

Dl. June 10,
11. 2022

F.M.A. 153 of 2019

Sk. Oli Mohammad
Vs,
Sri Sri Iswar Gopal Gobinda Jew
Thakur represented by
Sri Horogopal Dalal & ors.

Mr. Manabendra Thakur,
Mr. Swarup Kumar Ghosh,
...for the appellant.

Mr. Rwitendra Banerjee,
Mr. Shibasis Chatterjee,
Mr. Sandip Kundu,
...for the respondents.

The present appeal has arisen out of an order passed on March 13, 2018 by the learned Additional District Judge, R. D. Court at Midnapore, Paschim Medinipur, in connection Judicial Miscellaneous Case No. 4 of 2018 filed under Order XXII, Rule 9 read with Section 151 of the Code of Civil Procedure along with an application under Section 5 of the Limitation Act for substitution of the present appellant in stead and place of deceased sole appellant, namely, Jabeda Khatun Bibi in Title Appeal No. 1337 of 2011. The application for condonation of delay was dismissed and in consequence thereof, the application under Order XXII, Rule 9 of the Code was also dismissed.

On December 5, 2017, the appellate court below passed an order recording that Title Appeal No. 1337 of 2011 stood abated as against the deceased sole appellant. The appellate court below also decided the application under Order XXII Rule 9 of the Code independently of its finding in respect of the application under

Section 5 of the Limitation Act.

Mr. Rwitendra Banerjee, learned advocate appearing on behalf of the respondents draws our attention to paragraph 9 of a Full Bench decision of this court in the case of **Sabyasachi Chatterjee vs. Prasad Chatterjee & ors.** along with **Gopal Das Bagri vs. Brij Mohan Benani & anr.** reported in **2013(4) CTC 657** and submits that in view of the said paragraph, this appeal may not be maintainable. The said paragraph is reproduced below :-

“This marked distinction between the exercise of authority by a Court of Original Jurisdiction under Order 38 or Order 39 or Order 40 or like provisions of the Code and the authority exercised by an Appellate Court by virtue of the permissive provision in Section 107(2) of the Code is the defining factor in determining whether an interlocutory Appellate Order made in exercise of the power under Section 107(2) of the Code is amenable to an Appeal. Since the bar under Section 104(2) of the Code would not apply to any order passed in course of an Appeal from a decree, Section 105(1) of the Code would come into play. The embargo under Section 105(1) of the Code is not as uncompromisingly absolute as in Section 104(2) thereof; it only prohibits Appeals from all Appellate orders for which there is no express provision of Appeal. the Appeals recognised under Order 43, Rule 1 of the Code from orders passed by a Court of Original jurisdiction cannot be understood to extend by implication to Interlocutory Appellate

Orders. Those Appellate Orders that are appellable are expressly provided for in Order 43, Rule 1, itself.”

Mr. Banerjee also draws our attention to the decision of this court in the case of **Shrimati Mamata Guha vs. Pranab Kumar Das** reported in (2011) 2 Cal L.T. 144 (HC) and an unreported decision of this court in the case of **Jamuna Chakraborty vs. Sital Chakraborty & ors. (F.M.A.T. 1373 of 2007)** in support of his argument.

In view of the clear finding in the decision of **Sabyasachi Chatterjee** (supra) that the appeal recognised under Order XLIII Rule 1 of the Code of Civil Procedure from orders passed by a Court of original jurisdiction cannot be extended to interlocutory appellate orders, we are of the opinion that the present appeal is not maintainable. In any event, dismissal of Section 5 application would be considered to a decision on merits for which a second appeal might lie in view of the decision of the Hon’ble Supreme Court in the case of **Shyam Sundar Sharma vs. Pannalal Jaiswal** reported in (2005) 1 S.C.C. 436.

Accordingly, the present appeal is dismissed as not maintainable.

This order, however, shall not prevent the appellant to take appropriate steps in accordance with law before the proper forum.

In the event, the appellant approaches the proper forum within a period of five weeks from date, the appellant shall be entitled to the benefit of Section 14(2) of the Limitation Act, 1963.

There will be no order as to costs.

Office is directed to return the certified copy of the order impugned to the learned advocate on record for the appellant upon his furnishing a photocopy of the same.

dns

(Ajoy Kumar Mukherjee, J.)

(Soumen Sen, J.)