

GAHC040006762023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

R.S.A. No.04(AP)/2023

1. **GTL Infrastructure Limited,**
3rd Floor, Mayur Garden, Opposite
Rajiv Bhawan, ABC Bus Stop,
Bhangagarh, G.S. Road, Guwahati-
781005, Assam.

2. **GTL Infrastructure Limited,**
3rd Floor, Global Vision, Electronic
Sadon-II, MIDC TTC Industrial Area,
Mahepa, Navi Mumbai, 400710,
India.

...APPELLANTS

-VERSUS-

1. **Smti. Omang Darang,**
W/o Sri Tagom Darang,
Resident of P.O & P.S. Pasighat,
District East Siang, Arunachal Pradesh.

2. M/S Dishnet Wireless Limited

5th Floor, Spencer Plaza, 769, Anna
Salai, Chennai-600002, Tamil Nadu.

....RESPONDENTS

Advocates for the petitioner : Mr. B. Kaushik, Id.Adv.

Advocates for the respondent : Ms. S.V. Darang, Id. Adv.

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 08.08.2023
Date of Judgment & Order : 29.09.2023

JUDGMENT & ORDER (CAV)

Heard Mr. B. Kaushik, learned counsel for the appellants. Also heard Ms. S. V. Darang, learned counsel representing the respondent No.1.

2. This is an appeal filed under Section 100 *read with* Order 42 Rule 1 and Order 41 Rule 1 & 2 of the Code of Civil Procedure, 1908, challenging the Order dated 06.05.2023 passed by the District & Sessions Judge, Pasighat, East Siang District, Arunachal Pradesh in PSG Misc. Appl.No.19/2023 arising out of PSG Misc.(C) No.07/2023 in PSG Title Appeal No.01/2023.

3. The brief facts leading to the filing of the present appeal is that; the

respondent No.1 as a plaintiff instituted a Title Suit being T.S. No.17/2020 before the Court of learned Civil Judge (Sr.Division) Pasighat, East Siang District, Arunachal Pradesh praying for degree of eviction/ejection of the defendants from her land and also for imposing a cost of Rs. 50,000/-(Rupees Fifty thousand) only along with any other relief as entitled under the law and equity against the present appellants. The present appellant Nos. 1 & 2 as a defendant Nos. 2 & 3 also contested the case and filed Misc. application No.16/2022 under Section 5 *read with* Section 8 of the Arbitration & Conciliation Act, 1996 for referring the said suit before the Arbitration Forum by taking recourse to point 6.2 of the Lease Deed dated 01.12.2007 entered between the parties. However, after hearing both the parties vide Order dated 04.11.2022 dismissed the aforesaid Misc. application. Thereafter, the Court of learned Civil Judge (Sr.Division) Pasighat, East Siang District in T.S. No.17/2020 passed the Judgment and Decree dated 28.11.2022, and operative part of the decree is *"the suit of the plaintiff/present respondent No.1 is decreed on admission with cost as prayed for. The Defendant Company is liable to be ejected from the land of the plaintiff located at Mir Chariali, Pasighat, East Siang District. The Defendant Company is also permanently restrained from disturbing the possession of the plaintiff in any form whatsoever"*.

4. Against said Judgment, Order & Decree dated 28.11.2022, the present appellants/defendant Nos.2 & 3 preferred an appeal before the Court of learned District & Sessions Judge, Pasighat, East Siang District, which is numbered as R.F.A. No.01/2023 arising out of T.S. No.17/2020. As stated above, the appellants/defendant Nos. 2 & 3 had filed a Misc. application No.16/2022, which was dismissed and thereafter the appellant also filed an application being Misc. Case No.17/2022 praying for keeping in abeyance the filling of the written

statement in the instant suit till the disposal of the application filed under Section 5 read with 8 of the Arbitration and Conciliation Act, 1996. Also, an Interlocutory Application being I.A.(Civil) No.07/2023 has been filed in RFA No.01/2023 praying for condonation of delay of 27 days in preferring the instant appeal arising out of the Judgment, Order & Decree dated 28.11.2022 passed by the learned Civil Judge (Sr. Division), Pasighat. But, the PSG Misc. Application No.07/2023 was dismissed for default on 22.03.2023, and the connected Title Appeal No.01/2023 was also dismissed on dismissal of Misc. application for condonation of delay. Thereafter, Misc. (Civil) No.19/2023 was filed for restoration of the earlier Misc. application No.07/2023 along with PSG Title Appeal No.01/2023, but, vide order dated 06.05.2023 the said Misc. application for restoration of appeal was dismissed for default and the connected appeal also dismissed along with the Misc. application for non prosecution.

5. On being highly aggrieved and dissatisfied with the Order dated 06.05.2023 passed by the learned District & Sessions Judge, Pasighat, East Siang District, Arunachal Pradesh in PSG Misc. Application No.19/2023 arising out of PSG Misc. (Civil) No.07/2023 in PSG Title Appeal No.01/2023 dismissing the Misc.Case No.19/2023 for restoration of the same filed an application for condonation of delay which was also dismissed for non-prosecution and also dismissing the appeal without going into the merits of the case, thus, the appellants/defendant Nos.2 and 3 preferred the present second appeal on the following grounds:-

5.1. The learned Trial Court vide impugned order dated 06.05.2023 dismissed the application being numbered as Misc. application No.19/2023 filed by the appellants for restoration of the Misc. Case No.07/2023 which was dismissed for default for non-appearance of the counsel for the appellants without taking into

consideration that the appellants should not be made to suffer for default on the part of the engaged counsel failed to represent the appellants. And, as such, the order passed by the learned Trial Court is bad in law and same is liable to be set aside and reversed.

5.2. The learned Trial Court erred in dismissing the appeal for non-prosecution and ought to have disposed of the appeal on merit. As such the order passed by the learned Trial Court is bad in law and same is liable to be reversed by this Court.

5.3. The learned Lower Appellate Court vide order dated 28.02.2023 was pleased to fix the Misc. Case No.07/2023 on 22.03.2023 which was an application under Section 5 of the Limitation Act, 1963 for Condonation of delay of 27 days in filing the connected appeal. On the said date i.e. on 28.02.2023 the learned Counsel for both the parties were present. But, on 22.03.2023, the learned counsel for the appellant was absent and accordingly, considering the absence of the counsel, the Appellate Court dismissed the Misc.Case No.07/2023 as well as the T.A. No.01/2023 for non-prosecution vide order dated 22.03.2023. Further, the learned Appellate Court, vide order dated 06.05.2023 was pleased to dismissed the Misc. Application No.19/2023 for non prosecution, which was filed for restoration of Misc. Case No.07/2023 as well as T. A. No.01/2023. Under such circumstance, the learned Trial Court ought not to have dismissed the Misc. Cases, and as such the impugned order dated 06.05.2023 is bad in law and the same is liable to be set aside and quash.

5.4. The learned Trial Court ought to have given another opportunity instead of dismissing the Misc. application filed by the appellants and thus, the impugned order passed by the learned Trial Court dated 06.05.2023 dismissing the Misc.

application along with Title Appeal is bad in law and same is liable to be set aside and quashed.

6. In the present appeal, it is seen that the notice was issued to the respondent side before admitting the appeal without hearing the appellants on substantial question of law. The respondents' side appeared on receipt of the notice and hence, the appeal was heard on admission hearing in presence of the respondents. Thus, the Court did not frame any substantial questions of law prior to the issuance of notice to the respondents' side. However, the substantial question of law has been formulated by the appellants, which are as follows:-

A). Whether the First Appellate Court erred in law in dismissing the Misc.App. No.19/2023 vide order dated 06.05.2023 under Order IX Rule 8 CPC wherein the respondents also had not appeared on 06.05.2023.

B). Whether the First Appellate Court can dismiss the Misc. Ap.No.19/2023 for non-prosecution whereas there is a specific provision under Order IX Rule 8 C.P.C.

C). Whether the First Appellate Court can dismiss the appeal without going into the merits of the case and without perusing the materials available in records.

D). Whether the First Appellate Court failed to apply the principles of 'party should not suffer due to fault of the counsel' while dismissing the Misc.App. No.19/2023 vide impugned Order dated 06.05.2023.

7. So the main substantial question of law is that; "as to whether the First Appellate Court can dismiss the appeal for non prosecution without going to the merit of this case and without perusing the material available on record."

8. In this regard, the learned counsel for the appellants, Mr. B. Kaushik has submitted that the learned Lower Appellate Court had dismissed the appeal only on the ground of non-prosecution and without going into the merits of the appeal, which is not legally tenable and hence, the order of dismissal is liable to be set aside and quash. He also submitted that the learned Appellate Court had not considered the prayer for remanding the matter before the Arbitration Forum and arrived at a wrong conclusion that the present appellants as a defendants admitted the Deed of Lease dated 01.12.2007 and accordingly, decreed the suit on admission with cost as prayed for, by directing the present appellants to vacate the land of the plaintiff/present respondent No.1 and also permanently restrained from disturbing the possession of the plaintiff land in any manner.

9. In this context, the learned counsel for the respondent No.1, Ms S. V. Darang has submitted that the substantial question of law, which has been formulated by the appellants, cannot be considered as a ground to admit the present appeal, which had been dismissed for default in two earlier occasions. She also submitted that the dismissal of an appeal cannot be a ground for the second appeal and hence, the present appeal cannot be admitted on the ground of substantial question of law as formulated by the appellants. She, further relies on the Judgment & Order passed by the ***Co-ordinate Bench in RSA No.56/2008***, wherein, the Court had discussed, "what is the substantial question of law" by relying the decision passed by the ***Hon'ble Supreme Court in the Case of State Bank of India & Ors Vs. S. N. Goyal reported in 2008 (8) SCC 92***, which dealt with the procedural aspect relating to second appeal.

10. Per contra, the learned counsel for the appellants has submitted that the dismissal of an appeal can also be a ground for second appeal as the dismissal order passed by the learned Appellate Court has upheld the judgment of the Trial Court, and thus, dismissal also can be a ground for second appeal and the substantial question of law which are formulated along with the Memo of Appeal are the good grounds to admit the second appeal. He further submitted that the dismissal was only due to default of the Advocate, who were entrusted by the parties and only for fault of the Advocate the party should not be suffered. He accordingly relies on the decision passed by the Hon'ble Supreme Court in the Case of ***Rafiq & Anr. Vs. Munshilal & Anr.*** reported in ***1981(0) AIR SC 1400 passed in Civil Appeal No.1415 of 1981 (arising out of S.L.P (C)No.1406 of 1981)***, wherein, he mainly stressed in paragraph-3 of the said Judgment's, which read as under:-

”Para-3; The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his

advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanor of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K.Sanghi.”

11. After hearing the submissions made by the learned Advocates of both sides, I have perused the orders passed by the learned Trial Courts as well as the substantial question of law which are annexed along with the Memo of Appeal. So, the only point to determine in this case, as to whether, the dismissal of an appeal can also be a ground for admitting a second appeal.

12. In the instant case, it is seen that the present appellants as a defendant contested the T. S. No.17/2020 filed by the respondent No.1 as a plaintiff and accordingly, the defendant/present appellants had preferred an appeal against the said decree on admission passed by the learned Civil Judge (Sr.Division), Pasighat, East Siang District along with a petition for condonation of delay for preferring the said appeal before the learned District & Sessions Judge, Pasighat, East Siang District. But, before admitting the appeal by condoning the delay of 27 days, the said Misc. application for condonation of delay was dismissed due to non-prosecution and accordingly, in view of dismissal of the

said application for limitation the connected appeal was also dismissed.

13. Further, it is seen that after dismissal of said Misc. application, the appellants also preferred the petition for restoration of earlier Misc. application for condonation of delay, but, due to non-appearance/non-prosecution the subsequent Misc. application for restoration of the application for condonation of delay was also dismissed by the learned District & Sessions Judge, vide order dated 06.05.2023. Thus, it is seen that, it is not a case where appeal was dismissed for non prosecution after admission of the same without considering the merit of the appeal. But, it is a case where the appeal had to be dismissed by the learned District & Sessions Judge, Pasighat, East Siang District, as the appeal could not be admitted due to non prosecution of petition filed under Section 5 of the Limitation Act for condonation of delay of 27 days in preferring the said appeal.

14. Though, the appeal was dismissed for non-prosecution of the connected application filed under Section 5 of the Limitation Act as well as the restoration petition, but, such dismissal when it confirms the decision of the trial Court on merits, itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal.

15. In this regard, the ratio laid down by the ***Three Judges Bench in the case of Shyam Sunder Sarma Vs. Pannalal Jaiswal & Others reported in AIR 2005 SC 226*** , wherein, it has been held that the - Delay in filing - Dismissal of application for condonation of delay - Consequential dismissal of appeal on refusal to condone the delay – Is nevertheless a decision in appeal. Paragraphs 9 and 10 of the said judgment, are read as under;-

“9. The specific question involved, came to be considered by this Court in [Messrs Mela Ram and Sons vs. The Commissioner of Income Tax, Punjab](#) (1956 SCR 166). This Court held that an appeal presented out of time is an appeal and an order dismissing it as time barred is one passed in an appeal. This Court referred to and followed the view taken by the Privy Council and by this Court in the two respective decisions above referred to. This Court quoted with approval the observations of Chagla C.J. in [K.K. Porbunderwalla vs. Commissioner of Income Tax](#) (1952) 21 ITR 63) to the following effect:

".... Although the Appellate Assistant Commissioner did not hear the appeal on merits and held that the appeal was barred by limitation his order was under [Section 31](#) and the effect of that order was to confirm the assessment which had been made by the Income-tax Officer."

[In Sheodan Singh vs. Daryao Kunwar](#) (AIR 1966 SC 1332) rendered by four learned Judges of this Court, one of the questions that arose was whether the dismissal of an appeal from a decree on the ground that the appeal was barred by limitation was a decision in the appeal. This Court held:

"We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits, itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal."

[In Board of Revenue vs. M/s Raj Brothers Agencies Etc.](#) (1973 (3) SCR 492), this Court approved the decision of the Madras High Court which had applied the principle stated in Messrs Mela Ram and sons (supra).

10. The question was considered in extenso by a Full Bench of the Kerala High Court in [Thambi vs. Mathew](#) (1987 (2) KLT 848). Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3A of Order XLI introduced by [Amendment Act 104 of 1976 to the Code](#), did not in any way affect that principle. An appeal registered under Rule 9 of Order XLI of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal."

16. In the instant case also the appeal was filed before the learned District & Sessions Judge, Pasighat, East Siang District in T.A. No.01/2023, which was dismissed along with the application for condonation of delay and subsequently, the petition for restoration of the said petition was also dismissed due to default and such dismissal also otherwise confirms the decision of the Trial Court dated 28.11.2022.

17. Thus, in view of the decision of the Hon'ble Surpeme Court, it is seen that the present second appeal is filed under Section 100 *read with* Order 42 Rule 1 and Order 41 Rule 1 & 2 of CPC, which is maintainable. However, there was no scope for dismissing the appeal on merit by the learned Civil Judge (Sr.Division) as the petition for condoning the delay was dismissed for non-prosecution and the appeal filed against the Decree was not admitted for hearing. And, in the said circumstances, the Court cannot dispose the appeal on merit as the appeal was not even admitted for hearing by condoning the delay.

18. In view of above findings, the second appeal is maintainable even on the ground of dismissal on first appeal in any technical aspect or for non-prosecution or refusal to condone the delay.

19. Considering the same, the substantial question of law is decided in favour of the appellants and accordingly the order passed by the learned District & Sessions Judge, Pasighat, East Siang District, Arunachal Pradesh in PSG Misc. Appl.No.19/2023 arising out of PSG Misc.(C) No.07/2023 in PSG Title Appeal No.01/2023 dated 06.05.2023 are set aside and remand the same for passing fresh Judgment and Order. The learned First Appellate Court shall dispose of the said matter after hearing the parties afresh preferably within a period of six months from the date of receipt of the Order and LCR. It is also pertinent to

mention herein that the learned First Appellate Court will issue notice to the parties concerned fixing a date for hearing within one month from today.

20. This second appeal is accordingly disposed of. Send back the case record immediately.

21. Let a copy of this order be furnished to the learned Trial Court.

JUDGE

Comparing Assistant