

6th April,
2026
(AK)
09

S.A. 37 of 2024
IA No: CAN 1 of 2023
CAN 2 of 2026

Sri Ashit Ghosh Mullick
Vs.
Tarun Ghosh Mullick and others

Mr. Dyutiman Banerjee
...for the appellant.

Mr. Sounak Bhattacharya
Mr. Sounak Mandal
...for the respondent nos1 & 2.

1. The present appeal arises out of a suit for declaration and permanent injunction and has been filed at the behest of the plaintiff.
2. The suit was filed sometime in the year 2005 and was dismissed on January 31, 2007.
3. After a gap of more than two years, an appeal, bearing Title Appeal No.55 of 2009, was preferred against the said dismissal before the court of the learned District Judge, Alipore, which did not have territorial jurisdiction to take up the matter according to the appellant.
4. Subsequently, the appeal was sought to be withdrawn.
5. Such application was allowed vide Order No.27 dated December 17, 2019, which recorded that the

appellant was permitted to withdraw the appeal and the appeal was thus dismissed for non-prosecution.

6. Conspicuously, no liberty to file a fresh appeal on the self-same grounds was recorded in the said order.
7. Being aggrieved, subsequently an application was filed by the appellant for recall of the said order of dismissal of the appeal dated December 17, 2014.
8. The said recall application, however, was dismissed on merits by the learned District Judge at Alipore vide Order No.30 dated March 12, 2015.
9. While so dismissing, the learned District Judge came to the conclusion that the learned Advocate for the appellant could not deny the fact that the appellant had put his signature by swearing affidavit on November 28, 2014, where he intended to withdraw the appeal.
10. Therefore, it was further observed, when the appellant himself withdrew the appeal and did not deny his signature at the bottom of the affidavit on the application dated November 28, 2014 where he intended to withdraw the appeal, and the same was allowed by the court, the court did not find any reason to recall the order dated December 17, 2014.

11. Subsequently, however, an appeal was preferred against the self-same decree of the learned Trial Judge before the appropriate court at Baruipur, along with an application for condonation of delay in filing the appeal.
12. By the judgment impugned in the present second appeal, the said application was turned down and consequentially the title appeal was dismissed as time-barred.
13. Learned counsel for the appellant argues that the appellant, being a layman having no knowledge of the law, cannot be castigated for the fault of his learned Advocate who had preferred and all along pursued the appeal before a wrong forum where it was pending for a considerable period of time, between the years 2009 and 2014.
14. Learned counsel cites a judgment of the Hon'ble Supreme Court in the matter of *Mool Chandra vs. Union of India* dated August 5, 2024 [2024 INSC 577] for the proposition that where no negligence can be attributed to the appellant, the courts ought to adopt a liberal and justice-oriented approach to condone the delay.
15. However, in the present case, it is not only a question of the *bona fides* of the appellant but also a legal bar in preferring the appeal.

16. Since the earlier appeal which was filed by the appellant was dismissed as withdrawn without liberty to sue afresh, which order was subsequently refused to be recalled on the ground of the appellant having himself instructed his counsel to do so, the same creates a legal bar within the contemplation of Order XXIII, read with Section 107, of the Code of Civil Procedure.
17. This court is not unmindful of the fact that a second line of argument may be advanced by the appellant, to the effect that a court not having territorial jurisdiction could not have dismissed an appeal and even if so dismissed, the principle of Order XXIII of the Code of Civil Procedure cannot be attracted in such a case, because the court passing such order of withdrawal did not have territorial jurisdiction in the first place.
18. However, such argument is substantially diluted by the fact that lack of territorial jurisdiction, unlike inherent jurisdiction, does not hit at the very root of the subject-matter jurisdiction of a court to pass an order. Even otherwise, such objection is required to be taken at the earliest possible opportunity. However, here the appellant himself had preferred the appeal before a court not having territorial jurisdiction and withdrew the same simpliciter,

without seeking leave to prefer a fresh appeal before the appropriate court having jurisdiction. Such withdrawal was not even the ground of lack of territorial jurisdiction. The question of lack of jurisdiction was not even raised before the said court.

19. Even if we proceed on the premise that the earlier Appellate Court did not have territorial jurisdiction, the findings of fact arrived at while rejecting the recall application, to the effect that the appellant himself had signed the withdrawal application and therefore was all along aware of the litigation pending at his behest before the District Court at Alipore, cannot be glossed over.
20. Hence, the argument that the appellant, being a layman, was unaware of the circumstances of the case cannot be accepted.
21. The application for condonation of delay which has been dismissed by the First Appellate Court of second instance by the impugned judgment was on the same premise of alleged lack of knowledge of the appellant, who is supposedly a layman in law.
22. From the facts of the case as discussed above, it is palpably clear that the appellant all along was conscious of what was happening to his litigation.

23. Thus, mere lack of legal acumen cannot provide sufficient protection to the appellant by explaining the long delay not only between dismissal of the earlier appeal as withdrawn in February, 2014 and the preference of the next appeal in the year 2015, but also between the point of time when the title suit was initially dismissed on January 31, 2007 and when the appeal before the court lacking jurisdiction was filed two years thereafter, that is, in the year 2009.
24. That apart, all the above discussions clearly indicate that the questions involved in the present second appeal are purely factual questions.
25. It is well-settled that unless a substantial question of law is raised, the appellant cannot cross the threshold of the second appellate court's jurisdiction by admission of the appeal.
26. We do not find any substantial question of law involved in the present appeal.
27. Accordingly, SA 37 of 2024 is dismissed under Order XLI Rule 11 of the Code of Civil Procedure.
28. CAN 1 of 2023 as well as CAN 2 of 2026 are also disposed of accordingly.
29. There will be no order as to costs.

30. Urgent photostat copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)

(Supratim Bhattacharya, J.)