

Calcutta High Court

HON'BLE JUDGE(S): PARTHA SARATHI SEN , J

ASRAFUL HOQUE V. SANKAR DAS

C.O. - 1484 of 2021, decided on 25/11/2022

Limitation Act (36 of 1963) , S.5— Civil P.C. (5 of 1908) , S.115— Application for condonation of delay - Dismissal of application - Revision against - Maintainability - Dismissal of application due to absence of applicant and by self same order, the Court recorded dismissal of appeal - By no stretch of imagination, it can be said that trial court dismissed title appeal on its merit on which decree can be drawn up - In view of same,revision against said order, maintainable.

(Para 8, 9)

Case Referred :

AIR 2020 SC 178

AIR 2005 SC 226 : 2004 AIR SCW 6513

AIR 1996 SC 378 : 1995 AIR SCW 4210

AIR 1956 SC 367

Chronological Paras

Para No.(6)

Para No.(6)

Para No.(4)

Para No.(6)

Name of Advocates

Sarbananda Sanyal for Petitioner; Rwitendra Banerjee, Shibasis Chatterjee, Devdutta Pathak for Respondent.

1. ORDER:-The present revisional application arises out of order No.21 dated 26.03.2021 as passed by the Learned Additional District Judge, Jangipur, Murshidabad in Title Appeal No. 15/2018 whereby and whereunder the said court by the impugned order dismissed the appellants' application under Section 5 of the Limitation Act on account of their absence and by the self same order recorded dismissal of the said appeal.

2. The appellant felt aggrieved and thus preferred the instant revisional application.

3. In course of hearing learned advocate for the petitioners/appellants draws attention of this Court to the certified copy of the impugned order. It is contended by him that by the impugned order learned trial court ought not to have reject the limitation petition in absence of the present petitioners. It is further contended that learned trial court acted beyond the law by dismissing the Title Appeal No. 10 of 2018 since he has flouted the provisions of Explanation of Order 41 Rule 17 of the Code of Civil Procedure.

4. In support of his contention learned advocate for the petitioners places his reliance upon the reported decision of Deva Ram and Anr. v. Ishwar Chand and Anr., Reported in **AIR 1996 SC 378** : (1995) 6 SCC 733.

5. While opposing the contention of the petitioners, learned advocate for the

opposite parties submits that though while passing the impugned order learned trial court committed a mistake in dismissing the said appeal overlooking the Explanation of Order 41 Rule 17 of the Code of Civil Procedure but since the impugned order of rejection of the limitation petition is passed in an appeal itself, the same is to be construed as an order passed in an appeal and that an order dismissing such an appeal tantamounts to a decree, and challenging the impugned order, second appeal to be preferred. It is thus contended that the instant revisional application is not maintainable in the eye of law.

6. In support of his contention learned advocate for the opposite parties places his reliance upon the following three reported decisions namely:-

- i. Mela Ram and Sons v. Commissioner of Income Tax, reported in **AIR 1956 SC 367**;
- ii. Prabodh Choudhury Das and another v. Mahamaya Das and others, reported in (2020)18 SCC701 : (**AIR 2020 SC 178**);
- iii. Shyam Sundar Sarma v. Pannalal Jaiswal and others, reported in (2005) 1 SCC 436 : (**AIR2005 SC 226**).

7. On perusal of the entire materials as placed before this Court especially the certified copy of the impugned order it reveals to this Court that on the day of passing of the impugned order the appellants were absent and accordingly none moved limitation petition as filed by the appellants and consequently such limitation petition was rejected. Such being the position this Court has got no hesitation to hold that the petition under Section 5 of the Limitation Act was practically dismissed not on merit but on default. It further appears that by the self same order learned trial court dismissed the said appeal for appellants' default without entering into its merit.

8. In view of such, under no stretch of imagination it can be said that by the impugned order the learned trial court dismissed the Title Appeal No.15 of 2018 on its merit on which a decree can be drawn up. The reported decisions as placed from the said opposite parties, in considered view of this Court, have got no nexus with the facts and circumstances as involved in the present lis since those judgements were pronounced in different perspectives.

9. In view of such, this Court holds that the instant revisional application is maintainable and is hereby allowed.

10. Accordingly the impugned order No.20 dated 26.03.2021 as passed in Title Appeal No.15 of 2018 by Learned Additional District Judge, Jangipur, Murshidabad is hereby set aside.

11. Learned Additional District Judge, Jangipur, Murshidabad is hereby directed to hear out the petition under Section 5 of the Limitation Act as filed by the petitioners herein on its merit after giving the respondents therein an

opportunity to file their written objection against the petition under Section 5 of the Limitation Act as filed by the appellants, if not, filed in the meantime.

12. With the aforementioned observation the instant revisional application is disposed of.

13. Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

Petition Allowed