

(1986) 02 GAU CK 0019
In the Gauhati High Court
Case No : M.A. (F) No. 61 of 1984

Sri Nabaram Basumatary and Others APPELLANT
Vs
Sri Bhubaneswar Deb Choudhury RESPONDENT

Date of Decision : 03-02-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 17, Order 41 Rule 17(2), Order 41 Rule 19, Order 43 Rule 1, 104
Limitation Act, 1963 — Article 122

Citation : (1986) 1 GLR 289

Hon'ble Judges : S.N. Phookan, J;K. Lahiri, J

Bench : Division Bench

Advocate : Y.K. Phukan and A.S. Choudhury, for the Appellant; K.P. Sarma and D.C. Chakraborty, for the Respondent

Final Decision : Allowed

Judgement

K. Lahiri, J.—This is a purported appeal under Order 43 Rule 1(t) of the Code of Civil Procedure, for short "the Code" against the order dated 4.5.84 passed by the District Judge, Kamrup at Gauhati in Misc. (J) Case No. 192 of 1983 refusing to restore Misc. (J) Case No. 246 of 1982. By the impugned order, learned Judge has also held that Misc. (J) Case No. 246 of 1982 sought to be restored was not maintainable.

2. We expressed doubts as to whether the appeal was maintainable under Order 43 Rule 1(t) or "the Code" against the impugned order dated 4.5.84 whereupon Mr. Y.K. Phukan, learned Counsel for the Appellants made oral prayer that the appeal may be treated as an application u/s 115 of "the Code". We have heard Mr. D.C. Chakraborty, learned Counsel for the Respondent-opposite party. To uphold the cause of justice and for expeditious disposal of the appeal we entertain the appeal as a revision.

3. The relevant facts are that the Respondent instituted Title Suit No. 6/74 in the Court of Asstt. District Judge Barpeta against the present Appellants. The

Appellant belong to the listed classes. Appellant No. 2 is an illiterate widow and Appellants 3 and 4 are minors. Appellant No. 1 is a peasant. The suit was for declaration of title, possession and mense profit in respect of "the suit land", an arable land.

4. The Appellants-Defendants are cultivators. The suit was decreed against them and an appeal was taken to the Court of the District Judge, Kamrup, who had at the relevant time jurisdiction to entertain the appeal. The appeal was posted for hearing on 26.7.80 at Barpeta while learned Judge held circuit Bench there. It appears that on 26.7.80 an application signed by the lawyer stating inter alia that he was unwell and the full brief of the case was not with him so the appeal might be adjourned was filed. The application was sent by the lawyer through a peon of the Court. Learned Judge perused the petition and held that it was not the proper procedure to send the application for adjournment through a Court peon and on that count alone dismissed the appeal for default. In short, without dismissing the application on merit learned Judge dismissed the appeal by rejecting the application seeking adjournment only on the ground that it was not properly presented before the Court. A lethal order of dismissal of the appeal was rendered and the poor Appellants suffered because their lawyer adopted a particular procedure with which the learned Judge was not happy. For the alleged remiss of the lawyer the punishment was inflicted on the party. Time out of number, the Supreme Court has held that for the remiss of a lawyer the litigant should not suffer. We refer to Rafiq and Another Vs. Munshilal and Another, , Goswami Krishna Murarilal Sharma v. Dhan Prakash, (1981) 4 SCC 574 and Smt. Lachi Tewari and Others Vs. Director of Land Records and Others, This Court has consistently followed the rule in Nirmal Das Gupta v. Prasanta Das Gupta AIR 1983 Gau 13 ; State of Assam Vs. Basanta Burman and Others, ; Sudhangshu Mohan Dutta Vs. Smt. Bela Rani Paul, Dismissal of an appeal is a serious business, more so when the judgment-debtor prefers an appeal. Before taking such a calamitous action the Court should seriously consider the necessity of taking such an action. In the instant case, it appears the learned Judge did not at all consider the merits of the application for adjournment filed by the learned Counsel for the Appellants. A perusal of Order 41 Rule 17(1) of "the Code" makes it clear that if on the date fixed for bearing of an appeal none appears on behalf of the Appellant when the appeal is called on for hearing the Court may make an order that the appeal be dismissed, whereas Order 41 Rule 17(2) provides that when the Appellant is represented and none appears on behalf of the Respondent "the appeal shall be heard ex-parte". In latter cases, the appeals must be heard ex-parte without caring for the appearance of the Respondents." However, when a party aggrieved by an order appeals to the Court and none appears for the Appellant, Parliament thought that to uphold the cause of justice the appeal may or may not be dismissed for default. A discretion is left to the Court when the Appellant is the judgment-debtor. The Court may adjourn the case on payment of such cost as it deems fit or pass it over for the day or may make other appropriate order and may also dismiss the appeal. So many actions

are kept open to the Court. It shows that dismissal of an appeal for the default of the lawyer for the Appellant is not the only order that should be made when the Appellant is unrepresented.

5. It appears that on 26.7.80. the very date of dismissal of the appeal, learned Counsel for the Appellants filed an application praying for setting aside the order of dismissal, inter alia, stating that when the learned Counsel was arguing a case in the Court of Shri B.K. Sarma, Judicial Magistrate a peon of the District judge came to inform him that the appeal was called on for bearing and he told the peon that he would come and handed over the petition to him stating the grounds praying for adjournment. Learned Counsel stated that he was just 3 or 6 minutes late in coming to the Court and in consequence of which the party suffered loss of property worth Rs. 70 to 80 thousands. Learned Counsel also prayed for the restoration of the appeal. It was filed at about 11.30 A.M. It was duly verified by the learned Advocate-vide pages 15-16 of the Lower Court records (File "C"). Learned Judge directed that it should be put up with the records for necessary orders at Gauhati. On 4.8.80 the application was registered as Misc. (J) Case No. 139 of 1980 at Gauhati. It maybe stated that at the relevant time the appeals arising out of the then sub-division of Barpeta used to be heard by the District Judge at Barpeta, on circuit. Misc. (J) Case No. 139/80 was registered at Gauhati but no notice was served on the learned Counsel for the Appellants to take appropriate steps, on 14.5.81 the Misc. case was taken up at Gauhati and dismissed without informing the Appellants and/or their counsel. Learned lawyer filed an application on 25.8.82 praying for restoration of the Misc. case dismissed for not taking steps on 14.5.81. The Misc. case came up for hearing on several dates but could not be taken up and on all those dates learned lawyer for the Appellants-Petitioners was present. Ultimately the case was posted for hearing on 11.7.83 and an application for adjournment was filed because the learned lawyer had left for his village. The said application was not entertained by the learned District Judge holding that it was filed by the pleader's clerk praying on behalf of lawyer for adjournment of the case, Without disposing of the application on merit learned Judge dismissed the case stating that there was no "proper petition" asking for adjournment of the case. Thereafter, another application was filed on 21.7.83 by another Counsel praying for restoration of Misc. (J), Case No. 246/82 to file which has been dismissed for default of the lawyer of the Appellants-Petitioners. Notices were served and by the impugned order dated 4.5.84 the petition was dismissed. It may be mentioned here that even the Respondent-opposite party did not file, any application objecting to the revival of the Misc. case.

6. Learned Judge held that the application for restoration of the appeal to file, which was registered as Misc. (J) Case No. 139/80 was barred by limitation. Secondly, learned Judge held that the Second Misc. case was not entertainable by the Court. Learned Judge also held that the prayer for restoration of Misc. cases were against appellable order, and, therefore the applications for restoration could not be entertained by the District Judge in exercise of Inherent

power u/s 151 of "the Code". In short, learned Judge held that the original Misc. case for restoration of the appeal was barred by limitation and that the subsequent application for restoration could not have been entertained and/or not entertainable by the learned Judge as the Appellants-Petitioners had the right of appeal under Order 43 Rule 1(t) of the Code.

7. Learned Judge has committed an error apparent on the face of the records in holding that the original application to restore the appeal to file was barred by limitation. We have just referred that the application for restoration of the appeal was filed on 26.7.80 the very date on which the appeal was dismissed. Under these circumstances, we are constrained to hold that the learned Judge was absolutely incorrect in holding that the application for restoration of the appeal was barred by limitation prescribed by Article 122 of the Limitation Act, 1963. We hold that the finding of the learned Judge that the application for restoration of the appeal was barred by limitation, is illegal and without jurisdiction. We also find that the subsequent application for restoration of the case was also filed within the period of limitation prescribed by Article 122 of the Limitation Act, as it was filed within 30 days from the date of knowledge of the order of dismissal. The records reveal that the order of dismissal of Misc. (J) case No. 139 of 1980 was dismissed at Gauhati and the lawyer and/or the Petitioner were not aware of the proceedings nor were they informed about the steps to be taken. As such, the application for restoration of Misc. (J) Case No. 7246/82, which was registered as Misc. (J) Case No. 192/83, was filed within the period of 30 days from the date of knowledge of the order of dismissal of the case. In the result, we hold that the finding that the applications were barred by limitation, is illegal and without jurisdiction and liable to be set aside.

8. We also find that the learned Judge has failed to exercise jurisdiction vested in him by law in assuming that the applications for restoration of the case dismissed for default were appealable, and, as such, he could not exercise inherent power u/s 151 of "the Code" to restore the cases to file. We extract the provisions of Order 43 Rule 1(t):

ORDER XLIII

Appeals from Orders

1. Appeals from Orders. An appeal shall lie from the following orders under the provision of Section 104, namely-

(t) and Order of refusal under rule 19 of Order XLI to readmit, or...to rehear, an appeal;

9. By the parent order the appeal was dismissed for default. In the Misc. cases learned Judge never passed order refusing to hear the appeal under Order 41 Rule 19 of "the Code". The appeal was dismissed on 26.7.80 and the application to readmit or to rehear the appeal under Order 41 Rule 19 pending before the

Court and ultimately dismissed for default. No order was rendered refusing to readmit or rehear the appeal on merit. Against the order of dismissal for default, the present Misc. cases were started. In short, by the subsequent applications the Petitioner prayed for restoring Misc. (J) case No. 139/80 to file. The provisions of Order 43 Rule 1(t) are applicable when the appellate Court in exercise of the power under Order 41 Rule 19 of "the Code" refuses to readmit or rehear the appeal, upon setting aside the order of dismissal. There is no order refusing to readmit the appeal and as such, no appeal could be entertainable under Order 43 Rule 1(t) of "the Code". Learned Counsel for the Respondent has failed to place before us any order of refusal rendered by the District Judge to readmit the appeal. Where an order is rendered in exercise of power under Order 41 Rule 19 of "the Code" refusing to readmit the appeal giving reasons for such refusal, an appeal is entertainable, otherwise not. We do not find any such order. We are of the firm opinion that the application made before the learned District Judge were entertainable u/s 151 of "the Code" and the learned Judge should have entertained and disposed the application in accordance with the law bearing in mind the principle of law set forth above.

For the foregoing reasons we hold that the findings of the learned Judge that the applications were barred by limitation and/or that Misc. (J) Case Nos. 246/82 and 192/83 were not entertainable by the Court u/s 151 of "the Code", are illegal and without jurisdiction. In the instant case, learned Judge has failed to exercise jurisdiction vested in him by law.

10. In the result, the appeal is allowed and the impugned order is set aside. Now the rewords are remitted to the learned District Judge, Barpeta for disposal of the cases. We direct the Learned Judge to bear all the Misc. Cases together and dispose them up by a common order and if the cases are allowed the appeal should be heard and disposed of as expeditiously as possible to uphold the cause of justice. We make no order as to costs.