

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Revisional Jurisdiction)

DATED : 28th DECEMBER, 2017

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

I.A. No.01 of 2017 in CRP No.02 of 2017

Petitioner : Smt. Bishnu Maya Rai,
W/o Shri Bibi Man Rai,
R/o Meyong,
Kaluk, West Sikkim.

versus

Respondents :

1. Dr. Rameshwar Prasad,
S/o Late B. Prasad,
R/o M. G. Marg,
Gangtok, East Sikkim.
2. Dr. Jogendra Prasad,
S/o Late B. Prasad,
R/o M. G. Marg,
Gangtok, East Sikkim.
3. Dr. Sanjeev Kumar Prasad,
S/o Late B. Prasad,
R/o M. G. Marg,
Gangtok, East Sikkim.
4. The Chief Secretary,
Government of Sikkim,
Gangtok, East Sikkim.
5. The Secretary,
Urban Development and Housing Department,
Government of Sikkim,
Gangtok, East Sikkim.
6. The Secretary,
Land Revenue and Disaster Management Department,
Government of Sikkim,
Gangtok, East Sikkim.
7. The District Collector,
East District Administrative Centre,
Sichey, Gangtok,
East Sikkim.
8. Smt. Sarawati Prasad,
W/o Late Mahesh Prasad,
R/o Souvenir Shop,
R/o M. G. Marg,
Gangtok, East Sikkim.

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9. Smt. Laxmi Devi,
W/o Late Biswanath Prasad,
R/o next to Trivedi Store,
Singtam Bazaar,
P.O. & P.S. Singtam,
East Sikkim.

Application under Section 5 of the Limitation Act, 1963

Appearance

Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri and Ms. Malati Sharma, Advocates for the Petitioner.

Mr. Sudhir Prasad, Advocate for Respondent No.1.

Mr. B. Sharma, Senior Advocate with Mr. Sajal Sharma, Advocate for the Respondents No.2 and 3.

Mr. Karma Thinlay, Senior Government Advocate with Mrs. Pollin Rai, Assistant Government Advocate for the State-Respondents No.4 to 7.

Ms. Bandana Pradhan, Advocate for Respondent No.8.

None for the Respondent No.9.

O R D E R

Meenakshi Madan Rai, J.

1. By filing I.A. No.01 of 2017, the Petitioner herein, seeks condonation of delay of 127 days in filing the Revision Petition.

2. The delay, it is explained, was inadvertent, having arisen on account of a wrong choice of Forum. That, the Learned Civil Judge, East Sikkim, at Gangtok, passed an Order dated 28-07-2016, in Title Suit No.12 of 2014, after hearing the preliminary issues on *res judicata* and Order II Rule 2 of the Code of Civil Procedure, 1908 (for short "CPC") and dismissed the issues. Seeking to assail this Order, the Petitioner approached the Court of the Learned Special Division – I, East Sikkim, at Gangtok, by filing

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an Appeal, registered as Title Appeal No.02 of 2016. That, the error of wrong Forum, remained unnoticed by the Petitioner and the Court till an objection was raised by the Respondents No.2 and 3, which resulted in withdrawal of the Appeal and the filing of the Revision Petition herein. That, the aforesaid circumstance was due to a *bona fide* error on the part of the Counsel for the Petitioner, hence, the delay that has occurred due to the wrong choice of Forum, be condoned and the Revision Petition be heard in the interest of justice. The prayers were garnered with support from the ratio in **Balbir Singh vs. Bogh Singh**¹.

3. Refuting the prayer for condonation of delay, the Respondent No.1 filed a written objection stating, *inter alia*, that the Petitioner had based her claims on manipulated land records, obtained with the help of the Officials of the Respondent No.7 and thereby Judgment had been pronounced in her favour right from the Trial Court to the Hon'ble Supreme Court. That, the Respondents No.5, 6 and 7 by a Petition before the Court of the Learned Civil Judge, East Sikkim, at Gangtok, now seek a spot verification of the disputed site by appointment of a Commission, which is being resisted by the Petitioner, as she is trying to conceal the forgeries carried out by her. That, the Petitioner is adopting all measures to keep the matter pending before the Learned Trial Court, which cannot be termed as "a *bona fide* mistake". That, the Petitioner had filed the Appeal to mislead the Court of the Learned District Judge, Special Division – II, East Sikkim, at Gangtok. Hence, the Petition

¹ (1974) 1 SCC 854

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being devoid of merit, be dismissed with costs. No verbal arguments were put forth by Counsel for Respondent No.1.

4. Respondents No.2 and 3 filed no written objection, but while advancing his verbal submissions, Learned Senior Counsel in sum and substance supported the averments made by the Respondent No.1 pertaining to manipulation of documents by the Petitioner. Respondents No.2 and 3 also reiterated the stand of the Respondent No.1, that, he seeks spot verification of the disputed area. It was urged that the Respondents No.2 and 3 had raised objection, *inter alia*, that the Appeal before the Learned District Court was not maintainable, but this was contested by the Petitioner before the Learned District Court with the contention that the Learned Civil Judge, East Sikkim, at Gangtok, had drawn up a Decree in pursuance of the Order. That, the Petitioner seeks to delay the trial before the Learned Trial Court by filing this Revision Petition and as the delay has not been satisfactorily explained, the Petition deserved to be dismissed *in limine*. Strength was drawn from the decisions in ***Taktuk Bhutia @ T. T. Bhutia vs. M/s. Pure Coke and Others***²; ***Smt. Mala Rai vs. Shri Bal Krishna Dhamala***³; ***Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and Others***⁴ and ***Basawaraj and Another vs. Special Land Acquisition Officer***⁵.

5. Respondents No.4 to 8 had no response to file nor were verbal submissions advanced.

² 2017 (178) AIC 339 (Sikkim) : SLR (2017) Sikkim 81

³ Review Pet. No.01 of 2017 and I.A. No.01 of 2017 passed by the Division Bench of this Court on 18-05-2017

⁴ (2013) 12 SCC 649

⁵ (2013) 14 SCC 81

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6. The submissions of Learned Counsel for the parties were heard in extenso and have been given due consideration. I have also perused the documents on record.

7. The facts, as apparent from the averments, is that, on 25-01-2008 the Government of Sikkim allotted an area of 520 sq.ft. to the Petitioner and duly registered the same on 28-01-2008. On 25-04-2011, an additional allotment of 190 sq.ft. was made in favour of the Petitioner. The Petitioner thereafter unauthorisedly constructed a cantilever and staircase and sought for regularisation of the unauthorised construction measuring 119 sq.ft. The Government regularised the construction of the cantilever, while regularisation of the constructed staircase is pending. The Respondents No.1, 2 and 3 herein, filed a Suit for declaration, cancellation, quashing of documents, injunction and consequential reliefs against the Petitioner and the Respondents No.4 to 8 which was registered as Title Suit No.15 of 2008 before the Learned District Judge, East Sikkim, at Gangtok. On transfer of the Suit to the Court of the Learned District Judge, Special Division II, East Sikkim, at Gangtok, it was re-numbered as Title Suit No.02 of 2010. This Suit (i.e., Title Suit No.02 of 2010) was dismissed by the Court of the District Judge, Special Division II, East Sikkim, at Gangtok. An Appeal was preferred against the dismissal, before this Court, which vide its Judgment, dated 30-06-2011, in RFA No.02 of 2011, dismissed the Appeal. Aggrieved, the Respondents No.1, 2 and 3 filed a Special Leave Petition (Civil) No.24765 of 2011 before the Hon'ble Supreme Court which was dismissed in *limine*.

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8. Consequent to the above dismissals, the Respondents No.1, 2 and 3 again filed a Suit for declaration, cancellation of documents, injunction and other consequential reliefs against the Petitioner and the Respondents No.4 to 8, being Title Suit No.15 of 2012, in the Court of the Learned District Judge, East Sikkim, at Gangtok. The Learned District Judge framed preliminary issues on 24-06-2013, being, (i) *Whether the Suit is barred by res judicata?* (ii) *Whether the present Suit is barred by the provisions of Order XI Rule 2 of the CPC in view of Title Suit No.02 of 2010 having been finally decided?* Evidently, this matter was transferred to the Court of the Learned Civil Judge, East Sikkim, at Gangtok, and re-numbered as Title Suit No.12 of 2014. The Learned Court heard the parties on preliminary issues on 04-05-2016 and after more than two and half months of the conclusion of the hearing, passed the impugned Order dated 28-07-2016, dismissing both preliminary issues.

9. Aggrieved by such dismissal, the Petitioner filed Title Appeal No.02 of 2016 before the Court of the Learned District Judge, Special Division – I, East Sikkim, at Gangtok, on 27-08-2016. On 29-11-2016, the Respondents No.2 and 3 filed an Application under Section 96 and Order XLI Rules 1 and 2 of the CPC challenging the maintainability of Title Appeal No.02 of 2016 to which the Petitioner filed her response. After the objection was raised by Learned Counsel for Respondents No.2 and 3 Petitioner's Counsel realised that the impugned Order of the Learned Civil Judge was not an appealable Order. Accordingly, an Application for

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withdrawing the Title Appeal No.02 of 2016 from the Court of the Special Division – I, East Sikkim, at Gangtok, was filed and allowed. Hence, the choice of a wrong Forum was unintentional and on account of a *bona fide* mistake of Learned Counsel for the Petitioner, pursuant to which the Revision Petition with a prayer for condonation of delay has been filed.

10. To address the issue concerning the delay, Learned Senior Counsel for the Petitioner has candidly admitted that the delay occurred on account of the erroneous choice of Forum evidently on a mis-conception of the Law. For his part, Learned Senior Counsel for the Respondents No.2 and 3 has placed reliance on the ratio of this Court in ***Mala Rai (supra)*** and ***Taktuk Bhutia (supra)*** seeking dismissal of the Petition. In ***Mala Rai (supra)***, it is seen that the Court after considering the delay of 211 (two hundred and eleven) days was of the view that the application for condonation of delay had failed to make out “sufficient cause”, inasmuch as the grounds urged therein were that the Petitioner being an uneducated house wife was unaware of the provision for review of Judgment dated 06-06-2017, pronounced by the Division Bench of this Court in Mat.App. No.01 of 2015. Consequent to awareness dawning, the delay occurred as the Counsel was approached in the month of December, 2016, but due to the intervening Winter Vacation the Review Petition could not be filed. It was pointed out by this Court that it is common knowledge that during Winter Vacation the Registry remains open for the purposes of filing, apart from the fact that she had been provided with Legal

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Aid Counsel in her earlier litigation being an Appeal before this Court. On these considerations, the Petition was dismissed. In ***Taktuk Bhutia*** (*supra*) this Court after considering the Petition for condoning delay of 98 (ninety eight) days, relied on the decision of ***Esha Bhattacharjee*** (*supra*) more appropriately on Paragraph 15 of the Judgment which culled out the broad principles for condonation of delay and concluded that the grounds put forth by the Petitioner did not merit consideration as it was evident that no attention had been paid to the drafting, the delay calculated was erroneous and above all, no reasons even on a week to week basis for the delay had been placed before the court, giving the impression that the Court was being taken for granted. It was observed that the Petition cannot be dealt with in a routine manner as the interest of not only the Petitioner, but the Opposite Party was also to be borne in mind and the grounds for delay taken by the Petitioner fall short of the requirement of law, as "sufficient cause" for not taking steps on time was found to be lacking. The grounds in the matters *supra* are clearly distinguishable from the one at hand.

11. In the instant matter, it is evident that the Appeal wrongly or rightly was filed against the Order of the Learned Civil Judge, East Sikkim, at Gangtok, dated 28-07-2016, before the Appellate Forum within the period prescribed by Law. Thereafter, when the matter was fixed for hearing, on the objection of Respondents No.2 and 3, realisation dawned on Learned Counsel for the Petitioner that the Appeal before the Learned District Judge was

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indeed not maintainable, leading to the filing of the Revision Petition.

12. In ***Maniben Devraj Shah vs. Municipal Corporation of Brihan Mumbai***⁶ it was held that;

"24. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the 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."

[emphasis supplied]

13. In ***Esha Bhattacharjee (supra)***, the Hon'ble Supreme Court, *inter alia*, observed that 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.

14. On the bedrock of the principles in ***Esha Bhattacharjee (supra)*** when the prayers of the Petitioner are examined, it can indeed be concluded that definitely there has been no negligence on the part of the Petitioner. The error committed has been admitted, which arose on account of a misconception of the Law and no negligence issues. I am satisfied that the Petitioner has "sufficient cause" there being no deliberate causation of delay and the grounds are *bona fide*. In any event, it be unfair to allow the Petitioner to suffer on account of any error committed by her Counsel as substantial justice should be accorded paramount consideration.

⁶ (2012) 5 SCC 157

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- 15.** Resultant, the Petition is allowed.
- 16.** Delay condoned.
- 17.** I.A. No.01 of 2017 stands disposed of accordingly.

Sd/-
(Meenakshi Madan Rai)
Judge
28-12-2017

Approved for reporting : **Yes**

Internet : **Yes**