

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present : The Hon'ble Justice Shivakant Prasad

F.M.A. 478 of 2012

Hemanta Kumar Das & Ors.
Vs.
Anjan Kumar Kar & Ors.
(Via Video Conference)

For the appellant	:	Mr. P. K. Banerjee Ms. Indrani Nandi Mr. Krishna Yadav
For the respondents	:	Mr. Sourav Sen Ms. Sayani Bhattacharjee
Heard on	:	08.03.2021
Judgment on	:	09.03.2021

SHIVAKANT PRASAD, J.

This appeal is directed against the Order No.45 dated 30th January, 2010 passed by the Civil Judge, Senior Division, Bongaon, North 24 Parganas in Misc. Case No.2 of 2006 in connection with Title Appeal No.153 of 2003 arising out of the judgment and order dated 31st May, 2003 passed by the learned Sub-Divisional Munsiff at Bongaon, North 24 Parganas in Title Suit No.182 of 1991.

The brief facts leading to the instant appeal is that the plaintiffs had filed a Title Suit No.182 of 1991 before the Sub-

Divisional Munsiff at Bongaon, North 24 Parganas against the present appellants/defendants for a decree of declaration in respect of 16 decimals of land in favour of the plaintiff no.1 and 7 decimals of land in favour of the defendant no.2 and for injunction as consequential relief.

On hearing the said suit was decided by the Trial Court by the judgment dated 31st May, 2003 decreeing the suit in favour of the plaintiffs/respondents herein.

Being aggrieved and dissatisfied with the said judgment and decree, the defendants/appellants preferred an appeal being, Title Appeal No.153 of 2003 before the learned District Judge at Barasat against the plaintiffs/respondents herein and during pendency of the appeal, the plaintiffs/respondent no.2 had died intestate leaving behind his two sons and two daughters. It is submitted that Smt. Parul Bala Das had died during pendency of the appeal and substitution was carried out. It is stated that the sons of the respondent no.1 deceased was already on record and on 21st November, 2005 date was fixed for taking steps but no step could be taken due to Bangla Bandh the learned Court was closed. On 3rd December, 2005, the appellant/petitioner took steps as per the order of the Court and the date was fixed on 19th December, 2005 for depositing postal receipt. It is submitted that on the

occassion of inauguration of Additional District and Sessions Court on 15th December, 2005 Hon'ble Judges of the Hon'ble Court and other respectable persons were present and for that reasons the papers could not be made ready for issuance of summons on the substituted heirs of the deceased respondent no.2 and at about 4 p.m. summons were made ready for issue on 16th December, 2005 but after receiving the same, summons could not be placed for registration in the office on that date due to expiry of time and thereafter on 17.12.2005 and 18.12.2005 being the holidays, the petitioner/appellant could not take steps. For the reasons aforesaid, the postal receipts could not be produced on 19th December, 2005, and prayer was made for time to deposit such postal receipts, but the learned Appeal Court below rejected such prayer and dismissed the suit with the observations that the appellants are reluctant to proceed with the case. Thereafter the application under Order 9 rule 9 read with Section 151 of the Code of Civil Procedure was taken out and Miscellaneous Case No.2 of 2006 was registered for restoration of the Title Appeal No.153 of 2003 but upon hearing the parties, the learned Appeal Court by an order dated 30.01.2010 dismissed the Miscellaneous case for restoration of the appeal on observation that the

appellant/petitioner had failed to file postal receipt on 19.12.2005 despite the opportunity given by the Court.

The learned Court upon taking evidence of the parties was of the view that as per provision of Rule 19 of Order 41 of the Civil Procedure Code, the appellants may apply to the Appeal Court for the re-admission of the appeal where an appeal is dismissed under Rule 11(2), Rule 17 or Rule 18 where it is proved, he was prevented by sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required. The learned Appeal Court further found that on 19.12.2005, the appellants took steps by filing hazira, but had failed to comply with the order of the Court for which the appeal was dismissed for non-compliance of the Court's order as per provision of law unless the dismissal follows under Rule 11(2) or Rule 17, there can be no restoration under Rule 19 of Order 41 of the Code of Civil Procedure.

Learned advocate for the respondents had submitted that the Misc. Case cannot be allowed in view of the provision of Order 41 Rule 19 of the Civil Procedure Code as it is not within the purview of Section 151 of the Civil Procedure Code where an appeal is dismissed under Rule 17 or Rule 18, the appellant may apply for the re-admission of the appeal. In the instant case the appeal was dismissed for non-compliance of the Court's

order in not filing the postal receipt vide order No.45 dated 30th January, 2010 impugned in this appeal. The appeal is thus directed against the order impugned, *inter alia*, on the grounds that learned Appeal Court has not discussed the scope of Order 41 Rule 19 of the Civil Procedure Code and erred in considering the application for restoration of the appeal dismissed for default in not filing the postal receipt despite proper explanation. It is also pointed out that the learned Court has committed error in not considering that the respondent no.1 was already on record from the date of the filing of the said appeal and the appeal ought not have been dismissed and an opportunity ought to be given as the appellant could not take step for filing the postal receipt.

Learned counsel for the appellant has adverted my attention to the Order No.42 dated 4.11.20009 passed by Appeal Court to contend that the appellants/defendants had moved an application for amendment of the cause title of the Misc. Case petition as an application under Order 41 Rule 19 of the Civil Procedure Code by deleting the captioned application under Order 9 Rule 4 of Civil Procedure Code as the same is a mere technicality. The amendment was carried out on being allowed by the learned appeal court below.

I am of the view that the learned Appeal Court rightly allowed the said application for amendment of the captioned application under Order 9 Rule 9 read with Section 151 C.P.C. as an application under Order 41 Rule 19 of the Code for re-admission of the appeal. I am further of the view that technicality of law is not bar in doing justice as the caption of the application is not considered rather substance of the application with its prayer has to be considered.

I am of the view that Rule 19 of Order 41 of Civil Procedure Code is provisioned for re-admission of appeal dismissed for default and the order of dismissal of appeal impugned is in substance, an order of dismissal of appeal for default for not having complied with the direction of the Learned Court. The observation made by the appeal court that the appellant is reluctant to proceed with the case appears to be a wishful thinking on the part of the Learned Court.

It must be borne in mind that even if appellant had no reasonable and sufficient cause within the meaning of Rule 19 Order 41 of the Code of Civil Procedure, the Appeal Court below has inherent power for restoration of appeal to its file upon setting aside on the order of dismissal of appeal for default. In other words, to readmit the appeal inasmuch as the caption of application was amended to one under Order 41 Rule 19 of

the Code. This is because, the appellant is not confined to the remedy of restoration but has alternative remedy to file another appeal, if within the period of limitation. That is why the term 'sufficient cause' appearing in Order 41 Rule 19 of the Code should be construed liberally because, the appellant is not required to appear in person before the Appellate Court.

In the context of the above discussion, Title Appeal being 153 of 2003 be restored to its original file and number before the Appeal Court below. Consequently, readmit upon setting aside the impugned Order No.45 dated 30th January, 2010 in Misc. Case No.2 of 2006 in Title Appeal No.153 of 2003, however, with cost of Rs. 5000/-.

Parties are directed to appear before the lower appellate court on 22nd March, 2021 and the learned appellate court below will take all endeavour to hear out the appeal and dispose of the appeal within a month on the basis of evidence on record.

Let a copy of this judgement be communicated to the lower appellate court below forth with.

Accordingly, Appeal being, FMA 478 of 2012 is allowed with the above direction.

Certified website copies of the judgment, if applied for, be made available to the parties, subject to compliance with all requisite formalities.

(SHIVAKANT PRASAD, J.)