

(2011) 02 GUJ CK 0016
In the Gujarat High Court

Case No : Civil Application No. 11518 of 2010 in First Appeal (Stamp Number)
No. 2411 of 2009

Paschim Gujarat Vij Company Ltd.

APPELLANT

Vs

Khemchand Nathabhai Gadhavi

RESPONDENT

Date of Decision : 03-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11, Order 41 Rule 13, Order 41 Rule 13(1), Order 41 Rule 3A(1), 96
Gujarat High Court Rules, 1993 — Rule 67
Limitation Act, 1963 — Section 10, 11, 12, 13, 14

Citation : (2011) 2 GLH 90 : (2011) 3 GLR 1867

Hon'ble Judges : V.M. Sahai, J;A.L. Dave, J

Bench : Division Bench

Advocate : Maya Desai, for M.D. Pandya, for the Appellant; B.P. Munshi, for the Respondent

Final Decision : Dismissed

Judgement

V.M. Sahai, J.—The short question that arises for consideration in this appeal is whether a time-barred appeal can be filed and is maintainable without an application and affidavit for condoning the delay?

2. This first appeal has been filed u/s 96 of the CPC challenging the judgment and decree dated 31st March, 2008 passed by the learned Principal Senior Civil Judge, Khambhalia dismissing Special Civil Suit No. 20 of 1997 filed by the Appellant-Plaintiff. The appeal has been filed on 16th May, 2009 whereas the limitation for filing the appeal had expired earlier on 30th August, 2008. The appeal was not accompanied by any application or affidavit for condoning the delay. However, Rule was issued to the Respondents on 18th November, 2010.

3. We have heard Ms. Maya Desai, learned Counsel holding the brief of Mr. M.D. Pandya, learned Counsel for the Appellant and Mr. B.P. Munshi learned Counsel appearing for the Respondent. The learned Counsel for the Appellant has prayed

for condonation of delay in filing the appeal. Mr. Munshi, appearing for the Respondent seriously objected to the condonation of delay. He urged that at the time of filing time-barred appeal, the appeal was not accompanied by any application or affidavit for condoning the delay, therefore, the appeal was liable to be dismissed under Order 41, Rule 3A of Code of Civil Procedure. He has further urged that in view of the provisions contained in Section 3(1) of the Limitation Act, 1963, the appeal was liable to be dismissed as the Memo of Appeal did not accompany delay condonation application or affidavit.

4. The last date of limitation for filing the appeal was 30th August, 2008. The appeal was filed on 16th May, 2009. The application for condonation of delay was filed on 26-2-2010 as reported by the Computer Section, though the Civil Application presentation form filled by the Appellant's Counsel or his office mentions that the application was filed on 11th December, 2009 it was not supported by any affidavit. The affidavit in support of the application was filed by Dineshbhai Gordhanbhai Sonigara, Deputy Engineer, City Sub-Division, on 16th August, 2010, wherein delay was tried to be explained in filing the appeal. In the affidavit, it is stated that the Appellant handed over papers to their Counsel on 3-12-2008, but the file was lost in the Counsel's office and later on it was traced out and appeal was filed on 15-5-2009. There is no explanation from 16-5-2009 to 16-8-2010 in the affidavit.

5. Order 41, Rule 3A of the Code of Civil Procedure, 1908 reads as under:

3A. 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 a notice to the Respondent, nonce 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.

Sub-rule (i) of Rule 3A of Order 41 of CPC provides that when an appeal is presented after expiry of the period of limitation, it shall be accompanied by an application supported by an affidavit giving all the detailed facts on which the Appellant wants to satisfy the Court that he was prevented by sufficient cause in not filing the appeal within the prescribed period of limitation. Therefore, this Rule mandates that if a time-barred appeal is filed, it has to be accompanied by an application and affidavit for condonation of delay. In absence, the appeal is rendered incompetent and is liable to be dismissed. The Rule is mandatory in

nature and its noncompliance is fatal.

6. Chapter-V, Rule 67(i) of the Gujarat High Court Rules reads as under:

67. Procedure in regard to office objection as to limitation : (i) When an appeal, application or memorandum of cross-objection is presented after the expiry of the period of limitation specified therefor, shall be accompanied by separate application for condonation of delay.

This Rule has been framed in consonance with Order 41, Rule 3A(1) of the CPC and makes it incumbent for the Appellant to file a separate application for condonation of delay at the time of presentation of the appeal, if the appeal has been preferred beyond the period of limitation. Since, the limitation for filing the appeal expired on 30th August, 2008 the appeal was filed on 16th May, 2009, it was mandatory for the Appellant to file an application for condoning the delay supported by an affidavit. In absence of non-compliance of Rule 67(i), the appeal is liable to be dismissed.

7. There is another aspect of the matter for which it is necessary to extract Section 3(1) of the Limitation Act, 1963 which reads as under:

3. Bar of limitation :- (1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) xxx xxx xxx

8. From the bare reading of the aforesaid provision, it is clear that if the appeal is filed beyond the period of limitation, then it has to be accompanied by an application supported by affidavit for condoning delay in filing the appeal. In absence of any application supported by an affidavit for condoning of delay, the appeal is rendered time-barred and is liable to be dismissed even in absence of plea of limitation having been set up as a defence. The appeal was time-barred when it was filed. The defect could not be cured by filing a delay condonation application subsequently.

9. The view taken by us finds support in Paragraphs 32 and 33 of the decision of the Apex Court in Noharlal Verma v. District Co-operative Central Bank Ltd. Jagdalpur 2008 (14) SCC 45, wherein the Apex Court held as under:

32. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation, a Court or an adjudicating authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.

33. Sub-section (1) of Section 3 of the Limitation Act, 1963 reads as under:

3. Bar of limitation - (1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred and application made after the

prescribed period shall be dismissed although limitation has not been set up as a defence.

(Emphasis supplied)

Bare reading of the aforesaid provisions leaves no room for doubt that if a suit is instituted, appeal preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in absence of such plea by the defence, Respondent or opponent, the Court or authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation.

10. In view of the legal position as explained by the Apex Court and in view of the fact that when the Appellant had filed the appeal beyond limitation and it did not accompany any application for condonation of delay supported by any affidavit, the appeal was not entertainable. We have therefore, no hesitation in holding that a time-barred appeal filed without delay condonation application supported by an affidavit is not maintainable. The appeal deserves to be dismissed as time-barred.

11. The Civil Application for condonation of delay is dismissed. The first appeal is also dismissed as time-barred. Rule is discharged. However, there shall be no order as to costs.