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C.O. 1510 of 2022

**Sri Ram Ratan Chowdhary
Vs
Nasir N. Sarkar & Ors.**

Mr. Surojit Nath Mitra, Sr. Adv
Mr. Debjit Mukherjee,
Ms. Susmita Chatterjee, ... For the petitioner.

Mr. Amal Kanti Das,
Mr. Abu Fazle Md. Shamim
Mr. Imran Karim
Ms. Anyasha Das,. ... For the Opposite parties.

The subject matter of challenge in this revisional application is against the judgment and order dated 29th April, 2022 passed by learned Civil Judge (Senior Division), 2nd Court, Howrah, in Misc Appeal No. 38 of 2019 directing the Court below to afford an opportunity of adducing evidence, for decision of an application under Section 5 of the Limitation Act, filed in connection with a Misc Case No. 81 of 2017, registered under Order 9 Rule 13 of the Code of Civil Procedure before learned Civil Judge (Junior Division), 3rd Court, Howrah,

Admittedly, there has been a reversal of order, passed by the First Lower Appellate Court sending the case back on remand for decision afresh of an application under Section 5 of the Limitation Act, after providing an opportunity to parties to adduce evidence.

Mr. Surojit Nath Mitra, learned Sr advocate

appearing for the petitioner submits that there has been an ex parte decree granted by the trial Court, which was challenged by the opposite parties by filing an application under Order 9 Rule 13 of the Code of Civil Procedure, and it was registered accordingly as a Misc Case No. 81 of 2017 before the learned Civil Judge (Junior Division), 3rd Court, Howrah. Since, there was some delay caused in filing Section 5 application, an application under Section 5 of the Limitation Act was also filed by the opposite parties praying for condonation of delay.

The Court below dismissed the Section 5 application upon receiving affidavits, and counter affidavits, thereby extending opportunity of hearing to both the parties. The decision of the trial Court rejecting the Misc Case No. 81 of 2017 was carried in appeal vide Misc Appeal No. 38 of 2019 of learned Civil Judge (Senior Division), 2nd Court, Howrah.

Mr. Mitra at the very threshold of this case strenuously contends that even in absence of any point taken as ground in the memorandum of appeal, the Court below erroneously decided the misc appeal after sending the case back on remand for decision afresh of an application under Section 5 of the Limitation Act, directing the parties to adduce evidence, without any specific findings that evidence is essentially required for the decision of Section 5 application.

Mr. Mitra further contends that when the trial Court has provided an opportunity of hearing upon receiving affidavits and counter affidavits in terms of the proposed prayer of opposite parties, adducing of evidence is not compulsorily required, and unless such finding is there by the Court below that adducing of evidence is inevitable, parties are not obliged to adduce evidence for a decision of an issue, particularly, when such point requiring decision by the appellate body is missing in memorandum of appeal.

It is thus submitted by Mr. Mitra that exercise of the authority by the First Lower Appellate Court has not been properly made in terms of the points raised in the memorandum of appeal.

Per contra, Mr. Amal Kanti Das, learned advocate appearing for the opposite parties disputes with the submission, raised by Mr. Mitra, submitting that no illegality has been committed by the Lower Appellate Body in sending back the case on remand to the trial Court for decision afresh of Section 5 application, after providing an opportunity to parties to adduce evidence.

Learned advocate for the opposite parties further submits that if decision of an issue is reached upon collecting evidence, the same cannot be considered to be a bad exercise of power. According to the opposite parties, unless there is something patently revealed that there has been error committed by the Court below

in exercise of jurisdiction vested to it, and unless there is express perversity shown in the impugned order, the impugned order can not be interfered with questioning the same.

Having considered the submissions of both sides, it appears that the appellate Court sent back the case on remand directing the trial Court for a decision afresh of an application under Section 5 of Limitation Act, after providing an opportunity to parties to adduce evidence.

The requirement of adducing evidence by a necessary finding appears to be *sine qua non* for a decision of the First Lower Appellate Court, before sending the case back on remand for decision afresh of an issue pertaining to an application under Section 5 of the Limitation Act for condonation of delay.

Upon perusal of the impugned order, it appears that there has been no conscious findings reached by the Appellate Court about the extreme need and essential requirement of adducing evidence, to be led by the parties, for a decision of Section 5 application.

But at the same time, the Court always desire to have best evidence for decision of an issue. If evidence is at all required for decision of an issue afresh, there has to be a finding reached by the First Lower Appellate Body prior to sending the case back on remand that recording of evidence is inevitable, to be adduced by

parties, without which the issue can not be effectively adjudicated.

If evidence was at all required for decision of section 5 application, the First Lower Appellate Court could have itself collected the evidence directing the parties to adduce evidence in the pending appeal, that exercise appears to have not been done by the First Lower Appellate Court. Therefore, unless there is specific findings reached by the First Lower Appellate Court, as regards the essential requirement of adducing evidence for a decision of an application afresh under Section 5 of the Limitation Act, the impugned order relegating the matter to Trial Court on remand for decision of an issue appears to contrary to law. The same as such is not sustainable and set aside accordingly.

The judgment and order dated 29th April, 2022 passed by the by learned Civil Judge (Senior Division), 2nd Court, Howrah in Misc Appeal No. 38 of 2019 is set aside with a direction upon Appellate Court below to hear out the same afresh, after addressing the issue as to the essential requirement of adducing evidence for a decision of Section 5 application, and resolve the same in accordance with law within eight (08) weeks from the date of communication of this order.

With this observation and direction, the revisional application stands disposed of.

Urgent photostat certified copy of the order, if applied for, be given to the parties on usual undertakings.

(Subhasis Dasgupta, J)