

**HIGH COURT OF TRIPURA
AGARTALA
RFA 05 of 2023**

Abdul Wahid through his L.Rs :

1a. Md. Taj Uddin (Son)

of West Batarashi, P.O. Rajbari,
Dharmanagar, North Tripura

1b. Mst. Salma Khatun (Daughter),

wife of Jair Uddain @ Jair Ali
of Durgapur, P.O. Rajbari,
Dharmanagar, District- North Tripura

1c. Mst. Howarun Nechha,

wife of Late Abdul Wahid
of West Batarashi, P.O. Rajbari,
Dharmanagar, North Tripura

1d. Md. Abdul Kadir,

Son of Late Abdul Wahid
of West Batarashi, P.O. Rajbari,
Dharmanagar, North Tripura

Abdul Matilib through his L.Rs :

2a. Md. Sonai Mia (Son)

2b. Md. Nazrul Islam (Son)

2c. Md. Rahel Uddin (Son)

2d. Md. Fakrul Islam (Son)

2e. Rayna Bagam (Daughter)

wife of Abdul Hasib

2f. Mst. Astarun Nessa (Wife)

all Sl. No.1 to 6 are residents of
Village West Batarashi, P.O. Rajbari,
Dharmanagar, North Tripura

2g. Mst. Bagam Bibi (Daughter)

wife of Inus Mia
of Village & P.O. Bhagyapur,
P.S. Dharmanagar

2h. Mst. Rashna Begam (Daughter),

wife of Abdul Ajid
of Village Latugaon, P.O. Dhupirband,
Lal Bherra, PS. Dharmanagar,
District- North Tripura

2i. Restana Bagam (Daughter),
wife of Rakman Ali
of Village & P.O. Churaibari,
District- North Tripura

*** In compliance with the Hon'ble Court's order dated 20.07.2023
passed in I.A. No.02/2023 in C/W RFA 05/2023, the legal
representatives of appellant No.(3) Lt. Md. Abdul Awal Ali has been
substituted as follows :

3. ***
wife of late Hazi Manajir Ali

3(a) Ms. Hasnara Begam,
wife of late Md. Abdul Awal Ali,

3(b) Md. Sahajhan Ali

3(c) Md. Jamal Ahmed

3(d) Md. Joynal Abedin

all are sons of Late Md. Abdul Awal Ali

3(e) Ms. Khalida Parvin,
daughter of Late Md. Abdul Awal Ali

all are residence of West Batarashi,
P.O. Rajbari, P.S. Dharmanagar, North Tripura

4a. Sarful Alam

4b. Tahid Alam

4c. Jahangir Alam
son of Late Liakat Ali

4d. Mst. Mehonoma Khanam

4e. Mst. Ambia Khanam,
daughters of Late Liakat Ali

4f. Mst. Laili Begam,
wife of Late Liakat Ali

all of Village-Batrashi, P.O. Rajbari, Dharmanagar

5. Md. Burkan Uddin,

son of Late Hazi Manajir Ali

6. Mst. Khudeja Khanam,

wife of Md. Abdul Jalil,
daughter of Late Hazi Manajir Ali

all of Village & P.O. West Batarashi,
Rajbari, P.S. Dharmanagar, North Tripura District

7. Mst. Ayesa Begam,

wife of late Abdul Noor,
daughter of Late Hazi Manajir Ali
of Village & P.O. Latugaon, P.S. Dharmanagar,
District- North Tripura

8. Mst. Amina Khatun,

wife of Md. Farid Uddin,
daughter of Late Hazi Manijir Ali
of P.O. South Padmabil, P.S. Dharmanagar,
District- North Tripura

-----Appellant(s)

Versus

Abdul Haque through his L.Rs :

1a. Mst. Kabutar Nechha (Wife)

1b. Md. Sahab Uddin (Son)

1c. Md. Siraj Uddin (Son)

1d. Mst. Samena Begam (Daughter-in-law)

1e. Md. Abu Mahammad Dilwar Hussain (Grandson)

1f. Md. Abu Saleh

1g. Md. Altar Hussain (Grandson)

1h. Mst. Mina Begam (Daughter-in-law)

1i. Md. Azhar Uddin (Grandson)

1j. Mst. Farida Parvin (Granddaughter)

all of Village-West Batarashi, P.S. Rajbari,
P.S. Dharmanagar, District-North Tripura

2. Mst. Kakala Bibi,

wife of Md. Faijul Haque,
daughter of Late Hazi Mafachil Ali

3. Mt. Rabia Begam,
wife of Abdul Machabbir,
daughter of Late Hazi Mafachil Ali

Abdul Kaiyum through L.Rs :

4a. Md. Maklurchhur Rahaman (son)
of Matarashi, P.O. Rajbari, Dharmanagar,
North Tripura

4b. Mst. Sayena Begam,
wife of Md. Jiyabuddin (Daughter),
resident of Village & P.O. Dhupirban,
Lalcherra, Dharmanagar

4c. Mst. Piyara Begam,
wife of Md. Jalal Uddin (Daughter)
of Village-Durgapur, P.O. Rajbari, Dharmanagar

5. Md. Abdul Sukkur,
son of Late Hazi Matachim Ali

Abdul Jalil through his L.Rs :

6a. Mst. Saharun Bibi (Wife)

6b. Md. Alkachhur Rahaman

6c. Md. Riful Amin

6d. Md. Elkachhur Rahaman

all are sons of Late Abdul Jalil

6e. Mst. Neharun Nechha,
wife of Md. Arab Ali,
resident of Irani, P.O. Baburbazar, Kailasahar

6f. Mst. Ristana Begam,
wife of Md. Sahidul Alam,
resident of Irani, P.O. Baburbazar, Kailasahar

6g. Mst. Hena Begam,
wife of Md. Abdul Mannan
of Village-Chowkidar Para,
P.O. Pipracherra, Damcherra

6h. Mst. Dilwara Begam,
wife of Md. Alam Miah
of Village-Batrashi, P.O. Rajnbari, Dharmanagar

7. Md. Ishad Ali,
son of Late Hazi Matichim Ali

of West Batarashi, P.O. Rajbari,
Dharmanagar, North Tripura

8. Md. Sainul Haque

of Batrashi, P.O. Rajbari,
Dharmanagar

9. Mst. Anwara Begam & Anu,

wife of Late Abdul Hannan,
daughter of Late Hazi Matachim Ali
of P.O. Chandrapur, Sabajpur, P.S. Dharmanagar,
District-North Tripura

10. Md. Manik Mia,

son of Late Hazi Matachim Ali
of P.O. Kalacharra, Dharmanagar,
District-North Tripura

11. Mst. Najama Begam,

wife of Asab Ali,
daughter of Late Hazi Matachin Ali
of Bisnupur, P.S. Kadamtala,
District-North Tripura

12. Mst. Perbeen Nessa,

wife of Abdul Kader,
daughter of Late Kabirun Nessa,
granddaughter of Late Matachin Ali,
resident of Durgapur, P.S. Dharmanagar,
North Tripura

13. Mst. Phatema Begam,

wife of Najrul Islam,
daughter of Late Kabirun Nessa,
granddaughter of Late Matachin Ali,
resident of Paschim Batarashi,
P.S. Dharmanagar, North Tripura

14. Mst. Jasmin Begam,

wife of Md. Bilayet Hossain,
daughter of Late Kabirun Nessa,
granddaughter of Late Matachin Ali,
resident of Paschim Batarashi,
P.S. Dharmanagar, North Tripura

15. Md. Abad Uddin,

son of Late Kabirun Nessa,
grandson of Late Matachin Ali,
resident of Paschim Batarashi,
P.S. Dharmanagar, North Tripura

-----Respondent(s)

For Appellant(s)	:	Mr. Sankar Deb, Sr. Adv. Mr. S. Datta, Adv.
For Respondent(s)	:	Mr. G.K. Nama, Adv.
Date of Hearing	:	21.05.2024
Date of delivery of Judgment & Order	:	20.06.2024
Whether fit for reporting	:	YES

HON'BLE MR. JUSTICE BISWAJIT PALIT
Judgment & Order

This is an appeal under Section 96 read with Order XLI Rule 1 of the CPC as preferred by the appellant challenging the order dated 10.01.2023 passed by Learned Civil Judge, Senior Division, North Tripura, Dharmanagar in connection with Case No.TS(P)03 of 2012 between Md. Abdul Wahid through his legal heirs and others, Plaintiffs and Abdul Haque through his legal heirs and others, defendants whereby the Learned Trial Judge dismissed the suit for default.

2. Heard Mr. Sankar Deb, Learned senior counsel assisted by Mr. S. Datta, Learned counsel appearing for the appellants as well as Mr. G.K. Nama, Learned counsel appearing for the respondents.

3. Before proceeding further with this appeal, let us discuss about the subject matter of the instant appeal for convenience. The predecessor in interest of the appellant Nos.1a to 1d to 2a to 2i and 3, 4, 5, 6, 7 and one Md. Liyakat Ali filed the partition suit being No.T.S.(P)03 of 2012 against the respondents or their predecessor in interest in the Court of Learned Civil Judge, Senior Division, Dharmanagar, North Tripura seeking partition of the properties as mentioned in Schedule A of the plaint. Md. Liyakat Ali, the original plaintiff died about three years back. He was unmarried and as such, his share fell to the other plaintiffs. Hence, his name was not arrayed in the present appeal. Subsequently,

written statement was filed on behalf of the defendant No.1 but no other defendants filed any separate written statement. Issues were framed and the parties adduce evidence and the Learned Trial Judge by a judgment dated 20.06.2016 decreed the suit. Abdul Haque, the predecessor-in-interest of the respondent Nos. 1a to 1i (since dead) preferred RFA 19 of 2016 before the High Court challenging the correctness and validity of the said decree. Apart from said Abdul Haque, the predecessor-in-interest of the respondent Nos.1a to 1i, (since dead) no other defendants challenged the said decree, even though, other defendants in the suit were arrayed as defendant respondents. The Hon'ble High Court by an order dated 12.11.2021 disposed of the appeal and the connected I.A. by order dated 12.11.2021. For the sake of convenience, I would like to refer herein below the relevant portion of the order dated 12.11.2021 in I.A. No.09 of 2021 arising from RFA 19 of 2016 which runs as follows :

"I have gone through the application. The applicant-appellants have submitted some documents which appear to be relevant for rendering equitable justice to the parties to the lis and in the opinion of this court, it would be convenient to remit the matter back to the learned trial court to take consideration of those documents and decide the case afresh.

Accordingly, this court remits the present appeal before the learned trial court. The applicant-appellants are directed to submit all the documents, in original, before the learned trial court within a period of 3 (three) weeks. Registry is directed to send the case record to the learned trial court within a period of 7 (seven) days. The learned trial court after receipt of the records, shall notify the parties. The learned trial court also shall consider any application for amendment, if so filed, by the applicant-appellants.

With the aforesaid direction, the instant Interlocutory Application stands disposed of."

And also for the sake of convenience, I would like to refer herein below the operative portion of the order passed by the Hon'ble High Court in RFA 19 of 2016 on 12.11.2021 which runs as follows :

"In view of the order passed today in I.A. 9 of 2021, this instant appeal stands disposed of.

Pending application (s), if any, also stands disposed of."

4. According to the appellants, in terms of the said order of the Hon'ble High Court disposing the appeal on 12.11.2021 the suit was remanded back to the Trial Judge and the Learned Trial Judge by an order passed on 23.12.2021 recorded that in view of the fact that the suit is remitted, fixed on 18.01.2022 for original record/order and on 16.03.2022, Court recorded the receipt of the original record and ordered the issuance of notice to the parties and on 04.04.2022 the parties entered into appearance before the Learned Trial Judge. However, the Learned Trial Judge also ordered that necessary steps were required to be filed and list of documents submitted by the legal heirs of defendant No.1, Abdul Haque under Order VIII Rule 1-A(3) of CPC was filed. On 07.06.2022, the plaintiffs filed a petition under Order VII Rule 14 read with Section 151 of CPC. Subsequently, adjournment petition was filed on behalf of the defendants was rejected by an order dated 12.07.2022 passed in T.S(P) No.3 of 2012 by Learned Civil Judge(Sr. Div.), North Tripura, Dharmanagar. The operative portion of the said order dated 12.07.2022 also runs as follows :

"From the record it is revealed that as per the order of the Hon'ble High Court of Tripura 12.11.2021 passed in RFA No.19 of 2016, this record was remitted back with a direction to the applicant-appellants to submit all the documents in original before this court within a period of 3 weeks but the answering defendants have submitted recently mostly photostat copies including coloured photostat copied before this court apart from any documents submitted earlier. There is also no prayer for amendment submitted till date. However at this stage this court is not going into the genuineness, admissibility and mode of proof of the documents submitted by the answering defendants and considering that the defendant bases or relies upon the documents in his possession or power at this stage, the petition of the L.Rs of defendant No.1 under Order-VIII Rule 1A(3) of CPC is allowed and the documents submitted are taken on record.

As the prayer of the plaintiffs, the plaintiffs have submitted certain documents by firisti on 07.06.2022 which as per the application under Order-VII Rule 14 of CPC read with section 151 of CPC is very much essential

for proper adjudication of the suit and thereby the prayer of the plaintiffs for receiving such documents in evidence is also allowed. Thus both the petitions are allowed and disposed off accordingly.

The parties are provided a final opportunity for submission of any other documents in connection with this case."

5. Further, according to the plaintiffs, on 16.08.2022 an application under Order XXII Rule 10A of CPC was filed on behalf of the defendant stating that they have filed Civil Misc. Case No.29 of 2022 before the Court of Learned District Judge, North Tripura, Dharmanagar. The defendant petitioner filed a petition for issuance of notices to the survivors and legal heirs of the defendants, the plaintiff respondent No.4 and defendant proforma respondent Nos.11 and 13. The said petition was rejected and directed the petitioners to take steps. But by an order passed on 10.01.2023 the Learned Trial Judge dismissed the said petition in Civil Misc. Case No.29 of 2022 disposing of the said petition for non-prosecution.

6. It was further submitted that while the petition under Section 24 of CPC was pending before the Learned District Judge, North Tripura, Dharmanagar which was disposed of on 16.01.2023 the Learned Trial Judge by an order dated 10.01.2023 dismissed the suit for default. Being aggrieved by the said order dated 10.01.2023 the present appellants preferred this appeal before the High Court.

7. In course of hearing, Mr. Sankar Deb, Learned senior counsel appearing for the appellants drawn the attention of the Court that the order dated 10.01.2023 dismissing the suit was a decree as per Section 2(2) of CPC, so there is scope for filing an appeal. Learned Senior Counsel firstly drawn the attention of the Court referring the said order dated 12.01.2021 passed by this Court in connection with Case No.I.A.09 of 2021 arising out of RFA 19 of 2016 and submitted that in

pursuance of the order of the Court necessary step was taken from the side of the appellants. Accordingly, the suit was posted for step by plaintiffs on 10.01.2023 but on that day, Learned counsel of both the parties were present but the plaintiff could not take required step and for that the Learned Court below came to the observation that the plaintiff is not interested to proceed with the suit and ultimately dismissed the suit for default.

8. At the time of hearing, Learned senior counsel further drawn the attention of the Court referring Civil Misc. Case No.29 of 2022 and Civil Misc. Case No.40 of 2022 and also referred the order of the Learned Trial Judge dated 12.07.2022, 19.07.2022, 02.08.2022, 16.08.2022, 23.08.2022, 27.09.2022, 21.11.2022, 13.12.2022 and submitted that there was no wilfull negligence on behalf of the appellant to take proper steps. But the Learned Trial Judge arbitrarily dismissed the suit without any ground. So, finally, Learned Senior Counsel by referring some citations drawn the attention of the Court to allow the appeal and to set aside the order dated 10.01.2023 passed by the Learned Civil Judge, Senior Division, North Tripura, Dharmanagar with further approach to remand back the suit to the Learned Trial Judge for completion of trial of the said partition suit.

9. On the other hand, Mr. G.K. Nama, Learned counsel appearing for the respondents at the very first instance drawn the attention of the Court that the appeal is not at all maintainable because referring the contents of the order, Learned counsel for the respondents submitted that on bare perusal of the order it is crystal clear that the said order was not a decree and as such, there was no scope to prefer any appeal under Section 96 read with Order XLI Rule 1 of CPC. Rather,

the appellant could approach to the Learned Trial Judge under Order IX Rule 9 of CPC but without resorting to the said provisions of law, there is no scope to entertain this appeal by this Court.

10. Finally, Learned counsel for the respondents referred one citation of the Hon'ble Apex Court in **Firdous Omer (Dead) by L.R.S. and Others versus Bankim Chandra Daw (Dead) by L.R.S. and Others** reported in **(2006) 6 SCC 569** and submitted that in view of the principle of law laid down by the Hon'ble Apex Court in the given case since the suit was dismissed for default by the Learned Trial Court and it is not a decree. So, this present appeal is not maintainable.

11. I have heard detailed argument of both the sides and gone through the record of the Learned Court below including the order impugned. For the sake of convenience, I would like to refer herein below the relevant provision of Order IX Rule 8 and Order IX Rule 9 of CPC which provides that :

Order IX Rule 8

"8. Procedure where defendant only appears.- Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

Order IX Rule 9

"9. Decree against plaintiff by default bars fresh suit.-(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

Order IX Rule 8 provides that if the defendant appears and the plaintiff does not appear when the suit is called on for hearing, and then the Court shall make an order that the suit be dismissed and against that order of dismissal there is a scope for seeking relief under Order IX Rule 9 of CPC as mentioned above.

12. According to Learned counsel for the appellants, the case was posted for step by the plaintiffs, all though, on that date, the Learned counsel for the plaintiffs as well as for the defendants were present but as no step was taken, so the suit was dismissed for default by the Learned Trial Court.

Learned Senior Counsel in this regard also referred the provision of Order III Rule 1 of CPC which provides as under :

Order III Rule 1

"1. Appearances, etc., may be in person, by recognized agent or by pleader.-Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader [appearing, applying or acting, as the case may be,] on his behalf :

Provided that any such appearance shall, if the Court so directs, be made by the part in person."

Referring the same, Learned senior counsel further submitted that since the Learned counsel for the plaintiffs was present on that date before the Learned Trial Court but due to some unavoidable circumstances, the appellant could not take any proper step. Even, there was no such prayer from the side of the appellants that they were unable to take any appropriate step. So, Learned Trial Court below dismissed the suit.

13. On bare perusal of Order III Rule 1 of CPC it appears that in absence of party, he or she may be represented by his/her engaged

counsel. Here in the given case although Learned counsel for the appellants was present, but no step was taken by the appellants before the Learned Trial Court.

14. In course of hearing, Learned senior counsel for the appellants referred few citations which provides as under :

In **United Bank of India, Calcutta versus Abhijit Tea Co. Pvt. Ltd. and Others** reported in **(2000) 7 SCC 357** the Hon'ble Apex Court observed in para-16 observed as under :

"16. But, it is now well settled that an order of remand by the appellate Court to the trial Court which had disposed of the suit revives the suit in full except as to matters, if any, decided finally by the appellate Court. Once the suit is revived, it must, in the eye of the law, be deemed to be pending - from the beginning when it was instituted. The judgment disposing of the suit passed by the Single Judge which is set aside gets effaced altogether and the continuity of the suit in the trial court is restored, as a matter of law. The suit cannot be treated as one freshly instituted on the date of the remand order. Otherwise serious questions as to limitation would arise. In fact, if any evidence was recorded before its earlier disposal, it would be evidence in the remanded suit and if any interlocutory orders were passed earlier, they would revive. In the case of a remand, it is as if the suit was never disposed of (subject to any adjudication which has become final, in the appellate judgment). The position could have been different if the appeal was disposed of once and for all and the suit was not remanded."

Further, in **P. Kiran Kumar versus A.S. Khadar and Others** reported in **(2002) 5 SCC 161** the Hon'ble Apex Court in para-12 observed as under :

"12. Explanation was added to Order 9 Rule 13 with effect from 1-2-1977 by the Code of Civil Procedure (Amendment) Act, 1976. Prior to its enactment a defendant burdened by an ex parte decree could apply under Order IX Rule 13 for setting aside the ex parte decree. He could also file an appeal under Section 96 against the ex parte decree. The mere fact of filing the appeal did not take away the jurisdiction to entertain and dispose of an application for setting aside an ex parte decree. Only in the cases in which the trial court decree merged with the order of the appellant court by reversal, confirmation or varying it, the trial court was precluded from setting aside the ex parte decree. Where the trial court decree did not merge with the appellate court order the trial court was at liberty to proceed with the application for setting aside the ex-parte decree. Such instances arose when the appeal was dismissed in default or where it was dismissed as having abated by reasons of omission by the appellant to

implead the legal representatives of a deceased respondent or where it was dismissed as barred by limitation. Explanation was added to discourage the two pronged attacks on the decree i.e. by preferring an application to the trial court under Order 9 Rule 13 for setting aside the decree and by filing an appeal to the superior court against it. The legislative attempt incorporating the Explanation to Order 9 Rule 13 is to confine the defendant, to either one of the remedies made available to him and not both. Dismissal of the appeal on any ground, apart from its withdrawal constituted a bar on the jurisdiction of the trial court to set aside the ex-parte decree. With the introduction of the explanation, no application to set aside the ex-parte decree would be maintainable where the defendant filed an appeal and the appeal was disposed of on any ground, other than the ground that the appeal have been withdrawn by the appellant."

In **Venkata Reddy and Others versus Pethi Reddy** reported in **AIR 1963 SC 992** the Hon'ble Apex Court in para-6 observed as under :

"6..... Therefore, if the reason given by the High Court is accepted it would mean that no finality attaches to decree at all. That is not the law. A decision is said to be final when so far as, the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as resjudicate between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees--a preliminary decree and a final decree--the decree which would be executable would be the final decree But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to S. 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is' precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree."

Referring the same, Learned Senior Counsel drawn the attention of the Court that in view of the principles laid down by the Hon'ble Apex Court in the aforementioned cases the appellants have rightly

preferred this appeal before this High Court, there is no ambiguity on that. So, the Court may allow the appeal setting aside the order of the Learned Trial Court and remand back the same for holding the rest portion of the trial.

15. On the other hand, Learned counsel for the respondents apart from his vital submission referred one citation in **Firdous Omer** (supra). In paras-11, 12 & 14 the Hon'ble Apex Court has observed as under :

"11. Afterall, a dismissal of the suit for non- prosecution or for non-appearance of the plaintiff is not a decree as specified by the Section 2(2) of the Code itself. Hence it is not appealable as a decree. Of course, the Calcutta High Court seems to have taken the view that the order of dismissal would amount to a judgment and hence appealable under clause 15 of the Letters Patent. We do not think it necessary to decide for the purpose of this case, whether dismissal of a suit for default on the part of the plaintiff would amount to a judgment within the meaning of clause 15 of the Letters Patent. We leave that question open for the present.

12. We also feel that the view of the Calcutta High Court, no doubt, backed by the procedure followed in that court and the practice of that court that once the order of dismissal is drawn up, completed and filed, the court loses its power to restore the suit in an appropriate case, seems to deprive the court of a power which every court has, of restoring a suit so as to enable the parties to contest the same on merits. It is even possible to argue, that the power to dismiss a suit for default, carries with it the power to restore that suit. That apart, in view of the power available under Section 5 of the Limitation Act to extend the period of limitation for making an application for restoration of the suit, the rigid view adopted cannot be said to survive. May be, the view that the order was a judgment and it was appealable under clause 15 of the Letters Patent, also induced the theory of the trial judge becoming functus officio on the order of dismissal being drawn up, completed and filed. After all, law of procedure is the handmaid of justice and Rule 35 of Chapter X of the Original Side Rules itself must be taken to confer a power on the trial judge to restore a suit which he had dismissed for default if sufficient cause in that behalf is shown especially in the context of Section 5 of the Limitation Act, 1963. The fact that the records have been consigned to the record room cannot interfere with the power of the court to do justice in a cause. We are therefore inclined to hold that the position adopted by the Calcutta High Court that on the expiry of the 30 days from the date of dismissal of a suit for default and on the order of dismissal being drawn up, completed and filed, the court becomes functus officio is not sustainable.

14. Thus, though on law, we are inclined to disagree with the High Court that the suit could not be restored, we

decline to interfere with its decision for the reason mentioned above. We dismiss the appeal. In the circumstances, we make no order as to costs."

Referring the same, Learned counsel submitted that in view of the law laid down by the Hon'ble Apex Court there is no scope to allow this appeal as the same is not maintainable.

16. After prolong hearing of both the sides and after going through the relevant case record and the principles of law laid down by the Hon'ble Apex Court in the aforementioned cases it appears to this Court that all though, Learned counsel for the appellants was present on that date but no step was taken inspite of providing opportunity to the party by the Learned Trial Court below and hence, the suit was dismissed by the Learned Trial Court. So, for the dismissal of the suit for non-prosecution, in my considered view, there is no scope to entertain this appeal filed under Section 96 of CPC by the appellants.

17. In the result, the appeal filed by the appellants is hereby disposed of being devoid of merit. However, the appellants shall be at liberty to approach the concerned Court for restoration of the suit and the Learned Court below shall dispose of the matter in accordance with law without being biased by the order of the Court.

With this observation, this appeal stands disposed of.

Pending application/s, if any, also stands disposed of.

A copy of this order be communicated to Learned Court below for information and compliance.

Send down the LCRs.

JUDGE

Digitally signed by SABYASACHI
BHATTACHARJEE
Date: 2024.06.21 13:00:57 +05'30'

Sabyasachi. B