

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble **Justice Prasenjit Biswas**

C.O. No. 2090 of 2012

with

C.O. No. 2091 of 2012

with

C.O. No. 2092 of 2012

Rekha Dutta

-Versus-

**Dipak Kumar Roy (Since Deceased) Substituted by Alope Kumar Roy &
Ors.**

For the Petitioner : **Mr. Amajit De,
Ms. Akanksa Mukherjee.**

For the Opposite Party No. 1 : **Mr. Tanmoy Mukherjee,
Mr. Sounak Bhattacharjee,
Mr. Souvik Das,
Mr. Rudranil Das,
Mr. Saunak Mondal.**

Hearing concluded on : **28.02.2024**

Judgment On : **27.03.2024**

Prasenjit Biswas, J:-

1. These revision applications are directed against orders dated 09.12.2011 passed by the learned Civil Judge, Junior Division, Additional Court, Berhampore passed in Miscellaneous Cases No(s). 38 of 2010, 39 of 2010 and 40 of 2010 by which applications under Section 5 of the Limitation Act are rejected. Consequently, upon the rejection of the said applications praying for condonation of delay the petition filed under Order 9 Rule 13 of CPC with prayers for setting aside the ex-parte orders were also rejected.

2. The opposite parties filed Miscellaneous Cases being No(s). 24 of 1999, 23 of 1999 and 25 of 1999 under Sections 8 and 9 of the West Bengal Land Reforms Act with prayers for getting orders of preemption in respect of “Ka” Schedule property mentioned in the applications. Those cases were decreed ex-parte against the present petitioner. Thereafter, applications were taken out on behalf of this petitioner under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the said ex-parte orders passed against them. As the said applications filed under Order 9 Rule 13 of CPC were filed beyond the statutory period of limitation applications under Section 5 of the Limitation Act for condonation of delay were also filed. The learned Trial Court after giving opportunity of hearing to the both sides found no plausible reasons and dismissed the same.

3. Learned Counsel on behalf of the petitioner submitted before this Court interalia that the learned Trial Court misread and misunderstood the case

made out in the application for condonation of delay and was wrong in holding that there is no sufficient cause for condonation of the delay. It is further submitted by the learned Counsel that there is sufficient reason to allow the application for condonation of delay and the Court must adopt a liberal approach but in not doing so the Trial Court made error of law in rejecting the application for condonation of delay.

4. Learned Counsel appearing on behalf of the opposite parties (herein) at the very outset raised the point that whether the order of rejecting an application for condonation of delay amounts to the rejection of the main proceeding as well. It is submitted by the learned Counsel that the aforesaid point has been settled by the Hon'ble Division Bench of this Court in **Md. Ali Sardar And Ors. Vs. Hossain Ali Monda** reported in **AIR 2012 Calcutta Page 171** after taking into consideration the decision rendered by the Hon'ble Apex Court in case of **Shyam Sunder Sarma Vs. Pannalal Jaiswal and Others** reported in **2005 Supreme Court 226**. So, it is submitted by the learned Counsel that in view of observations of the Division Bench of this Court referred above that in case of dismissing the application under Section 5 of the Limitation Act filed with the petition under Order 9 Rule 13 of CPC is an appealable order and the revisional proceeding under any provision of law does not lie in view of ratio laid down in case of **Md. Ali Sardar And Ors.**

5. For the sake of immediate reference, Order XLIII Rule 1(d) of CPC is extracted as under: "Order XLIII Rule 1. Appeal from orders –

An appeal shall lie from the following orders under the provisions of section 104, namely:- (a) xxx

(c) xxx

(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex-parte.”

6. I have considered the submission advanced by both the parties. Perused the impugned order as well as the decisions cited on behalf of the opposite parties.

7. It is profitable to quote the observations of this Hon’ble Court in case of **Md. Ali Sardar (supra)** which entails at paragraph no. 19.

“While thinking this issue in case of reverse situation namely when application for condonation of delay is allowed obviously it cannot be an appealable one as no decision is rendered either way on decree either in case of appeal or in case of proceeding under Order IX Rule 13 as doctrine of deemed finality does not apply. It appears that views taken in the case of Md. Oli Sheikh and Ors. v. Tarani Mahato and Anr. by the learned Single Judge of this Court runs counter to our observation as above, hence it cannot be accepted to be correct proposition of law. Legal proposition on this aspect enunciated by the learned single Judge in case of Sri. Gobinda Malik v. Sri Gopal Chandra Ghosh (C.O. No. 808 of 2011) is in our view, correct. In view of the above discussion we conclude as follows while deciding the reference:

(a) The order dismissing the application under Section 5 of the Limitation Act intending to prefer appeal is an appealable one and the revisional proceedings under any provision of law does not lie in view of the ratio laid down in case of Shyam Sundar Sarma v. Pannalal Jaiswal (AIR 2005 SC 226) (supra),

(b) Similarly order rejecting an application under Section 5 of the Limitation Act filed in proceeding initiated under Order IX, Rule 13 of the Code is an appealable order.”

8. In view of observations the Court is to find whether the order or decree sought to be impugned invoking Section 5 of the Limitation Act is appealable or not. If it is so obviously on dismissal of application filed under Section 5 of the Limitation Act consequent upon dismissal of the proceeding underneath, by which order or decree is sought to be impugned becomes appealable automatically, applying the principle of merger most appropriately termed as doctrine of fictional merger.

9. As against the ex-parte decree, a defendant has three remedies available to him. First, is by way of filing an application under Order IX Rule 13 CPC seeking for setting aside ex-parte decree; the second, is by way of filing an appeal against the ex-parte decree under Section 96(2) of the CPC and the third, is by way of review before the same court against the ex-parte decree. Against the order passed under Order IX Rule 13 CPC rejecting an application for seeking setting aside the decree passed exparte, an appeal is provided. When an application is filed seeking condonation of delay for

seeking setting aside an ex-parte decree and the same is dismissed and consequently, the petition is also dismissed, the appeal under Order XLIII Rule 1(d) CPC is maintainable.

10. It appears from the impugned orders passed by the Trial Court that the applications seeking condonation of delay in filing petitions under order 9 Rule 13 of CPC were dismissed and consequently the main petitions filed under Order 9 Rule 13 CPC were also dismissed which the Trial Court noted in the impugned orders in the following words:-

“Be it mentioned here that when this Court has rejected the petition of the petitioner under Section 5 of the Limitation Act in that event the question of condoning the delay on the party of the petitioner is redundant, and then the petition for setting aside the ex-parte decree becomes barred by time.”

11. In view of the ratio in the above decision rendered by this Court in case of **Md. Ali Sardar** (supra) there is no hesitation to arrive at the finding that the rejection of an application for condonation of delay amounts to the rejection of the petition filed by the petitioner under Order 9 Rule 13 of CPC which is an appealable order under Order 43 of the Code of Civil Procedure. Therefore, application for dismissal of Section 5 in connection thereto will obviously be an appealable but order of dismissal of Section 5 application simpliciter is of no effect.

12. Therefore, the orders impugned in this revisional applications are appealable under the provisions of the Code of Civil Procedure. As this Court

finds that the present petitioner has efficacious alternative remedy by way of statutory appeal and therefore, this Court does not find any grounds warranting the invocation of powers of judicial review.

13. Accordingly, the revisional applications filed by the petitioner filed under Article 227 of the Constitution of India are not maintainable and accordingly the same are liable to be dismissed.

14. So, C.O being No(s). 2090 of 2012, 2091 of 2012 and 2092 of 2012 are hereby dismissed on contest as not maintainable.

15. There will be no order as to costs.

16. Urgent Photostat certified copy of this order, if applied for, be given to the parties on payment of requisite fees.

(Prasenjit Biswas, J.)