
(2007) 08 P&H CK 0160
In the Punjab And Haryana At Chandigarh

Didar Singh

APPELLANT

Vs

Nirmal Singh and Others

RESPONDENT

Date of Decision : 17-08-2007

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2007) 4 PLR 552

Hon'ble Judges : Satish Kumar Mittal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Satish Kumar Mittal, J.—Plaintiff Didar Singh has filed this Regular Second Appeal against the judgment and decree dated 12.4.2002 passed by the Additional District Judge, Ambala, whereby after reversing the finding of the trial court on issue No. 1, his alternative suit for recovery of Rs. 20,000/- with interest, has been decreed.

2. In this case, the trial court decreed the suit of the plaintiff - appellant for possession of the suit land by way of specific performance of the agreement to sell dated 22.3.1990. Feeling aggrieved against the judgment and decree passed by the, trial, court, defendant No. 3 - Nirmal Singh filed an appeal before the first Appellate Court with an application for condonation of delay as the said appeal was barred by limitation of more than two years. The first Appellate Court, without deciding the said application for condonation of delay, has partly allowed the appeal. The relief of specific performance of the agreement (Ex. P1) has been declined and the alternative suit of the plaintiff-appellant for recovery of Rs. 20,000/- with interest, has been decreed.

3. Counsel for the appellant argued that the first Appellate Court was having no jurisdiction to entertain and decide the appeal on merits without first deciding the application for condonation of delay. To ascertain the factual position as to whether the said application for condonation of delay was decided by the first

Appellate Court or not, the lower court record was requisitioned by this Court on April 30, 2007. The said record has been received. Both the counsel for the parties have inspected the record. I have also perused the record of the first Appellate Court. Undisputedly, the application filed by respondent No. 1 for condonation of delay in filing the appeal was not decided by the first Appellate Court and without deciding such application, the appeal filed by the said respondent was decided on merits and the decree of the trial court was modified while declining the claim of the appellant for specific performance of the agreement (Ex.PI), Counsel for respondent No. 1 also admits the factual position that the application for condonation of delay in filing the appeal was not decided by the first Appellate Court by passing any order.

4. In view of this admitted factual position, learned Counsel for the appellant submitted that without deciding the application for condonation of delay, the appellate Court was having no jurisdiction to entertain and decide the appeal on merits. According to the learned Counsel, the judgment and decree passed by the first Appellate Court is wholly without jurisdiction.

5. On the other hand, counsel for respondent No. 1 submitted that since the appeal was decided on merits after hearing the counsel for both the parties, therefore, it should be assumed that the first Appellate Court has condoned the delay, though no specific order was passed on the said application for condoning the delay.

6. After hearing the counsel for the parties, in my opinion, the impugned judgment and decree passed by the first Appellate Court is liable to be set aside and the matter is required to be remitted back to the first Appellate Court to first consider and decide the application for condonation of delay after hearing both the parties and thereafter decide the appeal filed by respondent No. 1 on merits in accordance with law, if necessary.

7. Order 41 Rule 3-A C.P.C. provides that when an appeal is presented after the expiry of the period of limitation specified therefore 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 the period of limitation. Sub-rule (2) of Order 41 Rule 3-A C.P.C. provides that if the Court sees no reason to reject the application without the issue of a 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. Sub-rule (3) of Order 41 Rule 3-A C.P.C. provides that before the decision on the application for condonation of delay, the Court shall not make an order for the stay of execution of the decree against which the appeal was filed.

8. From the bare reading of the aforesaid rules, it appears that the said rule is partly mandatory and partly director. It is mandatory to the extent it obliges the Court to dispose of question of limitation before it proceeds to deal with appeal.

The rest of the provisions are directory. The filing of an application for condonation of delay in preferring the appeal as accompanying the memo of appeal is a procedural requirement and is not mandatory. In my opinion, without deciding the application for condonation of delay, the Appellate Court has no jurisdiction to entertain and decide the appeal on merits. It is incumbent upon the court to decide the application for condonation of delay before it proceeds to decide the appeal on merits.

9. The Rajasthan High Court in *Chhelaram Vs. Manak*, has held that it is incumbent upon the Court to decide the application before it proceeds to decide the appeal on merits. In case the Court accepts the application only then it can proceed under Rule 11 of Rule 13. If the application for condoning the delay in filing the appeal is dismissed the question of registration of appeal under Rule 9 and its consideration under Rule 11 does not arise. When a memorandum of appeal barred by limitation is filed along with an application for condonation of delay u/s 5, of the Limitation Act, until the application is allowed the appeal is virtually non est. The Appellate Court assumes jurisdiction to decide the appeal on merits when the delay in filing the appeal is condoned. Therefore, in my view, the judgment and decree passed by the first Appellate Court, without first deciding the application for condonation of delay, is wholly without jurisdiction. I do not find any substance in the argument of the counsel for respondent No. 1 that while deciding the appeal on merits after hearing the counsel for both the parties, it should be inferred that the first Appellate Court has condoned the delay in filing the appeal. Undisputedly, the application for condonation of delay was not decided by passing any order. Without specifically passing an order on the said application, it cannot be assumed that the said application was decided and allowed by the first Appellate Court. In *Satinder Kaur v. Iqbal Singh* (1975) 77 P.L.R. 1, this Court has held that merely by admitting the appeal without passing a specific order on the application for condonation of delay, it cannot be assumed that the delay in filing the appeal was condoned.

10. In view of the above, the appeal is allowed and the judgment and decree dated 12.4.2002 passed by the Additional District Judge, Ambala is set aside and the matter is remanded back to him to first decide the application for condonation of delay filed by respondent No. 1 and then decide the appeal on merits in accordance with law.