REGISTRAR GENERAL
HIGH COURT, CALCUTTA

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No. 731 - G **Dated, Calcutta, the, 27.02. 2020.**

To : **The District & Sessions Judge,**
Darjeeling, Kalimpong, Cooch Behar, Jalpaiguri, Uttar Dinajpur, Dakshin Dinajpur, Malda, Murshidabad, Paschim Burdwan, Purba Burdwan, Birbhum, Bankura, Purulia, Nadia, Hooghly, Howrah, North 24 Parganas, South 24 Parganas, Paschim Medinipur, Purba Medinipur, Jhargram, A & N Islands.

The Chief Judge,
City Sessions Court, Calcutta,
City Civil Court, Calcutta,
Presidency Small Cause Court, Calcutta.

In the Court of District & Sessions Judge (SD) Alipore, 24-Pgs. RECEIVED Contents Not Verified 2 MAR 2020 2497

Subject : S.A.. 212 of 2012.

Sir,

I am directed to forward herewith a copy of the **Judgment dated 11.02.2020**, passed by the **Hon'ble Justice Bibek Chaudhuri** in connection with the case captioned above, and to request you to cause immediate circulation of the same amongst all the learned judicial officers posted in your judgeship, for their information with a caution that the First Court of Appeals should not take such type of slipshod manner to dispose of an appeal without considering the merit of the same.

The Hon'ble Court has further directed that "**However, it is made clear that the learned Judges in the District Judiciary shall dispose of the applications under Section 5 of the Limitation Act on the facts and circumstances of each and every case placed by the petitioner before them.**

Yours faithfully,

Registrar General

Enclo. : As stated.

Seen uploaded in website as well as circulated
04/3/2020

Form J(2) **IN THE HIGH COURT AT CALCUTTA**
Civil Appellate Jurisdiction
Appellate Side

Present :
The Hon'ble Justice Bibek Chaudhuri

S. A. 212 of 2012

Maya Rani Chowdhury
-Vs.-
Sukumar Ghosh

For the Appellant : Mr. Mukti Chandra Ghosh, Adv.,
Mr. Subhas Medda, Adv.

For the Respondent : None.

Heard and Judgment on : 11.02.2020.

Bibek Chaudhuri, J.

In spite of service of notice the respondent has not turned up to contest the instant appeal. Affidavit-of-service be kept with the record. Since the respondent has not turned up I have no other alternative but to dispose of the appeal *ex parte*.

It is very often experienced by this Court that the First Court of Appeal very often takes the easy route to dispose of a time-barred appeal by rejecting an application under Section 5 of the Limitation Act. This trend should not only be deprecated but the learned Judges in First Appellate Court should revisit and relook the matter that this will unnecessarily add to multiplicity of proceeding because if this Court finds that the application under Section 5 of the Limitation Act was rejected without considering the facts and circumstances as well as the legal principles set out in plethora of decisions by the Hon'ble Supreme Court and various High Courts, this Court will no other alternative but to allow the appeal by allowing the application under Section 5 of the Limitation Act and directing the First Court of appeal to hear out the appeal on merit. This may in turn follow another second appeal filed by this Court by

an aggrieved party who will be defeated in the appeal. Therefore, the intention of the Courts should be to dispose of a *lis* in contested manner.

Coming to the background leading to filing of the instant appeal, suffice it to record that the plaintiff/appellant filed Title Suit No. 122 of 1989 against the defendant/respondent praying for eviction, recovery of khas possession and other consequential reliefs claiming, *inter alia*, that the defendant was a tenant under him at a monthly rental of Rs. 140/- payable according to English calender month. The said suit for eviction was filed on the ground of default, reasonable requirement, violation of Section 108 of the Transfer of Property Act etc.

Another suit being Title Suit No. 471 of 1995 was filed by one Smt. Arati Mondal stating, *inter alia*, that she purchased the suit property from proforma-defendants no. 3 to 5 by a registered deed of sale dated 1st November, 1994. The defendant no. 1 was a tenant in respect of one shop room in the suit property. The plaintiff prayed for eviction of defendant no. 1 from the said suit property on various grounds.

The learned Trial Judge dismissed Title Suit No. 122 of 1989 on contest and decreed Title Suit No. 471 of 1995. Against the said Judgement and Decree passed in Title Suit No. 122 of 1989 the plaintiff/appellant preferred an application for review under Order XLVII Rule 1 of the Code of Civil Procedure before the Trial Court. The said application for review was dismissed on 12th May, 2006. The appellant obtained the certified copy of the said order passed in the review on 10th July, 2006 and consulted her learned Advocate about the next course of action. The learned Advocate advised him to file a revisional application before this Court under Article 227 of the Constitution of India. Finally, on 4th September, 2006, the learned Advocate advised her that her remedy lies in preferring an appeal before the First Appellate Court against the Judgement and Decree of dismissal dated 28th October, 2005. Accordingly, the appellant preferred Title Appeal No. 66 of 2006 along with an application under Section 5 of the Limitation Act praying for condonation of delay of about 11 months in

preferring the appeal. The learned District Judge, North 24-Parganas at Barasat rejected the application under Section 5 of the Limitation Act on the following observation:-

"In the present case though Judgement was dismissed on contest appellant filed review against the said Judgement. No sufficient cause is shown in the petition that why the appellant filed the review instead of filing the appeal against a contested Judgement.

In the background, I am of the view that 11 months delay cannot be condoned on the ground of ignorance of law. Appellant/petitioner miserably failed to make out a case for condonation of delay, hence the petition under Section 5 of the Limitation Act should be rejected".

In view of rejection the application under Section 5 of the Limitation Act the appeal filed by the appellant was dismissed. The appellant preferred the instant appeal before this Court. The appeal came up for hearing for admission on 23rd February, 2009 before the Division Bench of this Court when the appeal was admitted formulating the following substantial questions of law :-

(a) *Whether the learned Court of Appeal below while rejecting the application under Section 5 of the Limitation Act for condonation of delay committed substantial error of law that the well settled position of law that the misadvise by a learned Advocate to a litigant resulting in delay should be treated to be sufficient ground for condonation of delay;*

(b) *Whether the learned Court of Appeal below committed substantial error of law in not considering the fact that a learned Advocate of this Court initially advised the appellant to prefer a revisional application under Article 227 of the Constitution of India and subsequently, the learned Advocate changed her decision and asked the appellant to prefer an appeal against the original decree for which the delay occurred;*

(c) *Whether the learned Court of Appeal below committed substantial error of law in not invoking the principle of Section 14 of the Limitation Act to the facts of the present case by excluding the time taken by the appellant in proceeding with the application for review;*

(d) *Whether the learned Court of Appeal below committed substantial error of law in not liberally considering the application for condonation of delay;*

Let the Lower Court Records be called for. Issue usual notices".

On perusal of the order passed by the learned District Judge, North 24-Parganas at Barasat it is ascertained that the learned Judge came to a finding that when adequate remedy of the appellant lies in preferring the appeal the application for review was filed out of mistake of law which cannot be considered to be a ground for condonation of delay.

Learned Judge in First Appellate Court failed to consider the provision of Order XLVII Rule 1 of the Code of Civil Procedure. The provision is quoted below:-

1. Application for review of judgment.-*(1) Any person considering himself aggrieved-*

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order

made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

*[**Explanation**.- The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment.]"*

Plain reading of the above provision shows that an aggrieved person may prefer a review of the Judgement from which an appeal is allowed but no appeal has been preferred on certain grounds, *viz.,* (i) discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time of trial of the suit, (ii) on account of mere mistake or error apparent on the face of the record and (iii) for any other sufficient reason.

Therefore, the appellant's remedy to challenge a Judgement passed in a suit by preferring a review is always available even against a Judgement and Decree against which an appeal shall clearly lie subject to the conditions stated above. The appellant acted under the instruction of his learned Advocate. Step taken by a litigant on the advice of the learned Advocate resulting any delay in preferring the appeal is a sufficient ground for condonation of delay.

The learned Judge in the First Appellate Court in his impugned order failed to appreciate the provision contained in Section 14 of the Limitation Act. The specific Act of the

appellant by taking step for review of the Judgement passed by the Trial Court should be treated as *bona fide* Act of the appellant in Court even assuming without jurisdiction.

The Hon'ble Supreme Court in **Collector, Land Acquisition, Anantag & Anr. vs. Mst. Katiji & Ors.** reported in **(1987) 2 SCC 107** observed that the legislature has conferred the power to condone delay by enacting Section 5 of the Limitation Act in order to enable to Courts to do substantial justice to parties by disposing of matters on merit. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the Law in a meaningful manner which seb-serves the ends of justice – that being the life-purpose for the existence of the institution of Courts. 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.

In **Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy & Ors** reported in **(2013) 12 SCC 649**, the Hon'ble Supreme Court has culled out the following principles while deciding an application for condonation of delay:-

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 haphazard 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, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters.

The same principle is reiterated by the Apex Court in **GMG Engineering Industries & Ors. vs. ISSA Green Power Solution & Ors.** reported in **(2015) 15 SCC 659**.

In **State of West Bengal vs. Howrah Municipality** reported in **AIR 1972 SC 749**, it was held that if a party acts in a particular manner on a wrong advice given by his legal adviser, delay can be condoned.

This Court in **Shalini Poddar vs. V.C.K Share and Stoke Broking Services Limited** reported in **AIR 2007 NOC 677 (Cal)** held that delay in filing appeal occasioned due to advice/action of the erstwhile advocate who was appointed for taking steps should be condoned. Because, the appellants were bona fide in their approach and had reposed faith in him. Under the facts and circumstances of the case, this Court held that the sufficient cause was made out by the appellant to condone the delay.

In view of the above discussion, I have no other alternative but to hold that the learned District Judge, North 24-Parganas at Alipore substantially erred in law in rejecting the application for condonation of delay under Section 5 of the Limitation Act in preferring Title Appeal No. 66 of 2006.

Accordingly, the order passed by the learned District Judge, North 24-Parganas at Barasat upon an application under Section 5 of the Limitation Act is set aside and the instant appeal is **allowed**. In view of the Judgement passed by this Court in the instant appeal the learned District Judge, North 24-Parganas at Barasat is directed to register Title Appeal No. 66

of 2006 to his file and dispose of the same on merit expeditiously and preferably within six months from the date of communication of the order and receipt of Lower Court Record.

A copy of this Judgement be circulated to the learned Judicial Officers through the District Judge of the respective Districts through the learned Registrar General, High Court, Calcutta for information with a caution that the First Court of Appeals should not take such type of slipshod manner to dispose of an appeal without considering the merit of the same.

However, it is made clear that the learned Judges in the District Judiciary shall dispose of the applications under Section 5 of the Limitation Act on the facts and circumstances of each and every case placed by the petitioner before them.

(Bibek Chaudhuri, J.)

Srimanta
A.R.(Court)