

**IN THE HIGH COURT AT CALCUTTA
Circuit Bench at Jalpaiguri
(Civil Revisional Jurisdiction)**

APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**C.O. 137 of 2023
Amrit Vyapaar Pvt. Ltd. & Anr.
Vs.
Parimal Kumar Dutta & Ors.**

For the petitioners : Mr. Hidar Ali
Mr. Pranit Bag
Mr. Satyam Sarkar

For the opposite Party No.1 : Mr. Partha Pratim Roy
Mr. Debasish Mukhopadhyay
Mrs. Jenia Rudra

Heard on : 17.11.2023

Judgment on : 20.11.2023

Ajoy Kumar Mukherjee, J.

1. This application under Article 227 of the Constitution of India has been preferred against the impugned order no. 9 dated September 30, 2023 passed by the learned District Judge, Jalpaiguri in Misc. Appeal No. 58 2023 in connection with Title Suit No.428 of 2023. By the impugned order learned Court admitted the aforesaid Misc. Appeal for hearing, inspite of objection raised by the petitioner against admission.

2. Petitioners' case in brief is that opposite party herein has instituted aforesaid Title suit being no. 428 of 2023, along with temporary injunction application before the Trial court. Said application for temporary injunction was moved by the plaintiff/opposite party herein and upon hearing the said application, learned judge by an order dated 25th July, 2023 was pleased to reject the prayer for injunction.

3. It is alleged that the opposite party herein being aggrieved by the said order preferred aforesaid Misc. Appeal which was not accompanied by a copy of judgment in violation of order XLI, Rule 1 of Code of Civil Procedure (hereinafter called as code) on 1st before learned District Judge, Jalpaiguri August, 2023. It is further alleged by the petitioner herein that the opposite party had inserted the certified copy of the impugned order dated 25th July, 2023 directly into the records of aforesaid Misc. Appeal without any order granting leave by the learned appellate court.

4. Thereafter the petitioner made an application on 15th September 2023 objecting that the certified copy of the impugned order has not been filed along with the Appeal before the learned district judge, and hence the appeal should not be admitted. Learned court below had taken up said objection raised by the petitioner herein but Learned Appellate court was pleased to admit the said Misc. Appeal being no. 58 of 2023 observing that the said Appeal has been filed as per statutory mandate laid down under order XLI rule 1 of the code.

5. Mr. Pranit Bag learned counsel appearing on behalf of petitioner strenuously argued that the Court below failed to appreciate that the

provisions laid under order XLI Rule 1 of the Code is not directory but mandatory. He failed to consider that the Appeal could not have been admitted in the Register of Appeal which was filed without certified copy of the order, and ignoring such mandatory provision, the court proceeded mechanically to pass the order impugned, admitting the instant appeal. He argued that the court below admitted the instant appeal beyond the period of limitation without considering the fact that the certified copy as provided by the opposite party on August, 2, 2023, could not have been accepted after the expiry of the limitation period of 30 days.

6. He further argued, since the instant Appeal was filed on August, 1, 2023 and the certified copy was filed after such date i.e. on August, 2, 2023, it could not have been *suo moto* accepted by the Registrar of Appeals without leave granted by the court concerned and as such the appeal is not only defective but also barred by limitation. It is further alleged by the petitioner that in fact the certified copy was accepted by the Court below on September, 30, 2023 and such acceptance was made beyond the period of limitation. The court below has no power to accept the appeal beyond the period of 30 days without an application under section 5 of the Limitation Act. Hence the petitioner contended that the very registration of the appeal is invalid, in view of statutory mandate as per order XLI rule 1 of the Code. Accordingly Mr. Bag submits that learned Appellate court has fixed the instant matter for hearing and if the instant appeal is allowed to proceed, further injustice would be caused and as such the petitioner has prayed for setting aside the order impugned. In this

context petitioner had relied upon Rule 256 of the Civil Rules and Order of Calcutta High court along with order XLI rule 1 read order XLIII rule 1 and also judgments passed by the apex court in ***Shakuntala Devi Jain Vs. Kuntal Kumari & others*** reported in **AIR 1969 SC 575** and another judgment of this court passed by a Division Bench in ***Rajindra Ram Vs. Coal India Limited and others***, reported in **AIR 1997 Cal 289**.

7. Mr. Partha Pratim Roy learned counsel appearing on behalf of the opposite party submits that the impugned order was passed on July 25, 2023 and as such the appeal was required to be filed within 24th August, 2023. In the instant case the appeal was preferred on 1st, August, 2023 and the certified copy of the impugned order in respect of which the appeal was preferred was filed on the very next day i.e. on 2nd August, 2023. Accordingly present appeal has been filed well within the statutory period and as such question of rejection of Memorandum of Appeal for non filing of the certified copy of the order impugned, within the prescribed period of limitation does not arise. He further contended that the rules of procedure are meant to advance the cause of justice and that the procedure, being a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice.

8. I have considered submissions made by both the parties.

9. On perusal of the list of the dates as annexed with the present Application it is admitted position that the appeal against the order dated July 25, 2023, was preferred on 1st August, 2023. Petitioner himself stated in the list of dates that the opposite party has inserted the certified copy in respect of

the order impugned directly into the record of Misc. Appeal No. 58 of 2023 on 2nd August, 2023 but he alleged that for such insertion of certified copy with the record of appeal no leave was granted by the Court below. Certified copy of order no. 1 dated 1st August, 2023 goes to show that on the date of presentation of appeal, appellant filed a petition and prayed for granting leave to file the appeal with the help of server copy of the impugned order on certain grounds and the court below kept the said application with the records and called for an office report. On the next date vide order no.2 dated 2.8. 2023 the office report was filed and the court below recorded that in view of office report submitted by the concerned officer, stating that the appeal was filed in compliance with order XLIII Rule 1, read with rule 2 of the Code, the appeal is in order and is duly stamped and has been filed within time and on being such satisfaction the court below fixed next date for admission hearing of the Appeal.

10. There is no quarrel with the proposition of law that sub rule (1) of rule 1 of Order XLI as it stands after the Amendment Act of 1999 requires that the Memorandum of Appeal is to be accompanied by a copy of the judgment appealed from unless filing such copy of the judgment is dispensed with by the Court. Such requirement was held to be mandatory and non-observance thereof was held fatal resulting in rejection of Memorandum of Appeal, as filing of appeal without certified copy of the order is considered as incomplete, defective and incompetent. It is equally true that limitation for filing appeal also begins to run from the date of the decree.

11. In the present context both order no. 1 and 2 passed in connection with Misc. Appeal no. 20, 2023 clearly depicts that though initially the appeal was filed on 01.08.2023 without annexing certified copy of the impugned order as mandated in order XLI rule 1, but appellant also sought for leave to present the appeal on the basis of server copy and for which the court below called for a office report and officer concerned after scrutinizing the documents available in the record, reported that the Appeal has been filed in compliance with the provision as laid down under order XLIII rule 1 read with rule 2 of the Code and accordingly the court below in view of the office report came to a finding that the Appeal is in order and has been filed within time. Such finding of the court below vide order no.2 dated 02.08.2023 was never challenge by the petitioner herein/respondent for which such observation has attained its finality and in view of such matter the appellant was directed to serve a copy of the memorandum of appeal and all necessary documents to the respondents vide order no. 7 dated 12.09.2023.

12. While the impugned order was passed learned court below observed as follows:-

“ on perusal of the case record it appears that the appellant filed the instant Misc. Appeal praying for leave to permit them to file certified true copy of the impugned order however before such leave was granted, the appellant filed the certified copy of the impugned order. So, the question of leave as well as adjournment was hearing in that aspect of the present appeal has become infructuous and thus redundant.”

13. In **Smt. Dipo Vs. Wassan Singh and others**, reported in **(1983) 3 SCC 376**, Hon'ble Apex Court, was pleased to held in paragraph 2 as follows:-

“We do not think that the High Court was justified in dismissing the second appeal on the ground of limitation. The defect was technical as the second appeal itself had been presented in time. It was only a copy of the trial court's judgment that was filed after the expiry of the period of limitation. The delay in filing a copy of the trial court's judgment should have been condoned and the second appeal should have been entertained and disposed of on merits. We are also satisfied that the learned District Judge was in error in dismissing the appeal on the ground that the appellant-plaintiff had not herself presented the memorandum of appeal. The appeal had been admitted by the District Judge earlier and there was no point in dismissing it thereafter on the ground that the memorandum of appeal had not been presented by the party herself. Rules of procedure are meant to advance the cause of justice and not to shortcircuit decision on merits. We have no option, but to set aside the judgments of the District Judge and the High Court. Instead of sending the case back to the District Judge for disposal on merits, we have ourselves heard the appeal on merits.”

14. In another judgment reported in **(2006) 1 SCC 75 (Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh and another)** the Apex court has held unequivocally that non compliance with any procedural requirement relating to a pleading, memorandum of appeal or application or petition for relief should not entail automatic dismissal or rejection unless the relevant statute or rule so mandates. It was further observed procedural defects and irregularities which are curable should not be allowed to defeat substantive right or to cause prejudice and it should never be made a tool to deny justice or perpetuate injustice by any oppressive or punitive use. However, the Apex court in this context has reiterated the well recognized exceptions to this principles in the following cases.

- (i)** where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance;
- (ii)** where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it;

(iii) where the non-compliance or violation is proved to be deliberate or mischievous;

(iv) where the rectification of defect would affect the case on merits or will affect the jurisdiction of the court;

(v) in case of memorandum of appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant.

15. Order XLI, Rule-1 does not provide for any penal consequence in case of non-compliance of prescribed procedure. There is no allegation that non filing of copy of order impugned along with the Appeal was deliberate or mischievous.

16. In the case of **Rajindra Ram(supra)** as relied by the petitioner herein also suggest that omission to file a copy of the decree appealed against along with the memo of appeal is a fatal defect but where however a copy has been subsequently filed within the time allowed for appeal and accepted by the Judge, the irregularity will be cured.

17. In the present case the court below has clearly observed in the impugned order that the appeal was filed on 1st August, 2023 praying for leave to permit them to file certified copy of the impugned order, but before such leave was granted Appellant filed the certified copy of the impugned order on the very next date i.e. on 2nd August, 2023 and as such court below observed that the question of leave has become redundant.

18. Apart from all these, this is an application under Article 227 of the Constitution of India and the High court must not interfere with the order of the courts below as a matter of a routine and such power cannot be taken by the High Court as right of another appeal to the aggrieved party. The High Court can interfere the order impugned passed by the Learned Trial Court under Article 227 when it has resulted in any gross and manifest failure of justice or while passing the order the court concerned committed illegality or perversity in passing the order impugned.

19. In the present context when the certified copy was filed on the very next day of preferring the appeal and when both the appeal and the certified copy of the order impugned were filed well within the period of limitation, the trial court had the jurisdiction to accept such certified copy and thereafter to admit the appeal. If the Appellate Court had the jurisdiction to grant such leave in admitting the appeal, I find no material for holding that there was any impropriety in exercising his jurisdiction. This court must not interfere with the order impugned, in exercise of the supervisory jurisdiction, on the only ground that a different view on facts elicited was possible. High Courts interference under Article 227 can arise only when trial court acted without jurisdiction and/or in excess of jurisdiction and such order resulted in failure of justice, in order to keep the subordinate courts within the bounds of their jurisdiction.

20. Since there is nothing to suggest in the order impugned that the court below has over-stepped its jurisdiction by accepting the certified copy of the order impugned which though not filed along with the appeal but had been filed on the very next date of filing the appeal, well within the period of limitation, I find nothing to interfere with the order impugned.

21. C.O. 137 of 2023 thus stands dismissed.

There will be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)