 about knowledge of Appellant of such declaration granted in favour of Respondent No.1 by way of paper publication is presumptive. When the dispute regarding shares of the parties over the properties is pending adjudication in the partition suit, i.e. C.S. No.938 of 2008, filing of a suit by Respondent No.1 without impleading the Appellant as a party, who is undisputedly a son of Kulamani and getting a decree therein amounts to suppression of facts thereby depriving the necessary party to raise his objections. So, in the circumstances the Appellant is found entitled for the right of opportunity to object from which he has been deprived of.

16. The observations and directions of learned District Judge against the Appellant to dismiss his appeal on the ground of limitation is thus found unjustified and accordingly set aside. The delay in filing the appeal before learned District Judge is condoned.

17. RFA No.100 of 2018 is accordingly restored by condoning the delay and the learned District Judge is directed to hear the parties on merits and dispose of the appeal in accordance with law, preferably within a period of six months from the date of appearance of the parties before him. The present Appellant as well as Respondents are directed to appear before the learned District Judge, Khurda at Bhubaneswar on 24th January, 2023 along with the certified copy of this order.

18. The appeal is allowed and in the circumstances, no order as to cost. It is made clear that this court has not opined anything on merits of the decree of the learned Civil Judge nor on the appeal of the Appellant in RFA No.100 of 2018.

19. An urgent certified copy of this order be issued as per rules.

(B.P. Routray)
Judge

M.K. Panda, Sr. Steno