

(1985) 08 CAL CK 0017
In the Calcutta High Court

Case No : Appeal No. 140 of 1983 (Suit No. 1892 of 1947)

Kalyan Kumar Basak

APPELLANT

Vs

Salil Kumar Basak and Others

RESPONDENT

Date of Decision : 23-08-1985

Acts Referred:

Calcutta High Court (Original Side) Rules, 1914 — Rule 32, 8

Citation : AIR 1986 Cal 298 : (1986) 1 CALLT 33 : (1986) 1 CHN 81 : (1988) 2 CompLJ 248

Hon'ble Judges : R.N. Pyne, J;Prabir Kumar Majumdar, J

Bench : Division Bench

Advocate : Gautam Chakrabartti, for the Appellant; A.K. Chatterji, (for Nos. 10, 11 and 12) and Dipankar Gupta, amicus curiae, for the Respondent

Judgement

R.N. Pyne, J.—On 2nd May 1983 the appellant made an application before M.M. Dutt and Monoj Kumar Mukherjee, JJ. and obtained an order granting leave to the appellant to file the above appeal against the order dated 3rd February 1983 of Mrs. Monjula Bose, J. without a certified copy thereof on usual undertaking and for stay of the said order. Pursuant to the said leave memorandum of appeal was filed without a certified copy of the said order. The above application was made returnable on 6th May 1983. No order for stay of the operation of the said order dated 3rd February 1983 was made. On the returnable date, i.e., 6th May 1983 the appeal Court gave directions for filing of affidavits in the said application. The said application is still pending.

2. As there were certain mistakes in the cause title of the appeal an order was made on 16th June 1983 for amendment of the cause title of the appeal, thereafter appellant took extension of time and on 5th August 1983 cause title of the appeal was corrected and/or amended.

3. The respondents Nos. 10, 11 and 12 through their Advocates-on-Record, M/s. Bose and Mitra wrote a letter to the registrar, Original Side, to set down the appeal before the Hon"ble Court as the appellant did not file the paper book

within time.

4. Thereafter, on 8th February 1985 the appeal appeared in the special list before Dipak Kumar Sen and Ajit Kumar Sengupta, JJ. but their Lordships released the same. Thereafter, on 27th February 1985 the appeal appeared in the special list before us. On that day we directed the appellant to file an affidavit explaining the reason why paper book was not filed within time. We also gave leave to the appearing respondents to file an affidavit. Pursuant to such leave an affidavit affirmed by the appellant on 16th March 1985 was filed. The respondents Nos. 10, 11 and 12 filed an affidavit affirmed then on 15th March, 1985.

5. Thereafter, on the 20th March 1983 when the matter appeared again in our list a point was taken on behalf of the appearing respondents that as no notice of appeal was taken out by the appellant and delivered to the Sheriff for service on the respondents in compliance with Rule 8 of Chapter 31 of the Rules of the Original Side of this Court the appeal should be dismissed. On behalf of the appellant it was submitted that Court had jurisdiction to extend the time for taking out and service of the notice of appeal. In view of the contentions of the parties we gave leave to the appellant to file an affidavit explaining why notice of appeal was not taken out and handed over to the Sheriff for service upon the respondents in time. We also gave leave to the appearing respondents to file an affidavit. Pursuant to such leave one Subir Chandra Bose, Advocate of M/s N. C. Bose and Co., Advocates-on-Record of the appellant, filed an affidavit affirmed by him on 27th March 1985. The respondents Nos. 10 and 12 filed an affidavit affirmed by them on 29th March 1985.

6. The question that arose for our consideration was if the appellant does not take out and deliver to the Sheriff a Notice of Appeal in time for service on the respondent as required under Chapter 31 Rule 8 of the Original Side Rules then whether the Court has no option but to dismiss the appeal. As there is no direct authority on the point involved in this case we invited Mr. Dipankar Gupta, Barrister-at-Law to assist us in the matter as *amicus curiae*. Following the usual tradition of the Bar Mr. Dipankar Gupta has appeared in the matter as *amicus curiae* and rendered assistance to the Court.

7. In his affidavit affirmed on 16th March 1985 the appellant has stated that before the paper book could be prepared and filed it was discovered that an inadvertent mistake crept in the cause title. On 16th June 1983 an order was made for amendment of the cause title. When the Advocate-on-Record of the appellant wanted to cause such amendment to be carried out in term of the said order dated 16th June 1983 it was found that the said order for amendment was not clear and the Department required that the said order should be clarified. Thereafter on 4th July 1983 and 29th July 1983 on the appellant's application an order for clarification and/or amendment was made and thereafter on 5th August 1983 amendment of the cause title was carried out. It is stated that all the interested parties appeared in the Court of appeal and as such they had sufficient notice of preferring of this appeal. Besides it is the normal and usual practice of

this Court that when all the interested parties appear at the time of admitting the appeal service of notice of appeal is not required to be made and/or is dispensed with. It is stated that there was no negligence or laches on his part in taking step for filing of the paper book and the reason for non-filing of the paper book was beyond his control. It is further stated that paper book is almost ready and a fortnight's period should be given to enable the appellant to file the paper book.

8. In their affidavit affirmed on 15th March 1985 respondents Nos. 10, 11 and 12 have stated that the appeal is not maintainable and is barred by limitation. It is stated that there are 19 respondents in the appeal and all the respondents have not appeared and no notice of appeal was ever served upon all the interested parties/respondents. It is also stated that the appellant has neither filed certified copy of the order appealed against nor served notice of appeal or the index of the paper book to all the interested parties/respondents and hence it is absurd to believe that the appellant can file the paper book within a fortnight.

9. Subir Chandra Bose, Advocate of M/s N. C. Bose & Company, Advocates-on-Record of the appellant in his affidavit affirmed on 27th March 1985 has stated that he took no steps under the provisions of Chapter 31 of the Original Side Rules for service of notice of appeal and for settlement of index or filing of paper book within time limited by the Original Side Rules because he was under a bona fide belief and impression that the provisions of Chapter 31 of the Original Side Rules apply only when the memorandum of appeal is filed in the Department along with a certified copy of the order but not when the appeal is admitted by leave of the Hon''ble Appeal Court without the certified copy of the order. According to him, in the latter case it is the normal practice of this Hon''ble Court to direct the time within which the paper book should be filed: service of notice of appeal is either dispensed with or directed to be served on the appearing parties within such time as is allowed by the Hon''ble Appeal Court and the settlement of index is usually dispensed but direction is given to the appellant to incorporate in the paper book all papers used in the trial Court.

10. Mr. Bose has further stated that in the event this Hon''ble Court is of opinion that the provisions of Chapter 31 of the Original Side Rules apply to the present appeal then he admits that he has committed a bona fide mistake arising out of his misconception of the law for which he has tendered unqualified apology. According to him, there was no mala fide conduct on his part or on the part of his client.

11. Mr. Bose has further stated that the appellant's application for interim order is still pending. He was under a bona fide impression that while disposing of the said application the Hon''ble Appeal Court would be pleased to dispense with the service of the notice of appeal and settlement of index and direct the appellant to file the paper book within a reasonable time as is usually ordered by the Hon''ble Appeal Court. He has further stated that the paper book is lying ready without the certified copy of the said order. Mr. Bose has stated that in the above circumstances he told the appellant when he came to Mr. Bose's office that the

matter was being properly attended to and the application and the appeal would be heard in due course. In view of the above circumstances Mr. Bose has prayed that delay on his part should be condoned and the appellant be permitted to file the paper book which is lying ready and further for leave to file a supplementary paper book containing the certified copy of the order appealed against. He has stated that the Hon"ble Court would be pleased to take a lenient and compassionate view of the matter in view of the bona fide mistake on his part.

12. The respondents Nos. 10 and 12 in their affidavit affirmed on 29th March 1985 have denied the statements made by Subir Chandra Bose in his affidavit. They have stated that Subir Chandra Bose did not act with due care or in accordance with the Original Side Rules of this Court. They have further stated that great prejudice and injury would be caused to the respondents Nos. 10, 11 and 12 if any order for extension of time for service of notice of appeal or filing of paper book is made.

13. Mr. Gautam Chakrabarti appearing on behalf of the appellant has submitted that under Chapter 31 Rule 8 of the Original Side Rules if there is any default on the part of the appellant to take out and deliver to the Sheriff a notice of appeal within the specified time or the, extended time then the appeal may be set down before the appellate Court for disposal. He has submitted that the word "disposal" in the said rule does not mean that the appeal must be dismissed. According to him, the said rule confers upon Court power either to dismiss the appeal or to dispose it in any other manner. Referring to Rule 35 of Chapter 10 of the Original Side Rules Mr. Chakrabarti has submitting that under this rule in the circumstances mentioned therein suits and proceedings may be placed before a Judge in chamber to be dismissed for default, unless good cause is shown to the contrary or be otherwise dealt with as the Judge may think proper. The marginal note of this Rule is "Disposal of suits for want of prosecution". Therefore, according to Mr. Chakrabarti the word "disposal" does not necessary mean dismissal According to Mr. Chakrabarti non-service of notice of appeal is not so fatal as would require only dismissal of the appeal In support of his submissions Mr. Chakrabarti has referred to a Dictated Order of M.M. Dutt and C.K. Banerji, JJ. dated 20th June 1983 in Appeal No. 28 of 1982 Official Liquidator, High Court, Calcutta v. Bhabendra Nath Ghose. He has also cited the case of State of West Bengal v. Bio-drug Laboratories Pvt. Ltd. 87 CWN 245 : (1983 Tax LR 2743).

14. Mr. A. K. Chatterji appearing for the respondents Nos. 10, 11 and 12 has submitted that the question of non-issuance of notice of appeal has not been decided in the Dictated Order cited by Mr. Chakrabarti. According to Mr. Chatterji if the appellant fails to take out the notice of appeal within the time as mentioned in Chapter 31 Rule 8 of the Original Side Rules then the appeal shall be dismissed. According to Mr. Chatterji the word "disposal" in the above rule means dismissal. Mr. Chatterji has also submitted that according to Chapter 31 Rule 15 paper book shall be prepared in accordance with approved or settled Index. In the instant case the appellant has not taken any step for approval or

settlement of Index.

15. Drawing an analogy to Order 41 Rule 18 of CPC which provides for dismissal of appeal when notice is not served in consequence of the appellant's failure to deposit costs Mr. Chatterji has submitted that for appellant's failure to take out notice of appeal as provided in Chapter 31 Rule 8 of the Original Side Rules the appeal shall be dismissed. Mr. Chatterji has also submitted that the instant appeal appeared in the Special List twice before.

Mr. Dipankar Gupta has submitted that the word "disposal" in Rule 8 of Chapter 31 of the Original Side Rules either means "dismissed" or it implies making of some other order. If the said Rule contains a discretionary power then the question of making out sufficient cause will arise. According to him, the word "disposal" does not mean that dismissal is inevitable.

16. Mr. Gupta has further submitted that where on account of default made on behalf of a party dismissal is inevitable the same is expressly stated so. In this connection he has referred to Order 9 Rules 5 and 8 of the Civil Procedure Code. He has submitted that Rules 5(1) and 8 provide that in the circumstances mentioned therein the Court shall make an order that the suit be dismissal. Hence, under the said Rules 5(1) and 8 dismissal is inevitable and in such cases the Court has no option but to pass an order for dismissal of the suit.

17. Mr. Gupta has also drawn our attention to Chapter 10 Rule 35 of the Original Side Rules, According to him, this Rule provides for three options namely, (i) suit may be placed before a Judge to be dismissed for default: (ii) the Court may not dismiss the suit if any good cause is shown to the contrary and (iii) the Court may deal with the suit and proceeding as it thinks proper. He has referred to the marginal note of Rule 35 which provides that "Disposal of suits for want of prosecution". He has submitted that the marginal note read in the context of the powers provided in the said Rule makes it amply clear that the word "disposal" does not mean only dismissal. According to him, "disposal" cannot be equated with "dismissal". The word "disposal" is a compendious expression and may include not only dismissal but also include other order for disposal.

18. It is also the submission of Mr. Gupta that Rule 22 of Chapter 31 of the Original Side Rules provides that in case of non-filing of paper book the appeal shall be set down in the peremptory list of appeals from the Original Side and shall be disposed of by the Court as it shall think fit. Hence, according to Mr. Gupta, where the intention is that for default on the part of a party the matter should be dismissed it is specifically provided so in the Rules. But where for default on the part of a party dismissal is not inevitable the word "disposal" is used. He has further submitted that under Chapter 38 Rule 46 of the Original Side Rules the Court or a Judge shall have power to enlarge or abridge the time appointed by the Rules or fixed by any order enlarging the time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement can be ordered, although the application

for the same is not made until after expiration of the time appointed or allowed.

19. The question therefore is if a party makes default in taking out and delivering to the Sheriff a notice of appeal as required under Rule 8 of Chapter 31 of the Original Side Rules then whether the Court has no option but to dismiss the appeal.

20. Rule 8 of Chapter 31 of the Original Side Rules (hereinafter referred to as "the said Rules") provides as follows :

"Within one week from the date of admission of an appeal, or within such extended time as may be allowed by the Registrar, the appellant shall take out and deliver to the Sheriff a Notice of Appeal for service on the respondent; in default, the appeal may be set down before the appellate court for disposal."

21. On the above question the arguments advanced by Mr. Gupta and Mr. Chakrabarti as stated hereinbefore have good deal of force.

22. The word used in Rule 8 of Chapter 31 is "disposal". The dictionary meaning of the word "disposal" is "control, direction", See Shorter Oxford English Dictionary (3rd Edition).

23. In Rule 8 of Chapter 31 of the said Rules the word used is "disposal" and not "dismissal". Where it is intended by any rule of the said Rules or any provision of the CPC that for non-compliance of the same the suit or the appeal should be dismissed it is specifically provided so. Order 9, Rules 5(1) and 9 Order 41, Rule 18 of the CPC provides that in the circumstances mentioned therein the Court shall make an order that the suit be dismissed. Here power of dismissal is specifically conferred upon the Court.

24. Rule 35 of Chapter 31 of the said Rules empowers the Judge to dismiss the suit for default unless good cause is shown to the contrary, or to otherwise deal with the matter as the Judge may think proper. The marginal note of the said above rule is : "Disposal of suits for want of prosecution". Marginal note makes it clear that disposal does not mean only dismissal.

25. Rule 22 of Chapter 31 of the said Rules provides that in case of omission to file paper book the appeal shall be set down in the next Peremptory List of Appeals from the Original Side, and shall be disposed of by the Court as it shall think fit. This Rule does not show that "disposal" means only dismissal.

26. From the above it is clear that "Disposal" in the said Rules does not mean only "dismissal" "Disposal" includes "dismissal" but is not confined thereto. Where power is given to the Court only to dismiss a suit, proceeding or appeal it is specifically provided so in the said Rules and the Civil Procedure Code.

27. In the case of The Official Receiver, High Court, Calcutta v. Bhabendra Nath Ghose, (Appeal No. 28 of 1982, D/- 20-6-1983 Cal) cited by Mr. Chakrabarti admittedly notice of appeal was served on the respondent and no index of papers was settled by the parties. The respondent had informal notice of the filing of

appeal. The paper book was filed by the appellant without the index of papers being settled by the respondent. On the above facts as the respondent was not served with the notice of appeal the appeal Court directed the appellant to serve notice of appeal on the respondent's Advocate-on-record and to file, a supplementary paper book containing the documents which were not included in the paper book already filed by the appellant.

28. It therefore appears that where the appellant has not taken out the notice of appeal or got the index of papers settled or filed the paper book within time the Court is empowered either to dismiss the appeal or make such other order as it would think fit. In this connection it should be noted that Rule 29 of Chapter 31 empowers the Court to enlarge the time for doing any act required to be done under Chapter 31 of the said Rules. Rule 46 of Chapter 38 also empowers the Court to enlarge the time.

29. In the instant case admittedly the appellant has not taken out notice of appeal; index of papers has not been settled and paper book has not yet been filed. According to Subir Chandra Bose, Advocate the paper book is ready but the order appealed against has not been included in the paper book.

30. From the affidavits filed in this matter it appears that notice of appeal has not been taken out, index of papers has not been settled and paper book has not been filed due to default and ignorance on the part of Subir Chandra Bose, Advocate of M/s. N. C. Bose & Co., Advocates-on-record of the appellant who is looking after this appeal for the appellant. The reasons for such default have been set out in the affidavit of Subir Chandra Bose affirmed on 27th March 1985 which we have set out earlier. It is regrettable that an advocate practising in the Original Side of this Court is not conversant with the practice and procedure of the original side of this Court. Subir Chandra Bose should have been more diligent in the matter. However, if for the defaults on the part of the Advocate the appeal is dismissed it is the appellant, who is in no way responsible therefore, will suffer. The appellant has taken all steps in the matter which are required to be taken by him. It is well settled that when a lay client has taken all steps in the matter of conducting the proceeding in Court then he should not be made to suffer for negligence, laches and/or defaults on the part of his lawyer. See Jaipur Mineral Development Syndicate, Jaipur Vs. The Commissioner of Income Tax, New Delhi, ; Rafiq and Another Vs. Munshilal and Another, ; Smt. Lachi Tewari and Others Vs. Director of Land Records and Others, and Tusnial Trading Co. v. Himangshu Kumar Roy 1 CHN 375.

31. In the instant case for not taking appropriate steps in the matter the Court has the discretion either to dismiss the appeal or to make such other order as it would think fit. Considering all aspects of this case and particularly, in view of the fact that if the appeal is dismissed the appellant who is not at all to be blamed, will suffer loss, in our view, for sake of justice the appeal should not be dismissed at this stage.

32. We, therefore, direct that the appellant will serve notice of appeal upon the respondents within two weeks from today. In default the appeal will stand dismissed. Paper book which has been already prepared by the appellant shall be filed within two weeks from today. A copy of such paper book shall be sent by the Advocates-on-record of the appellant to the Advocates-on-record of the appearing respondents within 7 days from today free of charge. Within 7 days from the date of receipt of the paper book the Advocates-on-record of the appearing respondents will inform the appellant's Advocates-on-record about the papers which were used in the trial Court but have not been included in the paper book already prepared by the appellant's Advocates-on-record. Settlement of index is dispensed with. Certified copies of the order appealed against and the order admitting the appeal shall be issued expeditiously. A supplementary paper book, printed or cyclostyled, containing the certified copies of the said orders and the papers which according to Advocates-on-record of the appearing respondents were used in the trial Court but have not been included in the paper book already prepared shall be filed within six weeks from date.

33. In the facts and circumstances of this case the appellant will pay to the respondents Nos. 10, 11 and 12 cost of this proceeding assessed at 20 G.Ms. Such payment shall be made to the Advocate-on-record of the said respondents before filing the supplementary paper book as mentioned above. Liberty to apply.

34. The question as to whether the appeal is barred by limitation or not and/or whether it is maintainable or not as raised on behalf of the appearing respondents will be decided at the time of hearing of the appeal.

35. Parties and Department will act on a signed copy of the ordering portion of the judgment.

Prabir Kumar Majumdar, J.

36. I agree.