
(2006) 12 GAU CK 0063
In the Gauhati High Court

Usha Mandal and Others (SMTI)

APPELLANT

Vs

Gita Das (SMTI) and Others

RESPONDENT

Date of Decision : 21-12-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Limitation Act, 1963 — Section 5

Citation : (2007) 2 GLT 146

Hon'ble Judges : H.N. Sharma, J

Bench : Single Bench

Judgement

H.N. Sarma, J.—By this application filed under Order 41, Rule 19, read with Section 151 of the CPC, the appellant/petitioner has prayed for read-mission of the appeal, which was dismissed for default on 12.5.2004, by recalling the order.

2. Heard Ms. B. Choudhury, learned Counsel for the appellant/petitioner and Mr. P.K. Roy Choudhury, the learned Counsel for the respondent/opposite party.

3. The second appeal filed by the petitioner was set down for hearing and when the matter was called upon none having appeared on behalf of the appellant, the appeal was dismissed for default 12.5.2004. This necessitated the appellant to file an application under Order 41, Rule 19 CPC for readmission of the appeal, which was registered as Misc. Case No. 1845/2006. In this application the petitioner has stated at paragraphs 5 and 6 that during the relevant time, since the engaged Senior counsel Mr. A.R. Banerjee, having been gone out of the station, due to illness of his mother, the case was in charge of the junior counsel. The learned junior counsel, during the relevant period was in bereavement due to death of her near relative and was irregular in attending the Court. It is further stated that the aforesaid appeal was listed in the terminal list No. 3 and the said page of the cause list, listing the appeal was not furnished to her and as such it was not within her knowledge about the listing of the case for hearing on that day. Consequently the learned Counsel could not appear when the appeal was called upon for hearing and hence the same was dismissed for default. It is

further stated that only when the appellant on getting the information from the Registry about the dismissal order, enquired with the learned Counsel about the case, it came to her knowledge about the dismissal of the case and in the process, there has been delay of 772 days in filing the present application to restore the appeal to file. Submitting the aforesaid grounds to be sufficient cause for nonappearance, the petitioner has prayed for restoration of the appeal. The appellant/petitioner/has also filed a separate application for condonation of delay, which was registered as Misc. case No. 1872. The respondents opposite party filed objection against the prayer for restoration. The justifiability, truthfulness, or otherwise of the grounds taken to condone the delay, in filing the application has not been questioned by the respondents. The respondents raised objection only on the maintainability of the application for restoration as well as condonation petition.

4. Mr. Roy Choudhury, learned Counsel for the respondents, submits that the above noted applications are not maintainable, in view of the fact that the affidavits appended to the application have been sworn by the learned Junior Counsel, and not by the appellant and in fact these Misc. cases have been filed by the advocate on behalf of the appellant/applicant. Hence, it is submitted that the application and affidavits, not being filed by the party himself, those are not maintainable in law. In support of his contention, learned Counsel refers to the provisions of Section 5 of the Limitation Act, and drawing my attention to the language of the section, that extension of the prescribed period of limitation can be made, if the "appellant" or "the applicant" satisfies the Court with sufficient cause as to why the appeal could not be filed within the period of limitation, it is submitted that words "appellants/applicants" does not include an advocate, and refers to the appellant/applicant personally. Referring to Order 41, Rule 19, it is further submitted that an appeal which was dismissed for default, can be readmitted in the event, only if the "appellant" files such an application for restoration and the word "appellant" cannot be extended to mean his advocate. According to the learned Counsel, the said provisions do not provide that an advocate is authorized to file such applications. Learned Counsel further refers to the provisions of Rule 18 in Chapter-4 of the Gauhati, High Court Rules which provides that every application for readmission or restoration of appeal shall be accompanied by an affidavit, stating the circumstances, for which, such default was made and whether or not the party whose appeal or application was dismissed had previous to such dismissal, engaged an advocate to conduct the appeal or application.

5. Referring to the aforesaid provisions, it is submitted by Mr. Roy Choudhury that such an application for restoration of an appeal, which is dismissed for default, it is only the "appellant" or the "applicant" himself who can file such applications and not his counsel though such counsel may be authorized to act on his/her behalf by validly executed vacalatnama.

6. I have given my anxious consideration to the submissions as made by the

learned Counsel.

For proper appreciation of the points raised on the issue involved for decision of this case, the provision of Section 5 of the Limitation Act, Order 41, Rule 19 CPC and Rule 18 of Chapter 4 of the Gauhati High Court Rules are quoted herein below:

Section 5 of the Limitation Act: Scope of enquiry by the Court--The scope of enquiry while exercising the discretionary power after sufficient cause is shown would be limited only to such facts as the Court may regard as relevant. It cannot justify an enquiry as to why the party was sitting idle all the time available to it. Sec. 5 empowers the Court to admit an application, to which provisions are made applicable, even when presented after the specified period of limitation if it is satisfied that the applicant had sufficient cause for not presenting it within time. The Court, therefore, has jurisdiction to determine whether there was sufficient cause for the applicant not making the application in time, and if satisfied, may admit it. It must not be lost sight of that a party should not suffer for the mistake of the Court. As such, where a party was misled by the notice from the Court, Sec. 5 is attracted.

When an appeal was filed without the copy of the decree, the Court should return the memo of appeal and only after filing the copy of the decree the question of limitation can be examined. Appeal was preferred beyond limitation and it was also admitted after excusing the delay without giving notice to the respondent. The Court has jurisdiction to reconsider the sufficiency of the cause and to dismiss the appeal as time barred.

A party seeking the benefit of Sec. 5 for excusing the delay in filing the appeal cannot plead that he was seeking the remedy under Order 9, Rule 13, C.P.C.

Before rejecting applications under Sec. 5 and dismissing appeals as barred by lapse of time, the Courts of law are required to put a glare as a condition precedent on the merits of the appeals and unless the appeals are forced to be hopelessly devoid of merits, ordinarily efforts should be made to decide the appeals or merits.

Order 41, Rule 19 CPC: Readmission of appeal dismissed for default--Where an appeal is dismissed under Rule 11, Sub-rule (2) of Rule 17 or Rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called for hearing or from depositing the sum so required, the Court shall readmit the appeal on such terms as to costs or otherwise as it thinks fit.

Rule 18 of Chapter 4 of the Gauhati High Court Rules:

Every application for the re-admission or restoration of an appeal or application, dismissed for default of appearance, shall be accompanied by an affidavit stating the circumstances in which such default was made, and whether or not the party

whose appeal or application was dismissed had, previously to such dismissal, engaged an advocate to the conduct the appeal or application.

The provision of Order III, Rule 1 which also has relevance to the issue is also quoted herein below:

Appearances, etc., may be in person, by recognized agent or by pleader--Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader (appearing, applying or acting, as the case may be,) on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

7. Section 5 of the Limitation Act disclose that it does not provide that an advocate who is a recognized agent, is not empowered or precluded from filing such an application, on behalf of the party.

Again turning to Rule 18 of Chapter 4 of the Gauhati High Court Rules, it is seen that the said rule contains two parts, the first part provides that such applications for readmission shall be accompanied by an affidavit stating the circumstances in which such default was made and the second part whether or not the party, whose appeal was dismissed previous to such dismissal had engaged an advocate to conduct the case. But the rule does not contain any thing to exclude or disentitling such engaged advocate him from filing such applications. Similarly in Order 41, Rule 19, although the word "appellant" has been used, who is entitled to file an application for readmission, the rule does not debar an authorised advocate from filing such application. Order 3 of the CPC prescribes the mode of appointment of a recognized agent, pleaders and to some extent their liability and responsibility. Order 3 Rule 1 authorizes the party to engage a recognized agent or a pleader for appearing and applying or acting as the case may be, on party's behalf. Order 41, Rule 19 is to be read along with Order 3 Rule 1 of the CPC. Order 3 Rule 1, having specifically empowered a party to engage a pleader or an advocate for appearing and acting on his behalf a restricted meaning of the word "appellant" including only the party itself, and not an engaged advocate, is not warranted. If such an interpretation of Order 41, Rule 19 is provided it will lead to absurdity and result the provision of Order 1 Rule 3 into otios. The right to engage an advocate/representative by a party to a proceeding and acting through such advocate in such judicial matters, can not be taken away by giving a restricted interpretation. It will also violative of the valuable right of a litigant in pursuing a matter in the Court of law.

8. In view of the aforesaid discussions the submission made by the learned Counsel for the respondents is not tenable and it has no legs to stand, accordingly the same stands rejected. Respondent has not objected on the merits of the ground agitated for condoning the delay in filing the application,

which is also reiterated at the time of hearing. On perusal of materials available before me I find that the grounds so canvassed for restoration of appeal condoning the delay are disclose sufficient reason for not filing the application within the period prescribed by law.

9. Upon perusal of the averments made in Misc. Petition No. 1845, I am also satisfied, that the petitioner was prevented by sufficient cause, for not, appearing before the Court, when the matter was called for hearing, on 12.5.2004. Consequently, the said order of dismissal for default of the appeal dated 12.5.2004 stands recalled and the appeal is restored to file. Misc. Case stands allowed.

Registry shall list the appeal for final hearing.