
(2001) 07 CAL CK 0055

Calcutta High Court

Case No: C.O. No. 830 of 2001

Sri Jagannath Dhara

APPELLANT

Vs

Sri Bankim Chandra
Dhara

RESPONDENT

Date of Decision: July 12, 2001

Acts Referred:

- Limitation Act, 1963 - Section 14, 5

Hon'ble Judges: Prabir Kumar Samanta, J

Bench: Single Bench

Advocate: S. Bhattacharyya and Mr. Sailendra Sekhar Bayerd, for the Appellant; B. Chatterjee and Mr. Sajal Pandit, for the Respondent

Final Decision: Allowed

Judgement

Prabir Kumar Samanta, J.

Heard the learned advocates for the parties.

This revisional application is directed against an order dated 16.1.2001 passed in Title Appeal No. 123 of 1992 thereby allowing the application u/s 5 read with section 14 of the Limitation Act filed by the defendant/opposite party No. 1.

2. Evidently, the suit for partition filed by the plaintiff/petitioner was decreed ex parte in preliminary form. The said opposite party filed an application under Order 9 Rule 13 of the Code for setting aside the said ex parte decree. The said application which was registered as J. Misc. Case No. 56 of 1987, was again dismissed on the failure of the said opposite party to take steps. Another application under Order 9 Rule 4 CPC was filed for restoration of the aforesaid J. Misc. Case No. 56 of 1987 along with an application for condonation of delay. Though the said Misc. Case was registered upon condonation of delay but the same was dismissed on contest on the merits of the same. The said order of dismissal was challenged in revision in this Court. This Court by its judgment dated

7.4.92 affirmed the said order of dismissal of the petition under Order 9 Rule 4 of the Code as above, but observed that the right of the petitioner to move against the ex parte decree according to law and to get relief thereunder if so entitled in law would not be any way affected.

3. Consequent upon such observation, the defendant/opposite party No. 1 preferred a regular appeal against the said ex parte decree and thereafter made an application for condonation of delay in filing the appeal under the provisions of section 5 read with section 14 of the Limitation Act. The learned Court of appeal below in view of the aforesaid observation by the Division Bench of this Court held that the defendant opposite party is entitled to the benefit of relief against the said ex parte decree by preferring an appeal irrespective of limitation caused in the meantime.

4. In the face of the aforesaid facts and circumstances of this case and more particularly in view of the observation so made by the Division Bench of this Court, it is necessary to decide whether the learned Court of appeal below was right in holding that the delay in filing the said appeal was liable to be condoned.

5. Against an ex parte decree a judgment debtor has two remedies open to him under the provisions of law. One is by way of setting aside the ex parte decree and the other is by way of preferring an appeal. If one particular remedy as prescribed under the law is pursued, it cannot be said that the same was pursued with bonafide mistake. The proceeding initiated by defendant/opposite party for setting aside the aforesaid ex parte decree under the provisions of Order 9 Rule 13 of the Code is a valid proceeding under the law. The same cannot be contended to ought not to have been pursued or that the law did not permit such proceeding but was initiated through bonafide mistake. The said proceeding did not fail because of defect of jurisdiction. Therefore, the benefit of protection u/s 14 of the Limitation Act was not available to the defendant opposite party No. 1. If such a protection is not available then obviously the delay in filing the appeal is required to be explained u/s 5 of the Limitation Act. Such explanation on the facts and circumstances as above must establish that the defendant/opposite party was prevented by sufficient reasons over which he had no control. The defendant/opposite party had chosen to pursue a particular remedy as provided under the law and such course of remedy was absolutely legal and valid. Therefore, it was not a case where the defendant was prevented by sufficient reason over which he had no control, but was case of abandoning a particular course of action by choice. This is more so because pursuing of the course of as provided under Order 9 Rule 13 of the Code was not under any misconception of law. The defendant/opposite party was thus not prevented by sufficient reason from preferring an appeal within the prescribed period of limitation, because of the facts and circumstances as above.

6. In all these views, I am of the view that the learned Court of appeal below acted illegally and/or with material irregularity in the exercise of jurisdiction in condoning the delay in preferring the appeal. The impugned order is thus set aside. The revisional

application is thus allowed.