

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 31st AUGUST, 2022

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

I.A. No.02 of 2022

in C.O. No.22 of 2022 (Filing Number) in RFA No.15 of 2016

Petitioner : Tenzing Kelsang Kalden

versus

Respondents : State of Sikkim and Others

Application under Section 5 of the Limitation Act, 1963.

Appearance

Ms. Gita Bista, Advocate for the Petitioner.

Mr. Sudesh Joshi, Additional Advocate General with Mr. Yadev Sharma, Government Advocate and Ms. Pema Bhutia, Assistant Government Advocate for the Respondent Nos.1 to 4.

Mr. Sudhir Prasad, Advocate for the Respondent No.5.

Mr. Karma Thinlay, Senior Advocate (Central Government Counsel) for the Respondent No.6.

Mr. A. Moulik, Senior Advocate with Mr. Ranjit Prasad, Advocate for the Respondent No.7.

ORDER

Meenakshi Madan Rai, J.

1. The Cross Objector/Petitioner herein has filed the instant application under Section 5 of the Limitation Act, 1963, seeking condonation of delay of 1946 days in filing the present Cross Objection. The Petitioner was substituted vide Order of this Court dated 08-12-2021 as the legal representative of his deceased father, Rinzing Dadul Kalden who was the original Respondent No.3 in RFA No.15 of 2016,.

2. Learned Counsel for the Petitioner enumerating the grounds for the delay in filing the Cross Objection contended that

initially I.A. No.01 of 2022 was filed wherein the delay was computed as "99 days" and withdrawn on the realisation that the original Respondent No.3 had been served with Notice on 10-11-2006, following which the delay was computed as "1946 days" and the instant I.A. being I.A. No.02 of 2022 was filed accordingly. That, the Appeal being RFA No.15 of 2016 was admitted on 24-03-2017, but the father of the Petitioner did not enter appearance neither was he represented by Counsel during his lifetime. Vide Order of this Court dated 11-06-2018, RFA No.15 of 2016 was kept in abeyance, in terms of the Order of the Hon'ble Supreme Court in **State of Haryana and Others vs. M/s. G. D. Goenka Tourism Corporation Limited and Another**¹, dated 21-02-2018. That, till 2019 the Cross Objector was in Bangalore and unaware of the pendency of the instant case which he came to learn only after the demise of his father on 22-08-2020. He then approached the Counsel on record representing Respondent Nos.1, 2, 4 and 5 (in the said RFA), who however expressed his inability to represent the Cross Objector. On his substitution on 08-12-2021 the Petitioner was unable to appear in the Court on the dates fixed on account of his mother's surgery on 01-12-2021 and the necessity for him to stay with her constantly during her recuperation and other health issues that plagued her then. The Winter Vacation of the Court followed during which period Learned Counsel for the Petitioner was at Ravangla, consequently he could meet her only in the first week of March, 2022, upon which Cross Objection came to be filed on 16-04-2022. That, the delay in filing the Cross Objection was not due to negligence on his part but due to the *bona fide* reasons

¹ Special Leave to Appeal (C) No.5552 of 2018 arising out of CC No.8453 of 2017

mentioned above. It was urged that no prejudice would be caused to any party in the matter as the Respondent Nos.1 and 2 in RFA No.15 of 2016 have already filed their joint Cross Objection being C.O. No.05 of 2016, against the issues that have been decided against them which are identical to the issues assailed by the Petitioner. That, the Appeal and the Cross Objection are yet to be heard. That, the grounds put forth hereinabove qualify as "sufficient cause" to explain the delay which in the interest of justice may be condoned. To buttress her submissions, reliance was placed on ***The Dean, I. K. Gujral Punjab Technical University vs. Sikkim Students Welfare Association of Chandigarh and Others***².

3. Contesting the submissions put forth by Learned Counsel for the Petitioner, Learned Additional Advocate General appearing for the State-Respondent Nos.1 to 4 submitted that the original Respondent No.3 did not appear before this Court although Notice was served on him on 10-11-2016, nor did he enter appearance before the Learned Trial Court, indicating his indifference in the matter. On 22-11-2021, the Petitioner herein suddenly appeared on the demise of Respondent No.3 on 22-08-2020 and was substituted vide Order of this Court dated 08-12-2021, after which, rather belatedly the Cross Objection was filed on 16-04-2022, along with an application seeking condonation of delay. The grounds agitated by the Petitioner are insufficient for condoning the delay as the Petitioner 'believes' that his father could not put in his appearance due to ill-health, revealing that he was unaware of his father's health which thereby raises doubts about the alleged claim of ill-health. Besides which, no medical

² SLR (2020) Sikkim 652

documents buttress the Petitioner's submissions regarding his parents' ill-health. That, in the interregnum the fruits of the Decree have ripened and the appellation will be disturbed by the acceptance of the Petitioner's pleas of delay and his Cross Objection. To buttress his submissions, reliance was placed on ***Estate Officer, Haryana Urban Development Authority and Another vs. Gopi Chand Atreja***³. That, where there is inordinate delay the Petition cannot be allowed for which reliance was placed on ***D. Gopinathan Pillai vs. State of Kerala and Another***⁴. Reliance was also placed on ***Basawaraj and Another vs. Special Land Acquisition Officer***⁵, ***University of Delhi vs. Union of India and Others***⁶ and ***Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and Others***⁷ which lay down the grounds for consideration of a delay petition. That, the Petition lacking in *bona fides* and inadequacy of sufficient grounds, deserves a dismissal.

4. Learned Counsel for the Respondent Nos.5 and 6 had no submissions to put forth in the matter.

5. Learned Senior Counsel appearing for the Respondent No.7 contesting the Petition urged that the delay is deliberate and it cannot be considered only for the reason that the Petitioner was substituted on the demise of his father. That, the Petitioner on substitution steps into the shoes of his father as his legal representative and in his Cross Objection cannot assert any new grounds. In this context, reliance was placed on ***Gajraj vs. Sudha***

³ (2019) 4 SCC 612

⁴ (2007) 2 SCC 322

⁵ (2013) 14 SCC 81

⁶ (2020) 13 SCC 745

⁷ (2013) 12 SCC 649

and Others⁸. That, no medical documents either of the mother or the father of the Petitioner have been filed to fortify the submissions pertaining to their ill-health. That, in fact the Petitioner's father was appearing through the Respondent No.2 before the Learned Trial Court and subsequently stopped appearing in the Court being negligent and indifferent, thus the grounds put forth by the Petitioner are not *bona fide* nor do they provide "sufficient cause" for the delay. Hence, the Petition deserves no consideration and should be dismissed.

6. I have given due consideration to the submissions of the Learned Counsel for the parties, carefully perused the documents on record and citations made at the Bar.

7. Relevantly, it may be noticed that the substitution of the Petitioner was made vide Order of this Court dated 08-12-2021 on an application being I.A. No.06 of 2021 filed by the State-Appellant seeking substitution of the legal heir and successor of the original Respondent No.3. The Petition was unopposed by the other parties and accordingly, the Petitioner was substituted as the legal heir of the original Respondent No.3. The records reveal that the appeal (RFA No.15 of 2016) was indeed filed on 15-10-2016 and Notice issued to the Respondent on 12-11-2016 in terms of the Order of this Court dated 10-11-2016. The original Respondent No.3 received Notice on 10-12-2016 contrary to the erroneous date of "23-11-2016" mentioned in the petition. The RFA was admitted on 24-03-2017. Thereafter, evidently the original Respondent No.3 failed to appear till 22-03-2018 during which period no effective hearing took place for reasons as borne

⁸ (1999) 3 SCC 109

by the records. On 11-06-2018, this matter was kept in abeyance in terms of the Order of the Hon'ble Supreme Court in **State of Haryana** (*supra*) and on the disposal of the **Indore Development Authority vs. Manoharlal and Others**⁹, the main appeal was again taken up on 30-09-2021, pursuant to which the Petitioner herein made his appearance on 22-11-2021. The Order of substitution was made on 08-12-2021.

8. Having considered the grounds, it is evident from the records of the case that the matter was in limbo, from 11-06-2018 up to 30-09-2021 for the reasons enumerated hereinabove. The Petitioner on the demise of his father has stepped into his shoes and filed the Cross Objection. While addressing the argument of Learned Senior Counsel for the Respondent No.7 regarding raising of contrary grounds to that of the original Respondent No.3, this Court is aware that the substituted Respondent is bound by the pleadings of his predecessor in whose place he has been substituted. In the facts of the present case, it cannot be said that the Petitioner herein substituted as Respondent No.3 has taken a stand contrary to what his father had taken as in the first instance no Cross Objection was ever filed by the original Respondent No.3. It cannot also be prophesied that had he lived the original Respondent No.3 would not have entered appearance subsequently. There is no Order of this Court which debars the appearance of the original Respondent No.3 before this Court nor is there an *ex parte* order issued by this Court. There is no prayer in fact made by Learned Counsel for the parties that the original Respondent No.3 ought to be proceeded *ex parte*. In the

⁹ (2020) 8 SCC 129

circumstances, as the Petitioner has stepped into his father's shoes it is to be assumed that this Cross Objection is being belatedly filed by him.

9. In *Basawaraj* (*supra*) the Supreme Court observed as follows;

"9. In this context, "sufficient cause" means that the party should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the court should not allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose.

.....
11. The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only *so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned*, whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible."

The above explanation therefore clarifies that each matter is to be assessed on the merits of its own case and discretion is to be exercised by the Court considering the specific case before it as there can be no straitjacket formula for condoning delay. The Court is at any given time to ensure even handed justice.

10. Although as pointed out by Learned Additional Advocate General and Learned Senior Counsel for the Respondent No.7 no medical documents fortify the submissions of Learned Counsel for the Petitioner pertaining to the ill-health of his parents yet it must be borne in mind that the petition filed by him under Section 5 of the Limitation Act is supported by an Affidavit.

11. In the context of condoning delay, in *Esha Bhattacharjee* (*supra*) the Supreme Court observed *inter alia* that;

"21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1. (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.

21.2. (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.

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

21.4. (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.

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

21.6. (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.

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

21.8. (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.

21.9. (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.

21.10. (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.

21.11. (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or

Tenzing Kelsang Kalden vs. State of Sikkim and Others

interpolation by taking recourse to the technicalities of law of limitation.

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

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

12. On the anvil of the principles set forth *supra*, while considering the instant application, it is evident that “sufficient cause” has been put forth for the delay added to the fact that the matter was kept in abeyance for some time as seen *supra* on account of the directions of the Hon’ble Supreme Court in the ratio of in ***State of Haryana (supra)***.

13. In ***Smt. Tara Wanti vs. State of Haryana through the Collector, Kurukshetra***¹⁰ relied on by Learned Senior Counsel for the Respondent No.7 it has also been held that “sufficient cause” within the meaning of the Section must be a cause which is beyond the control of the party invoking the aid of the Section and the test to be applied would be to see as to whether it was *bona fide* cause, inasmuch as nothing could be considered to be *bona fide* if it is not done with due care and attention. In the case at hand, the grounds put forth cannot be set aside as insufficient merely because the original Respondent No.3 failed to take steps as it is apparent from the submissions of his son that he was encumbered by illness.

14. Besides, although Learned Additional Advocate General argued that the fruits of the decree have ripened, the Appeal and the Cross Objection filed by Respondent Nos.1 and 2 are yet to be

¹⁰ AIR 1995 Punjab and Haryana 32

heard. It is not the case of the State-Respondents that Respondents No.1 and 2 (in RFA No.15 of 2016) has not filed a Cross Objection in the Appeal pending, on the same issues, i.e., 1, 3, 4 and 5 which were decided against Respondents No.1 and 2 and the Petitioner herein. In consideration of the fact that the hearing has not taken place at all either in the Appeal or the Cross Objections, the condonation of delay will prejudice no party and assists the Court in dispensing even handed justice. As held in ***Esha Bhattacharjee (supra)*** there should be a liberal, pragmatic, justice oriented and non-pedantic approach while dealing with an application for condonation of delay for the reason that the Courts are not supposed to legalise injustice, but obliged to remove injustice.

15. That apart, it may be borne in mind that the period of limitation was extended by the Supreme Court vide several orders which are reflected in the Order of ***In Re : Cognizance for Extension of Limitation***¹¹ on account of the COVID-19 pandemic, as follows;

"4. The present miscellaneous application has been filed by the Supreme Court Advocates-on-Record Association in the context of the spread of the new variant of the Covid-19 and the drastic surge in the number of Covid cases across the country. Considering the prevailing conditions, the applicants are seeking the following:

(i) Allow the present application by restoring the order dated 23-3-2020 passed by this Hon'ble Court in *Cognizance for Extension of Limitation, In re* [(2020) 19 SCC 10] ; and

(ii) Allow the present application by restoring the order dated 27-4-2021 passed by this Hon'ble Court in *Cognizance for Extension of Limitation, In re* [(2021) 17 SCC 231]; and

(iii) Pass such other order or orders as this Hon'ble Court may deem fit and proper.

5. Taking into consideration the arguments advanced by the learned counsel and the impact of

¹¹ 2022 SCC OnLine SC 27

Tenzing Kelsang Kalden vs. State of Sikkim and Others

the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of MA No. 21 of 2022 with the following directions:

5.1. The order dated 23-3-2020 [(2020) 19 SCC 10] is restored and in continuation of the subsequent orders dated 8-3-2021 [(2021) 5 SCC 452], 27-4-2021 [(2021) 17 SCC 231] and 23-9-2021 [2021 SCC OnLine SC 947], it is directed that the period from 15-3-2020 till 28-2-2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

.....”

16. This Court cannot disregard the said orders despite the fact that Learned Counsel for the Petitioner has failed to raise this point, for the reason that the Order of the Hon'ble Supreme Court is binding upon all Courts/Tribunals and Authorities under Article 141 of the Constitution of India.

17. The delay is accordingly condoned and I.A. disposed of.

18. Let the Cross Objection be registered.

(Meenakshi Madan Rai)
Judge

31-08-2022

Approved for reporting : **Yes**