

(1998) 09 CAL CK 0012

In the Calcutta High Court

Case No : Civil Revisional Jurisdiction C.O. No. 2229 of 1998

Netai Charan Sadhukhan and Another

APPELLANT

Vs

Santosh Kumar Dhara and Others

RESPONDENT

Date of Decision : 04-09-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 17, Order 41 Rule 19
Constitution of India, 1950 — Article 227

Citation : (1999) 1 CALLT 163

Hon'ble Judges : Dibyendu Bhusan Dutta, J

Bench : Single Bench

Advocate : Mr. Priyabrata Mukherjee and Mr. Sumit K. Ray, for the Appellant; Mr. Bidyut Kumar Banerjee, for the Respondent

Judgement

D.B. Dutta, J.—Order dated 3.8.1998 passed by the learned Judge (Senior Division, 2nd Court. Howrah in Title Appeal No. 248 of 1995 forms the subject matter of the present revision petition under Article 227 of the Constitution of India.

2. On 3.8.1998, learned Appellate Court passed two orders. By the earlier one. he was pleased to reject the application of the defendant-petitioners for adjournment of hearing of the appeal and directed the learned Advocate of the defendant-appellant-petitioners to get ready. The record was directed to be put up on that date at 4-35 p.m. for necessary orders. The said order was passed in presence of both the sides. By the subsequent order, the learned Judge was pleased to dismiss the appeal for default after rejecting the application for adjournment that was filed after the previous application for adjournment was rejected by the earlier order.

3. It is true that the last line of the subsequent order reads as If the application and the appeal were disposed of, but It was not a case of disposal of the appeal on merits. Learned court below has nowhere adverted to the merits of the appeal and the ordering portion begins with the expression:

"that the appeal be and the same is dismissed for default"

The last sentence in that order is :

"Thus the application together with the appeal disposed of accordingly."

4. There is thus no room for doubt that it was a case of dismissal of an appeal for default within the meaning of Order XLI Rule 17 of the Code of Civil Procedure, so as to attract the provisions of Rule 19 of Order XLI of the Code for restoration of such an appeal on sufficient cause being shown.

5. Learned Advocate for the respondent raises a preliminary objection as to the maintainability of the instant application under Article 227 of the Constitution on the ground that equally efficacious and adequate legal remedy lies under Order XLI Rule 19 of the Code forgetting the relief sought for. It is settled law that when there is an equally efficacious and adequate alternative remedy, it is not advisable to exercise the extraordinary jurisdiction of this court under Article 227 of the Constitution. If any authority is required to be cited, in support of this proposition, a decision of the Apex Court in *Miss Maneck Gustedji Burjarji Vs. Sarafazali Nawabali Mirza*, can be cited here. Learned Advocate for the petitioners, however, places reliance on a decision of Bombay High Court reported in *Narayan Deju Puthrani Vs. Labour Appellate Tribunal of India at Bombay and Another*, but that was a case where the appeal was dismissed on merits and not for default. Moreover, by the 1976 amendment of the Code of Civil Procedure, and explanation has been added to Rule 17 of Order XLI of the Code so as to make it clear that nothing in the said Rule 17 is to be construed as empowering the court to decide on merits whenever there is default in appearance when the appeal is called on for hearing.

6. it is not disputed on behalf of the petitioners that the statutory remedy under Order XLI Rule 19 C.P.C. does he in the instant case against the impugned order of dismissal of appeal.

7. Accordingly, I do not consider it to be a fit and proper case for exercising the extraordinary Jurisdiction under Article 227 of the Constitution. it is true that the Impugned order was passed at 4-40 p.m. and it is submitted by the learned Advocate for the petitioners that under the Civil Rules & Orders, any order passed at a time after the expiry of the prescribed hours of the sitting, cannot be legal and valid. There is nothing on record to suggest that the order of dismissal was not passed in open court by the learned court below and the Civil Rules & Orders, in my view, do not forbid the court to take up any matter even at 4-40 p.m. As such, on the sole ground of the order being passed at 4-40 p.m., the order cannot be characterised as Illegal and without Jurisdiction, so as to call for interference in exercise of Jurisdiction under Article 227 of the Constitution of india.

8. The fact remains that the statutory remedy under Order 41 Rule 19 has already been availed of by the petitioners in view of the fact that an application

under Order XLI Rule 19 of the CPC has actually been filed before the learned court below.

9. In the circumstances. I do not find any scope for invoking the Jurisdiction of this Court under Article 227 of the Constitution. The application herein is accordingly rejected as not being maintainable.

10. However, it is made clear that this Court has not decided the merits of the application and the learned appellate court is to decide and dispose of the application under Order XLI Rule 19 of the Code on merits in accordance with law.

11. Liberty is granted to communicate the gist of the order.

12. Application rejected