

7th February, 2024
(D/L No.53)
(SKB)

C.O. 1791 of 2019

Panchu Gopal Das
Versus
Jamini Ranjan Das

Mr. Manish Kumar Das,
Mr. Nibaran Kumar Das
... for the petitioner.

Ms. Shila Sarkar,
Mr. Souvik Das
... for the opposite party.

This is an application preferred against the order dated 19th March, 2019 passed by the learned Additional District Judge, Fast Track 3rd Court, Basirhat, District-North 24 Parganas, in Misc. Appeal No.31 of 2012 arising out of Misc. Case No.6 of 2006 in connection with Title Suit No.205 of 1992.

Opposite party herein as plaintiff filed the aforesaid suit for declaration that the impugned deed was a loan in substance and there was an agreement to return the loan within a stipulated period. Thereafter, the defendant no.1 appeared in the suit before the trial court. The suit was thereafter decreed *ex parte* as none appeared on behalf of the defendants on the date of hearing.

Defendant no.2 filed an application under Order IX Rule 13 of the Code of Civil Procedure with a prayer for

setting aside the impugned *ex parte* decree along with an application under Section 5 of the Limitation Act for condonation of delay in filing the application being Misc. Case No.6 of 2006. The said Misc. Case No.6 of 2006 came up for hearing before the Trial court and the learned trial court after hearing was pleased to dismiss the said Miscellaneous case.

Being aggrieved by that order, the defendant/petitioner preferred miscellaneous appeal being Misc. Appeal No.31 of 2012 before the Appellate Court. Learned Appellate Court by the order impugned was pleased to dismiss the appeal with the observations that the miscellaneous appeal has been filed after 51 days from the date of passing the final order, whereas Article 116 (b) of the Limitation Act provides that an appeal is required to be filed within 30 days from the date of the order. Since the petitioner/defendant did not file any application for condonation of delay, the learned Appellate Court rejected the same. Learned Court below further held that the delay in filing the said Miscellaneous case under order IX, Rule 13 before the Trial Court, being Misc. Case 6 of 2006 was also not properly explained and, accordingly, he affirmed the dismissal order passed by the learned trial court while disposing of the Misc. Appeal 31 of 2012 by the order impugned.

Mr. Das, learned counsel appearing on behalf of the petitioner submits that the appeal was preferred within time and, as such, no application under Section 5 of the Limitation Act was required to be filed in the present miscellaneous appeal being Misc. Appeal No.31 of 2012. He further submits that learned court below without considering that serious arguable issue is involved in the case had hurriedly come to a finding that the delay in filing the application under Order IX Rule 13 has not been properly explained and thereby non-suited the petitioner herein, going against the judicial pronouncements.

Having considered the facts and circumstances of the case, it appears that the order under challenge in appeal was passed in Misc. Case No.6 of 2006 on 18.08.2012.

The document shows that the defendant/petitioner applied for obtaining certified copy of the said order dated 18.08.2012 on 20.08.2012. The certified copy got ready for delivery on 27.09.2012 and, ultimately, the certified copy was delivered to the defendant/petitioner on 03.10.2012. The instant appeal before the 1st Appellate Court was filed on 10.10.2012. section 12(2) of the Limitation Act, 1963 provides for exclusion of time required for obtaining a copy of order. Accordingly, the appeal was filed well within the

statutory period and for which no application under Section 5 of the limitation Act need to have filed by the petitioner/appellant herein and the order impugned to that extent is perverse.

Furthermore, on perusal of the order impugned, it also appears that court below suddenly jumped to a conclusion that delay in filing the Misc. case has not been properly explained, on the basis of his personal belief, surmise and conjecture not supported by evidence, which is also not convincing and perverse.

In such view of the matter, the order impugned dated 19.03.2019 passed in Misc. appeal No.31 of 2012 is hereby set aside. Learned court below is directed to dispose of the aforesaid Misc. Appeal afresh on merit after giving an opportunity to both the parties to hear and to pass a reasoned order preferably within a period of three months from the date of communication of this order. C.O.1791 of 2019 is, accordingly, disposed of.

Urgent Photostat certified copy of this order, if applied for, be given to the parties after compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)