

(2019) 11 CAL CK 0063
In the Calcutta High Court

Case No : Tender Second Appeal (SAT) No. 243 Of 2019 With Civil Application (CAN) No. 7406 Of 2019

Zubaida Begum @ Zubeda Khatun & Ors APPELLANT
Vs

Anwar Ali & Anr RESPONDENT

Date of Decision : 19-11-2019

Acts Referred:

Limitation Act, 1963 — Section 5
Code Of Civil Procedure, 1908 — Order 41 Rule 3(A), Order 41 Rule 3(A)(3), Order 41 Rule 11

Citation : (2019) 11 CAL CK 0063

Hon'ble Judges : Bibek Chaudhuri, J

Bench : Single Bench

Advocate : Kushal Chatterjee, Rahul Karmakar, Debabrata Roy

Final Decision : Disposed Of

Judgement

Bibek Chaudhuri, J

The instant matter is listed at the instance of the appellants/petitioners.

CAN 7406 of 2019 is an application under Section 5 of the Limitation Act filed by the appellants/petitioners praying for condonation of delay of 25 days in preferring the second appeal. On 26th September, 2019 this Court granted an interim order of stay of execution proceeding instituted at the instance of the respondent /decree holder till 14th November, 2019.

Mr. Rahul Karmakar, learned advocate for the respondents/opposite parties submits that this Court cannot pass any interim order of stay pending disposal of an application under Section 5 of the Limitation Act as well as pending admission of the appeal under Order XLI Rule 11 of the Code of Civil Procedure in view of the provision contained in Order XLI Rule 3(A) of the Code of Civil Procedure. In support of his contention Mr. Karmakar refers to a decision of this Court in the case of Baidyabati Sheoraphuli Co- operative Bank Ltd. and Another versus State

of West Bengal and Others reported in CLT 1998 (1) HC 219.

I have carefully gone through the above mentioned report cited by Mr. Karmakar. It is clearly laid down in the aforesaid decision that the question of grant of interim stay on the application for stay shall not arise at all until and unless the delay in filing the appeal is condoned by the tribunal.

Here, in the instant case the second appeal could not be taken up for hearing for admission under Order XLI Rule 11 of the Code of Civil Procedure due to pendency of the application under Section 5 of the Limitation Act. It was submitted by the learned advocate for the appellants/petitioners that the execution case is being proceeded with. The application under Section 5 of the Limitation Act could not be taken up for hearing as service of notice of the said application could not be effected on 26th September, 2019 when the order was passed.

Sub-rule (3) of Rule 3 (A) of Order XLI of the Code of Civil Procedure clearly lays down that where an application for condonation of delay has been made under sub-rule (1) the Court would not make an order for stay of execution of decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under Rule 11, decide to hear the appeal. A plain reading of the above provision read with the principle laid down in Baidyabati (supra) shows that the order dated 26th September, 2019 requires certain modifications under the facts and circumstances as it stands now.

At this stage, this Court proposes to hear out the application under Section 5 of the Limitation Act to which both the learned advocates for the parties have agreed.

The instant appeal has been filed 25 days after statutory period of limitation.

On perusal of the application as well as grounds stated, I am of the view that the petitioners have been able to establish sufficient ground for which there was delay of 25 days in preferring the appeal.

Accordingly, the delay is condoned.

The instant appeal be registered to file and be sent to the Division Bench having determination to take up the hearing of the appeal on the point of admission under Order XLI Rule 11 of the Code of Civil Procedure.

Mr. Karmakar agrees that the respondent/decreed holder will not proceed with the execution case for one week. With such undertaking, the appellants are directed to take positive endeavour to get the matter admitted under Order XLI Rule 11 of the Code of Civil Procedure within one week hence.

CAN 7406 of 2019 is thus disposed of.