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THE HIGH COURT OF MADHYA PRADESH
Civil Revision No.90/2015
Rajeev Singh Vs. Ram Singh and others

Gwalior, Dated :11/09/2019

Shri K.S. Tomar, Senior Advocate with Shri J.S. Kaurava,
Advocate for applicant.

Shri Santosh Agrawal, Advocate for respondent no.1.

Shri Tej Singh Mahadik, Advocate for respondent no.3.

This Civil Revision under Section 115 of CPC has been filed against the order dated 15/9/2015 passed by the Second Additional District Judge, Gwalior in MJC No.50/2013, thereby rejecting the application under Section 5 of the Indian Limitation Act, as a consequence thereof, the application under Order IX Rule 4 read with Section 151 of CPC was also dismissed.

2. The necessary facts for disposal of the present revision in short are that the applicant had filed a suit for specific performance of contract. The said suit was decreed *ex parte* by judgment and decree dated 15/5/1998. The respondent/defendant filed an application for setting aside the *ex parte* decree, which was rejected. The order of rejection was challenged by the respondent by filing Miscellaneous Appeal before this Court and during pendency of the said appeal, the respondent/defendant Ram Singh expired on 29/4/2004 and his legal representatives were brought on record, however, prior to his death it is alleged that Ram Singh had executed a sale deed in favour of

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respondents no.2 and 3 and, therefore, they were also impleaded as parties. The appeal filed by Ram Singh, which was further prosecuted by his legal representatives, was allowed by the High Court by order dated 29/1/2009 and the *ex parte* decree passed in favour of the applicant was set aside.

3. Thereafter, an application under Order XXII Rule 4 read with Order XXII Rule 10 CPC was filed before the trial court for impleading the legal representatives of deceased Ram Singh on record. Although the legal representatives Sanjiv Singh, Smt. Vimla, Smt. Arpana and defendants no.2 and 3/respondents no.2 and 3 appeared before the trial court, but the remaining legal representatives of deceased Ram Singh did not appear, as result of which, the trial court directed for service of notice on Smt. Arun and Smt. Uma Bais by publication. However, the applicant did not pay the process fee and, therefore, by order dated 1/2/2010 the suit was dismissed under Order IX Rule 2 CPC.

4. Thereafter, an application under Order IX Rule 4 CPC was filed alongwith an application for condonation of delay.

5. In the application for condonation of delay it was mentioned that on 1/2/2010 the suit was dismissed under Order IX Rule 2 CPC, however, the applicant came to know about the dismissal of the suit for the first time on 13/4/2013 and accordingly, he filed an

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application for obtaining certified copy, which was received on 22/4/2013 and because of the death of father-in-law of the counsel for the applicant, he went outside and after he returned back, an application for restoration under Order IX Rule 4 CPC was filed on 30/4/2019 alongwith an application under Section 5 of the Limitation Act.

6. The application was opposed by the respondent.

7. The trial court by impugned order dated 15/9/2015 has dismissed the application filed under Section 5 of the Indian Limitation Act and as a consequence thereof, has dismissed the application filed under Order IX Rule 4 read with Section 151 of CPC.

8. Challenging the order passed by the court below, it is submitted by the counsel for the applicant that it is well established principle of law that while considering the application for condonation of delay, the courts must adopt a lenient view and should not adopt a hyper-technical view and every attempt should be made to decide the *lis* on merits. In support of his contentions, the counsel for the applicant has relied upon the judgments passed by the Supreme Court in the case of **G.P. Srivastava vs. R.K. Raizada and others** reported in **(2000) 3 SCC 54, A B E Marine Products Pvt.**

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Ltd., v. Indian Bank and others reported in AIR 1999 Calcutta 267 and **The Lakshmi Commercial Bank Ltd. v. Hans Raj Sayal and others** reported in AIR 1981 Punjab and Haryana 228.

9. *Per contra*, it is submitted by the counsel for the respondents that the trial court did not commit any mistake in rejecting the application filed under Section 5 of the Limitation Act and as a consequence thereof, the application under Order IX Rule 4 CPC has also been rightly rejected.

10. Heard learned counsel for the parties.

11. It is well established principle of law that while deciding the application under Section 5 of the Limitation Act, the Court should not adopt a hyper-technical view and the application should be considered by adopting a lenient view, so that the *lis* can be decided on merits and the dispute between the parties should not be thrown out by adopting a hyper-technical view.

12. If the grounds raised by the applicant in his application under Section 5 of the Limitation Act are considered, then it is clear that the suit was dismissed under Order IX Rule 2 CPC on 1/2/2010 and the application under Order IX Rule 4 CPC was filed on 30/4/2013. In the application filed under Section 5 of Limitation Act the applicant has merely mentioned that he came to know about the dismissal of

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the suit on 13/4/2013, i.e. after expiry of more than three years and two months. Except the above explanation, no other explanation has been given as to why the applicant was keeping silent for a period of three years and two months. From the impugned order, it appears that a submission was made by the counsel for the applicant that the earlier counsel, namely, Shri Deepak Sharma had assured the applicant that he should not unnecessarily bother about the suit, as his presence on each and every date is not necessary and whenever the presence of the applicant is required, he would inform him, however, no information was given by his earlier counsel. It is clear from the application filed under Section 5 of the Limitation Act that no such averment has been made. The application under Section 5 of the Limitation Act was supported by an affidavit of the applicant, whereas the submissions which were made by the counsel for the applicant before the trial court were *de hors* the pleadings of the applicant. When the applicant in his application under Section 5 of the Limitation Act had not pleaded that he was assured by his earlier counsel that his presence is not required and he will inform as and when required, then any submission made by the counsel for the applicant during the course of arguments cannot be treated as the statement of the applicant, but at the most it can be treated as an afterthought statement made by the counsel himself. Under the Bar

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Council of India Rules the counsel has to act on the instructions of his party. Any statement made by the counsel without there being any factual foundation, cannot be said to be a statement on the instructions of the party and if the counsel wants to substitute his own submission, then it would amount to travelling beyond the authority given by his party by executing a Vakalatnama. Therefore, the verbal submissions made by the counsel for the applicant before the trial court to the effect that the applicant was instructed by his earlier counsel that he would be informed as and when required, cannot be accepted. Thus, it is clear that there is absolutely no ground in the application filed under Section 5 of the Limitation Act explaining the delay of three years and two months. When no explanation has been given by the applicant, then the Court cannot substitute its reasoning under the garb of lenient view. First of all it is for the party to raise a contention and only then, the Court would come in picture to consider that contention. When there is no contention at all, then there is no question of any interpretation.

13. This Court in the case of **Lokpal Singh v. Matre and others** reported in **2019 (I) MPWN 27** has held as under:-

“.....Being the plaintiffs, it was the duty of the appellants to keep a track of their civil suit and in view of the fact that nowadays everybody is having a mobile phone and they have full technical

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facilities to contact their counsel even on mobile and having failed to do so, this Court is of the considered opinion that the appellants have failed to make out any good reason before the appellate court for condonation of delay in filing the appeal. Accordingly, this Court is of the considered opinion that the appellate court did not commit any mistake in rejecting the application filed by the appellants under Section 5 of the Indian Limitation Act.”

14. Under these circumstances, this Court is of the considered opinion that even after adopting a lenient view, no favour can be shown to the applicant, who has failed to make out any case for condonation of delay under Section 5 of the Limitation Act.

15. Under these circumstances, this Court is of the considered opinion that the trial court did not commit any mistake in rejecting the application filed under Section 5 of the Limitation Act for condonation of delay in filing the application under Order IX Rule 4 CPC.

16. Accordingly, the order dated 15/9/2015 passed by the Second Additional District Judge, Gwalior in MJC No.50/2013 is hereby affirmed.

17. The Civil Revision fails and is hereby **dismissed**.

Arun*

(G.S. Ahluwalia)
Judge