



IN THE HIGH COURT AT CALCUTTA

CIVIL REVISIONAL JURISDICTION

CIRCUIT BENCH AT PORT BLAIR

PRESENT: HON'BLE JUSTICE PARTHA SARATHI SEN

CO/40/2026

SMT. LAXMI BISWAS

... PETITIONERS

Versus

SMT. SHANTI RANI PATHRE AND ANOTHER

... OPPOSITE PARTIES

For the Petitioner : Mr. K.Vijay Kumar

For the Opposite parties : Mrs. Anjili Nag, Sr. Adv.
Mr. Adarsh Ilango

Heard on : 04.08.2026

Judgment on : 04.08.2026

PARTHA SARATHI SEN, J.

1. The subject matter of the instant revisional application as filed under Article 227 of the Constitution of India is the order dated 23.06.2026 as passed by the learned District Judge, Andaman and Nicobar Islands in Misc. Appeal No. 11/2026 whereby and whereunder the said appellate Court granted a stay of the impugned judgement before him till 29.07.2026 and thus disposed of a petition as filed by the appellant under Order 41 Rule 5 CPC. The respondent



of the said appeal being the plaintiff in the Trial Court felt aggrieved and thus preferred the instant revisional application.

2. At the time of hearing Mr. K.Vijay Kumar, learned advocate appearing on behalf of the plaintiff/petitioner draws attention of this Court to the certified copies of the orders dated 09.06.2026 and the impugned order 23.06.2026 as passed by the First Appellate Court in Misc. Appeal No. 11 of 2026. It is submitted by Mr. Vijay Kumar, learned advocate that on conjoint perusal of the aforementioned two orders it would reveal that the Misc. Appeal 11 of 2026 was not filed within the period of limitation and for that reason the appellant who is opposite party herein filed an application under Section 5 of the Limitation Act praying for condonation of delay in filing the said appeal along with an application under Order 41 Rule 5 CPC praying for staying of the execution as pending before the executing Court.

3. It is submitted by Mr. Vijay Kumar that on further perusal of the aforementioned two orders it would reveal that the returnable date for issuance of the notice of appeal was fixed on 29.07.2026 and all on a sudden, on 23.06.2026 the learned First Appellant Court on the basis of a put-up petition filed by the opposite party/appellant took up the petition under Order 41 Rule 5 CPC for hearing in absence of the respondent and passed a favourable order of stay of the impugned judgement in the said appeal till 29.07.2026 and disposed of the said petition under Order 41 Rule 5 CPC.



4. It is submitted by Mr. Vijay Kumar that the learned First Appellate Court while passing the impugned order has failed to visualize that the appeal as pending before him was *non-est* in the eye of law in view of the fact that the delay in filing the said Misc. Appeal No. 11 of 2026 has not been condoned as yet and the petition under Section 5 of the Limitation Act is still pending.

5. It is further submitted by Mr. Vijay Kumar that on account of passing of the impugned order a serious miscarriage of justice occurred which requires intervention by this Court in its Superintending Jurisdiction under Article 227 of the Constitution of India.

6. In support of his contention Mr. Vijay Kumar, learned advocate for the revisionist/respondent/plaintiff placed his reliance upon the judgement of the Hon'ble Supreme Court in the case of *The State of West Bengal and others. Vs. Somdeb Bandyopadhyay & others* reported in *AIR 2009 Supreme Court 1989: 2009 (2) SCC 694* and another judgement of the Hon'ble Supreme Court dated 17.01.2025 in *Civil Appeal No. 567 of 2025 (U.Sudheera & Others vs. C.Yashoda & Others)* reported in 2025 INSC 80.

7. *Per contra*, Ms. Nag, learned Senior Advocate appearing on behalf of the opposite party/appellant/defendant supports the impugned order. It is argued that on perusal of the aforementioned two orders dated 09.06.2026 and 23.06.2026 it would reveal that the



learned First Appellate Court visualizing the extreme urgency of the matter took up the hearing of the petition under Order 41 Rule 5 CPC and thus granted a limited stay so that the appeal as pending before the said First appellate Court does not become infructuous. It is submitted by Ms. Nag that before the First Appellate Court a specific case has been made out on behalf of the opposite party/appellant herein that after dismissal of the petition under Order 9 Rule 13 CPC the revisionist/respondent/plaintiff has initiated execution proceeding and in such execution proceeding she is taking steps to take possession of the decretal property.

8. On being asked, Ms. Nag submits before this Court that in Other Execution No. 4 of 2026 as filed by the petitioner/plaintiff, 29.06.2026 was the date fixed for submission of report by bailiff and the next date is fixed on 22.09.2026 for OCR. It is further submitted by Ms. Nag that despite receipt of the notice of the appeal along with copy of the application for condonation of delay and the petition for stay as filed under Order 45 Rule 5 CPC the petitioner/respondent/plaintiff in the said appeal did not turn up as yet.

9. In course of hearing, Ms. Nag also placed her reliance upon a judgement of a Coordinate Bench of this Court in the case of *Ram Ch. Sinha vs Smt. Protiva Dutta* reported in (1978) 2 CLJ 462. By placing her reliance upon the case of *Sri Rani Satiji Mandir and others vs. Shyam Sundar Jhunjumwala and others* reported in 1984



AIR Calcutta 20 as passed by a Division Bench of this Court it is argued by Ms. Nag that the Hon'ble Division Bench refused to vacate the stay order so that whole appeal does not become infructuous even if the application for condonation of delay is granted thereafter.

10. This Court has meticulously gone through the entire materials as placed before this Court. This court has given its due consideration over the submissions of the learned advocates for the contending parties.

11. For effective adjudication of the instant revisional application this Court at the very outset proposes to look to some of the provisions of Order 41 of the Code of Civil Procedure, 1908 and those are quoted herein below in verbatim.

"[3-A. Application for condonation of delay.-(1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.

2) If the Court sees no reason to reject the application without the issue of notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under Rule 11 or Rule 13, as the case may be.

3) Where an application has been made under sub-rule (1), the Court shall not make an order for the stay of execution of the 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."

* * * * *

5. Stay by Appellate Court.-(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

[Explanation.-An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate



Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.

- (2)
(3)
(4)
(5)”

12. Keeping in mind the aforementioned legislative provisions if I look the factual aspects as involved in the instant *lis* it appears to this Court that admittedly before the First Appellate Court the Misc. Appeal No. 11 of 2026 was not filed within the period of limitation which is why the Memorandum of Appeal as filed before the First Appellate Court was accompanied with an application under Section 5 of the Limitation Act. It further reveals that in such appeal the application under Order 41 Rule 5 CPC was filed.

13. On perusal of the order dated 09.06.2026 as passed by the First Appellate Court in Misc. Appeal No. 11 of 2026 it further appears that the returnable date of the said appeal was fixed on 29.07.2026. On perusal of the impugned order dated 23.06.2026 it further appears that the learned First Appellate Court on the basis of the put-up petition filed by the appellant/defendant/opposite party herein took up the application under Order 41 Rule 5 CPC. It appears that while disposing the said petition under Order 41 Rule 5 CPC for stay, learned First Appellate Court considering the submissions of the appellant came to a finding that in the event the plaintiff succeeds in executing the decree, the appeal as pending



before him would become infructuous. Probably such finding persuaded the First Appellate Court to pass an order of stay till 29.07.2026.

14. On careful perusal of the entire materials it appears to this Court that before the learned First Appellate Court the Misc. Appeal No. 11 of 2026 is still *non-est* in the eye of law since the appeal as pending before the First Appellate Court has not yet been entertained on account of delay in filing the said appeal. There is no certainty as to whether the delay in filing the said appeal would be at all condoned or not.

15. As rightly argued by Mr.Vijay Kumar that in the case of *Samdeb Bandyopadhyay (supra)* the Hon'ble Supreme Court deprecated the practice of granting series of interim orders in writ appeal without condoning the delay and without entertaining the appeal.

16. In the case of *U.Sudheera (supra)* the Hon'ble Supreme Court also opined that the High Court should not have pass the interim order without satisfying itself of the existence of a substantial questions of law as mandated under Section 100 CPC in a Second Appeal.

17. In the judgement of *Raghavendra Swamy Mutt vs. Uttaradi Mutt* reported in *AIR 2016 Supreme Court 1589* the Hon'ble Supreme Court while considering the scope of entertaining a stay application



in a second appeal prior to formulation of the substantial questions of law categorically held that the legislative provision does not empower the High Court not to formulate the substantial questions of law for the purpose of admission, defer the date of admission and pass an order of stay or grant an interim relief. It thus appears to this Court that since the appeal before the learned First appellate Court is still at its *non-est* stage, the First Appellate Court ought not to have issued the order of stay by way of entertaining the petition under Order 41 Rule 5 CPC overlooking the legislative provision under order 41 Rule 3A (3) CPC.

18. In considered view of this Court the judgments as passed by a Coordinate Bench of this Court in the case of *Sri. Rani Satiji Mandir* and a Division Bench of this Court in *Ram Ch Sinha (supra)* are distinguishable from the facts and circumstances of the instant case inasmuch as in the said two cases the Hon'ble Single Bench and Hon'ble Division Bench of this Court considered the scope of passing the ad interim order of stay when there was extreme urgency.

19. In view of the discussion made here in above this Court thus finds sufficient merit in the instant revisional application.

20. Consequently the CO/40/2026 succeeds.

21. Consequently the impugned order dated 23.06.2026 as passed in Misc. Appeal No. 11 of 2026 by the learned District Judge, Andaman and Nicobar Islands is hereby set aside.



22. Consequently the stay order as passed by the learned First Appellate Court is hereby vacated.

23. Learned District Judge, Andaman and Nicobar Islands is hereby requested to take up the petition under Section 5 of the limitation Act as filed by the appellants before him first and in the event the delay in filing the appeal is condoned, he is directed to consider the Misc. Appeal No. 11 of 2026 on the point of its admissibility and in the event learned District Judge is satisfied with regard to admissibility of the said appeal, he is at liberty to take up the hearing of the Order 41 Rule 5 CPC afresh.

24. It is made known to this Court that despite service of the notice of appeal along with copy of the application under Section 5 of the Limitation Act along with a copy of the stay application, none appears on behalf of the respondents in the said appeal before the First Appellate Court and accordingly the learned First Appellate Court has fixed the next date on 01.10.2026 under the heading *ex parte*.

25. Since the learned counsels for the parties to the instant revisional application are present before this Court and since this order is passed in open Court in presence of them, this Court directs the appellants and the respondents of the Misc appeal No. 11 of 2026 as pending before the learned District Judge, Andaman and Nicobar Islands to appear before the learned District Judge,



Andaman and Nicobar islands on August 18, 2026 and on that day learned District Judge, Andaman and Nicobar Islands shall consider the petition under Section 5 of the limitation Act.

26. This Court however grants liberty to the petitioner/respondent to file her written objection against the petition for condonation of delay before the first appellant court on or before August 18, 2026.

27. It is made clear that in the event none appears on August 18, 2026 before the learned District Judge, he is at liberty to pass appropriate orders.

28. CO/40/2026 is disposed of accordingly.

29. Urgent photostat certified copy of this judgement, if applied for, be given to the parties on priority basis on compliance of all legal formalities.

(PARTHA SARATHI SEN, J.)