
(1964) 03 P&H CK 0033

In the Punjab And Haryana At Chandigarh

Case No : Civil Miscellaneous No. 1726 of 1963 in F.A. No. 329 of 1963

Jagdish Chandra Gupta

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-03-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, 122, 151
Constitution of India, 1950 — Article 225
Limitation Act, 1963 — Section 5

Citation : AIR 1965 P&H 129

Hon'ble Judges : I.D. Dua, J;H.R. Khanna, J

Bench : Division Bench

Judgement

I.D. Dua, J.

(1) This case has been placed before this Bench in pursuance of an order of a learned Single Judge of this Court dated 8-11-1963 before whom R. F. A. No. 329 of 1963 was placed for admission along with Civil Miscellaneous No. 1726 of 1963 under S. 5 of the Indian Limitation Act read with S. 151, Civil Procedure Code. The learned Single Judge considered it proper, and in my opinion rightly, that the question of limitation be settled first and since a regular first appeal cannot be dismissed in limine by Single Bench in case the appeal is held to be barred by time, it was considered proper to place the whole matter before a Division Bench in the very first instance.

(2) The circumstances in which the prayer for condonation of delay has been necessitated may now be briefly stated. The regular first appeal, according to the petitioner-appellant's case, was filed in this Court on 20-7-1963. Limitation for filing the appeal, it is common ground, was to expire on 25-7-1963. The counsel for the petitioner-appellant who had recently shifted to practice in this Court, and hence was not fully conversant with the practice of the Court, and hence was not fully conversant with the practice of this Court, by inadvertence omitted to deposit a sum of Rs. 100/- on account of advance printing charges and to attach

a receipt of such deposit along with the memorandum of appeal. the Deputy Registrar vide endorsement dated 30-7-1963 pointed out this omission and directed the appeal to be returned to the appellant to be refilled within a week. The memorandum of appeal was, however, received by the counsel on 5-8-1963 and the same was refiled on the following day, namely 6-8-1963 after complying with the note. It is in these circumstances that the prayer for condoning the delay has been made. Notice to the opposite party was given in accordance with the direction of the learned Single Judge, in pursuance of the order dated 8-11-1963.

(3) This case was first argued before us on 28-1-1964 when our attention was drawn on behalf of the respondent to Ram Rachhpal v. Ramji Dass, F. A. No. 241 of 1962 (Punj) in which a Division Bench of this Court of which I was a member, after referring to an order by a learned Single Judge of this Court in Jagan Nath v. Nathu Ram, Civil Misc. No. 1950-C of 1960 dated 25-11-1960 (Punj) and to a decision of the Punjab Chief Court in Gonda Ram. v. Ilahi Bakhsh, First Appeal No. 726 of 1914 decided on 6-5-1914, took the view that by virtue of Rule 9 contained in Chapter 2-A of High Court Rules and Orders, Vol. V, it must be held that, in the absence of a receipt for a sum of Rs. 100/- deposited with the treasurer of the High Court to cover the costs of printing the record, no appeal of the appellant had been received in this Court. It may be stated that there was also an application under S. 5 of the Limitation Act filed in that case but it was observed in this connection that since there was no appeal received in this Court, the situation for considering the benefit of S. 5 had not yet arisen. Incidentally, it may be mentioned that later the application under S. 5 of the Limitation Act came up for hearing before a Bench consisting of Mehar Singh J. and my learned brother H. R. Khanna J. and it was ordered that the same be heard at the time of the hearing of the appeal. It is desirable at this stage to mention that in Ram Rachhpal's case. F. A. No. 241 of 1962 (Punj) the appellants had applied for permission to file the appeal as a pauper and along with that application, there was another application under S. 151, Civil Procedure Code, praying that the record of the appeal be typed and advance printing charges of Rs. 100/- be dispensed with. On 10-5-1962, a Bench of this Court dismissed the application under Order 44, Rule 1, of the Code and allowed the petitioner-appellants there two months' time to make good the deficiency in court-fee. The last date by which court-fee could be paid was 9-7-1962, the office returned the appeal to the plaintiffs with the remark that no sufficient cause had been shown for the late payment of the Court-fee. The appeal was then refiled on 17-9-1962. On behalf of the opposite party an application was also moved under S. 151, Civil Procedure Code, that the plaintiffs' appeal be dismissed on the ground:

(a) that court-fee had not been paid within time in accordance with the orders of the Court, and

(b) that the deposit of Rs. 100/- had not been made according to Rule 9, Chapter 2-A Vol. v. High Court Rules and Orders. We are only concerned, with

the second objection for our present purpose. After reproducing Rule 9, it was observed that the application for permission to file the appeal in forma pauperis under Order 44, Rule 1, Civil Procedure Code, having been dismissed, there was no occasion for an appeal in forma pauperis and the most that could be stated was that the memorandum of appeal filed by the plaintiffs-appellants with their application under Order 44, Rule 1, Civil procedure Code, thereby became an ordinary appeal that was filed on the date on which the application under Order 44, Rule 1, was dismissed or perhaps even when the said application was filed, thereupon it became an ordinary appeal, with the result that immediately the provisions of Rule 9 were attracted and the plaintiffs could only have their appeal received in the office by producing a receipt for a sum of Rs. 100/-. Having not done this up to the date of the order, the appeal must be held to have not been received. The word "shall" used in the rule was construed to have a mandatory effect. It was also observed there that such a rule could be made by this Court under clause 27 of the Letters patent.

(4) The appellant's learned counsel in that case relied on Narsingh Dass v. Mangal Dubey ILR All 163 (FB) for the contention that Courts while construing statutes like the CPC should not act upon the principle that every procedure is to be taken as prohibited unless expressly provided by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by law. Rule 9 was, however, construed to contain such an express prohibition. Reliance for the appellants there was also placed on Motibhai Vithalbai Patel and Another Vs. The State of Gujarat and Another, but this was also considered to be unhelpful because it was ruled that the filing of a receipt of Rupees 100/- was a condition precedent to the receipt of the appeal in this Court and, therefore, an imperative requirement. Two further contentions were raised there that Rule 9 does not deal with a case when an application for leave to appeal in forma pauperis is dismissed and that office of the High Court had already received the memorandum of appeal and, therefore Rule 9 in terms was inapplicable. These contentions were also held untenable. What was done under a mistaken impression contrary to Rule 9 could not be recognised as having been done under the rules.

(5) Considering the matter to be of great importance to the litigants and also to the administration of justice in this Court, we considered it proper to request the advocate-General to assist us as *amicus curiae*, with the result that Mr. L. D. Kaushal Senior Deputy Advocate General, has been kind enough to appear and give us the benefit of his arguments.

(6) The learned counsel for the petitioner-appellant has, to begin with, submitted that Rule 9, which concerns us, has not been made by virtue of the power conferred on this Court S. 122, CPC Support for this contention has been sought from chapter 21, Vol. I, High Court Rules and Orders, which contains rules made under this section, annulling, altering or adding to the rules in the first Schedule of the Code. It is further contended that Vol. V. of the High Court Rules and

Orders purports merely to contain rules relating to proceedings in the High Court made under the authority of the Constitution of India, the Letters Patent and the Acts of Parliament, without clearly disclosing as to under which precise law, delegating legislative power to this Court, has Rule 9 in question been made. This contention has been advanced for the purpose of supporting the argument that Rule 9 is a mere executive or administrative direction not having the force of law and not having been intended to curtail the right of appeal conferred on an aggrieved party by S. 96 read with Order 41, Civil Procedure Code. For the purpose of developing this argument, reference has been made to various provisions contained in volumes I and V of the High Court Rules and Orders. The third contention raised by the appellant-petitioner's learned counsel is that the appeal was in fact presented on 20-7-1963 in accordance with the prescribed manner of presentation of appeals and the office actually received it. Had the office declined to receive it or having received it, taken reasonably prompt action in returning it to the learned counsel, he would have remedied the defect and represented the appeal within the period of limitation, for the limitation only expired on 25-7-1963, five days after the initial presentation. The office took an unreasonably long time and actually returned the memorandum of appeal on 5-8-1963. The counsel, it is emphasised, without any further delay, remedied the defect and refilled it on 6-8-1963. The learned counsel has very fairly pointed out that the date on the endorsement of returning the memorandum of appeal is 30-7-1963 but it is obvious that the endorsement is in the handwriting of a subordinate staff and the date has not been put on it by the Deputy Registrar at the time of signing it. It seems to be highly likely that it was not returned actually on 30-7-1963 and I have no reason to doubt that it was actually returned to the counsel on 5-8-1963, as sworn by the learned counsel himself in his affidavit. Lastly, it has been contended that in any case the circumstances disclose a sufficient ground for giving to the appellant-petitioner the benefit of S. 5 of the Indian Limitation Act. Some assistance has been sought for this contention from a decision of a Division Bench of the Lahore High Court in Muhammad Hassan-ud-Din v. Saif Ali Shah 134 PLR 1923 to which reference has been made by way of analogy.

(7) Shri Kaushal, the learned Senior Deputy Advocate General who has been good enough to assist the Court as *amicus curiae* has drawn our attention to Article 225 of the Constitution and to Section 223 of the Government of India Act, 1935, as also to section 106 of the Government of India Act, 1915, in support of the contention that these provisions of law fully empower the High Court to make Rule 9; reference has further been made to clause 27 of the Letters Patent which also authorises this Court to make rules like the one in question. For the purpose of showing that the publication of this rule in Vol. V of the High Court Rules and Orders is sufficient compliance with the principle that law must be made known to the people generally, support has been sought from Harla Vs. The State of Rajasthan, and from Abhey Kumar Jain v. Faqir Chand, Civil Revn. No. 262-D of 1963 (Punj) decided by Bhandari C. J. Whether Rules 9

imposes a mandatory obligation or merely lays down a directory provisions, Shri Kaushal has referred us to The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, and has argued on the basis of the ratio of this case that the rule must be held to be mandatory entailing invalidity of the act done if it is not complied with. Reliance has been placed on the observation of Subba Rao J. who prepared the majority judgment at page 765. It is observed there:

"When a statute uses the word "shall:", prima facie it is mandatory, but the Court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in questions is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

The counsel has also referred us to Sainik Motors, Jodhpur and Others Vs. The State of Rajasthan, where it is stated:

"The word "shall" is ordered mandatory, but it is sometime not so interpreted if the context or the intention otherwise demands."

He has next cited Bhairon Ghulam and Others Vs. Ram Autar Singh,) where amendment in Order 41, Rule 1, Civil Procedure Code, by inserting Rule 2 requiring a copy of the judgment of the first Court to accompany an appeal from an appellate decree to the High Court was held to be a mandatory provision.

(8) In so far as the applicability of S. 5, Indian Limitation Act, is concerned, Shri Kaushal has conceded that it is open to this Court to give benefit of this section to the appellant-petitioner if the facts justify it.

(9) Shri Partap Singh, learned counsel for the respondent, has urged that Rule 9 must be considered to have been made in exercise of the power conferred on this Court by section 122. Civil Procedure Code. He has also urged that no sufficient cause has been shown by the learned counsel for the appellant-petitioner because mere ignorance of the existence of Rule 9 cannot justify the benefit of section 5, Limitation Act.

(10) In so far as the question of the mandatory or directory nature of Rule 9 is concerned, in my opinion, the principle is well-settled and is hardly in doubt. It is only the application off that principle to the facts of each case which sometimes creates some difficulty. Even in Sainik Motors, Jodhpur and Others Vs. The State of Rajasthan, the passage quoted by Shri Kaushal is followed by the following observation:

"In In re, Lord Thurlow; Ex parte Official Receiver 1895 1 QB 724 Lord Esher, M.

R. Observed at p. 729 that " the word "shall" is not always obligatory. It may be directory". and Lopes L. J. at p. 731 added.

"It is clear that the word "shall" is not always used in a mandatory sense. There is abundance of authority to the contrary in cases where it has been held to be directory only". It was thus that the word "shall" was held to be directory only, in that case, by Coutts Trotter, C. J. in *Manikkam Pattar v. Nanchappa Chettiar* 1928 Mad WN 441 by Russel. J., in *Rustom v. H. Kennedy* ILR 26 Bom 396 ; In re *Rustom Jamshed Irani*, 3 Bom LR 653, by Venkatasubba Rao, J. in *Firm Jethaji Peraji Vs. Krishnayya and Others*,) and by the Judicial Committee in *Burjore v. Bhagana*. 11 Ind App 7 (PC)."

In *Banwarilal Agarwalla Vs. The State of Bihar and Others*, , Ds Gupta J., speaking for the Court stated the position thus:

"As has been recognised again and again by the Courts, no general rule can be laid down for deciding whether any particular provision in a statute is mandatory, meaning thereby that non-observance thereof involves the consequence of invalidity or only directory, i.e., a direction the non-observance of which does not entail the consequence of invalidity, whatever other consequence may occur. But in each case the Court has to decide the legislative intent. Did the Legislature intend in making the statutory provisions that non-observance of this would entail invalidity or did it not? To decide this we have to consider not only the actual words used but the scheme of the statute, the intended benefit to public of which is enjoined by the provisions and the material danger to the public by the contravention of the same."

In *Rani Drig Raj Kuer Vs. Raja Sri Amar Krishna Narain Singh*, Sarkar J., expressing the majority view. spoke thus:

"But it is well-known that the use of the word "shall" is not conclusive of the question whether a provisions is mandatory: see *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, . The intention of the Legislature has to be gathered form the whole statute."

In *The Collector of Monghyr and Others Vs. Keshav Prasad Goenka and Others*, it has been observed:

"It is needless to add that the employment of the auxiliary verb "shall" is inconclusive and similarly the mere absence of the imperative is not conclusive either. The question whether any requirement is mandatory or directory has to be decided not merely on the basis of any specific provision which, for instance, sets out the consequences of the omission to observe the requirement, but on the purpose for which the requirement has been enacted, particularly in the context of the other provisions of the Act and the general scheme thereof."

In *Maxwell on Interpretation of Statutes* (10th Edition) the position is stated thus at p. 364:

"It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. The whole scope and purpose of the statute under consideration must be regarded." This passage has approvingly been quoted in *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, . In this very judgment occurs another quotation from Lord Campbell in *Liverpool Borough Bank v. Turner* (1860) 30 LJ Ch. 379:

"No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

(11) In the light of the principles just reproduced, let us see the purpose and object of Rule 9. This Rule occurs in Chapter 2-A, High Court Rules and Orders, Vol. V. Chapter 2 is headed "Preparation of Paper-Books and Record" and Part A as "The Preparation of Printed Record in First Appeals". Rule 9, with its marginal heading "initial deposit by the appellant", is in the following terms:

"In every appeal in which under these rules a record has to be printed, the appellant shall, with his appeal attach a receipt for a sum of one hundred rupees which should be deposited with the Treasurer of the High Court to cover the cost of printing the record. No first appeal from decree shall be received unless it is accompanied by such receipt."

Exception. This rule does not apply to an appeal filed in forma pauperis in which case the appellant will be required to pay the approximate cost of printing or copying of such portion of the record as the Judge admitting the appeal may. under Rule 2 of this Chapter, order."

The note underneath it does not concern us. The right of appeal from original decrees of civil Courts is created by section 96, Civil Procedure Code, which lays down that save where otherwise expressly provided in the body of the said Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court. Rule 1 of Order 41, Civil Procedure Code, which by virtue of section 121 of the Code has the effect of being enacted in the body of the Code, prescribes the form of appeal and what is

to accompany the memorandum. According to this rule, every, appeal is to be preferred in the form of a memorandum accompanied by a copy of the decree appealed from and unless dispensed with the judgment on which it is founded and presented to the Court or the officer appointed by it in this behalf. This provision is repeated in Rule 2(b), Chapter 1-A, High Court Rules and Orders, Vol. V. Sub-rule (2) prescribes the contents of the memorandum. Rule 3 provides for rejection or amendment of memorandum in case it is not drawn up in the manner prescribed, and Rule 5, Chapter 1-A, High Court Rules and Orders Vol. V lays down that the Deputy Registrar may return for amendment, within a time to be fixed by him, any memorandum of appeal for reasons specified in the said Rule. It is relevant to bear in mind that this Court has not chosen to act u/s 122 of the Code for incorporating in Order 41 a provision like Rule 9. It is doubtful if the language of Rule 9 can be so construed as to bring it within the expression " by any other law" used in section 96 of the Code so as to affect the right of appeal conferred by that section. The contention that Rule 9 construed in the light of its purpose and object should not be construed to be mandatory for it would, in that case, curtail the valuable statutory right of appeal appears to me to demand serious thought and consideration and cannot be lightly brushed aside. The exception to the Rule clearly suggests that the object of the Rule pertains merely to the convenience at the time of the final hearing of the appeal by providing a printed record, and we know that for sufficient reasons printing of the whole or part of the record can be, and has been, dispensed with by this Court in suitable cases. These, among others, are relevant considerations which demand due weight in determining the extent of rigour of Rule 9 on the right of appeal. I consider it, however, unnecessary to express any final opinion on this point at this stage because the controversy raised before us can in my opinion, be settled on other grounds. I should also like to point out, what at times is ignored and not given due consideration, that even a directory provisions is intended to be obeyed and it does not authorise its deliberate and conscious violation or breach; it does not purport necessarily to confer an absolute discretion to do or not to do the thing directed. Directory provision no doubt calls for obedience but a failure to obey the direction may not render the thing otherwise duly done but in disobedience of it, an absolute nullity or non-est which the judicial eye must decline to see. This point, however, may on a more suitable occasion call for a closer examination and more authoritative pronouncement.

(12) The memorandum of appeal in the instant case was admittedly presented in the office of this Court in accordance with paragraph 1, Chapter 1-A, High Court Rules and Orders, Vol. V., five days before the expiry of the period of limitation. Since the manner prescribed was deposit of the appeal in the petition box, it is true that the occasion for exercising the judgment whether or not to receive the memorandum of appeal on account of non-compliance with Rule 9, Chapter 2-A, did not arise at that time, but this appeal must have been taken out of the box on the same day and it is to unreasonable to expect the office to have scrutinised the memorandum of appeal, if not on the 20-7-1963, certainly, on the following

working day, which happened to be 22-7-1963 (21-7-1963 being a Sunday). Not to have scrutinised it up to 30-7-1963 seems to me to be wholly unreasonable and does not reflect credit on the efficiency of the office. That a litigant should lose his right of appeal on account of want of due diligence and reasonable promptitude on the part of the official entrusted with the responsible task of checking the presentation of appeals and petitions in the highest Court of justice in the State is something which I am unable to countenance. Indeed, it should not be tolerated in any court or Tribunal whose duty it is to adjudicate on the citizens' disputes. Again, there is no material on the record which would justify us not to rely on the affidavit of the appellant-petitioner's learned counsel that the memorandum was actually returned on 5-8-1963 and it was indisputably refiled after due compliance with R. 9 on 6-8-1963. In these circumstances, in my opinion, the provision of section 5, Indian Limitation Act, is attracted with full justification. According to this section, an appeal may be admitted after the period of limitation prescribed therefor, when the Court is satisfied that the appellant had sufficient cause for not preferring the appeal within such period. I am of course proceeding on the assumption that the appeal according to law was only preferred when it was re-presented on 6-8-1963. It is well recognised that no suitor or litigant should suffer on account of an act of the Court or its officers. Had the office of this Court performed its duty with reasonable diligence and expected promptitude, the memorandum of appeal must have been returned within 2/3 days of its presentation and in that event, the appellant-petitioner could and would have represented the appeal well within the period of limitation after complying with Rule 9. The unreasonable delay in the office of this Court has resulted in prejudice to the appellant which, in my opinion, this court must undo by allowing him extension of period u/s 5, Limitation Act. To determine the rights of the parties because of the undue delay or laches of the officers of this Court appears to me to be quite unsupportable on any sound rule of law.

(13) For the foregoing reasons, this petition succeeds and allowing the same extend time u/s 5, Indian Limitation Act, and hold the appeal to be within time and admit the same to a Division Bench. The record would now be printed in accordance with rules. In the peculiar circumstances of the case, there would be no order as to costs of these proceedings.

Khanna, J.

(14) I agree with my learned brother that it is unnecessary to express opinion on the point as to whether Rule 9 in Chapter 2-A of High court Rules and Orders, Volume v, is mandatory or directory because in any case there is sufficient ground for extending the time under S. 5 of the Limitation Act and thus holding the appeal to be within time.

15. Petition allowed.