



**HIGH COURT OF SIKKIM**

Record of Proceedings

**RSA No.01/2018**

Jigmi Phunchok Bhutia

.... Appellant

Versus

Aishwarya Rai & Anr.

.... Respondents

Date:24.08.2018

CORAM

**HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, J.**

For Appellant : Mr. Nilanjan Bhattacharjee, Mr. Souri Ghosal,  
Mr. Anil Gurung and Ms. Rajani Rizal,  
Advocates.

For Respondent : Mr. Sudesh Joshi, Legal Aid Counsel.  
No.1.

.....

**I.A No.01/2018**

This is an application filed by the Appellant under Section 5 of the Limitation Act for condonation of delay of 34 days in preferring the second Appeal before this Court.

It is pleaded that the impugned Order was passed on 25.09.2017 and the application for the certified copy was made on 17.10.2017 after which the order was made available on 26.10.2017. The Applicant submits that during the period, the wife of the Applicant was pregnant and as such, the Applicant was required to travel to and fro Gangtok to Siliguri for check up and treatment of his wife and although, the certified copy had been received, no steps to file the Appeal could be taken. To substantiate this contention the Applicant has also filed the birth certificate of the newborn child as well as relevant medical documents.

The learned Counsel for the Respondent No.1 does not wish to contest this application.



**HIGH COURT OF SIKKIM**

Record of Proceedings

Adequate reason for condoning the delay has been set out in the application.

The application is allowed and the delay condoned.

**RSA No.01/2018**

This is a Regular Second Appeal preferred by the Appellant under Section 100 of the Code of Civil Procedure, 1908 (CPC) against the order dated 25.09.2017 passed in Title Appeal Case No.04/2015, by which the learned District Judge would set aside the Judgment of the Trial Court as having been rendered in the absence of the necessary parties and remanded the matter to be decided afresh after impleading the necessary parties.

Mr. Sudesh Joshi, learned Counsel appearing for the Respondent No.1 would raise a preliminary objection on the maintainability of the Regular Second Appeal preferred by the Appellant against the impugned order. He would submit that under Order XLI Rule 23 A CPC where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal on a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23. The learned Counsel would further submit that under Order XLI Rule 23 CPC where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

The learned Counsel would also draw attention of this Court to Order XLIII Rule 1(u) CPC which provides that an appeal shall lie from an order under Rule 23 or Rule 23 A of Order XLI remanding a case, where an appeal would lie from the decree of the

**HIGH COURT OF SIKKIM**Record of Proceedings

Appellate Court under the provision of Section 104 CPC. It is further submitted that the procedure to be followed would be under Order XLIII Rule 2 CPC which provides that rules of Order XLI shall apply, so far as may be, to appeals from orders. Order XLI CPC in turn relates to appeals from original decrees. Section 104 CPC is the provision for orders from which appeals lie.

Admittedly, the present Appeal has been preferred under Section 100 CPC and not under Section 104 CPC. On hearing the submissions made by Mr. Sudesh Joshi, learned Counsel for the Respondent No.1 Mr. Neelanjan Bhattacharjee would fairly submit that in fact appeal ought to have been preferred under Section 104 CPC instead of Section 100 CPC as has been done in the present Case. In the circumstances, he prays that liberty may be granted to the Appellant to withdraw the present RSA with liberty to file afresh.

It is quite evident that an appeal is preferable against the order impugned in the present RSA. In view of the aforesaid liberty is granted to the Appellant to withdraw the present RSA with liberty to file afresh, if advised. The learned Counsel for the Appellant would further submit that the Appellant has filed certified copies of impugned order in the present RSA which may be returned on furnishing a true copy of the impugned order to replace the certified copy of the impugned order which may be needed for the purpose of filing the Appeal under Section 104 CPC. The prayer is reasonable and is granted.

RSA No.01/2018 is dismissed as withdrawn.

**Judge**  
**24.08.2018**

Index: yes/No  
Avi/ Internet: yes/No