

## APPELLATE CIVIL.

*Before Mr. Justice Brett and Mr. Justice Doss.*

CHANDRA NATH DAS

v.

KALIPRASANNA CHAKRAVARTI.\*

1908

March 4.

*Appeal—Appeal, when to be dismissed for default—Talabana—Talabana, not paid within the time ordered—Civil Procedure Code (Act XIV of 1882), s. 557.*

An appeal should not be dismissed for default before the date fixed for the hearing of the appeal arrives, simply because the appellant has failed to explain satisfactorily, why the *talabana* was not deposited within the period fixed by the Court and without ascertaining, whether there was ample time after the deposit to serve the notices upon the respondents.

APPEAL by the petitioners for re-admission of appeal.

One Chandranath Das and others filed an appeal in the Court of the District Judge of Dacca, which was registered on the 28th July 1906, and on the same day the order was passed "issue notice on payment of costs within 10 days. Fix 1st September for hearing." The *talabana* was not however filed before the 15th August, 1906. On the 16th, the District Judge called upon the pleader to explain the delay. On the 18th August, the explanation was given, viz., that the appellants did not come earlier, although they were told that the *talabana* had to be paid within ten days from the 28th July last.

The appeal was dismissed for default the same day.

On the 15th September following, the appellants prayed for re-admission of the appeal on the ground that the dismissal before the date fixed for the hearing of the appeal was illegal, and that owing to poverty they could not raise sufficient money to deposit the *talabana* within the period fixed by the Court.

The petition was rejected on the 17th September, 1906.

*Babu Upendralal Roy* for the appellants. Section 557 of the Code is clear in its terms and states that the appeal can be

\* Appeal from Original Order No. 543 of 1906, against the order of H. Walsley, District Judge of Dacca, dated 17th September 1906.

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dismissed on the date fixed for hearing or later on. The respondents may appear notwithstanding service of notice from Court. The deposit was accepted by the office and there was sufficient time to serve notice upon the respondents. The dismissal was illegal and unjust, and, if it is held to be so, the later order rejecting the petition for re-admission is also wrong.

*Babu Rajendra Chandra Guha* for the respondents.

BRETT AND DOSS JJ. This is an appeal against an order of the District Judge of Dacca dismissing an application for revival of an appeal, which had been dismissed for default on the 18th August, 1906.

It appears that the appeal was registered on the 28th July 1906, and an order was passed that notices should issue on the respondents on payment of costs within ten days; and the 1st September was the date fixed for the hearing. On the 16th August 1906 a report appears to have been made to the District Judge that the *talabana* had been paid in on the previous day and the Judge accordingly called upon the pleader for the appellants to explain why the order passed on the 28th July, which directed that costs should be paid within ten days, had not been complied with. As the explanation offered was not in the opinion of the District Judge sufficient, he on the 18th August 1906 dismissed the appeal for default; and on the 17th September 1906 rejected the application for revival of the appeal.

In our opinion the District Judge failed to exercise a wise discretion and has erred in law in dismissing the appeal on the 18th August 1906, that is, before the date fixed for the hearing of the appeal had arrived, and before too it had been ascertained that the notice to the respondents could not have been served by the date fixed for the hearing in consequence of the failure on the part of the appellants to deposit the necessary fees for issue of notices within the time fixed by the Court (Section 557 of the Civil Procedure Code). The order dismissing the appeal for default cannot, in our opinion, be sustained, and therefore the order rejecting the application for revival of the appeal must also be set aside.

The result, therefore is, that this appeal is decreed, the order of the District Judge, dated the 18th August 1906, as well as the order refusing to grant the application for revival of the appeal, are set aside. We direct that the appeal be sent back to the District Judge of Dacca to be restored to his file under its original number and to be tried according to law.

We make no order as to costs.

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*Case remanded.*

S. M.