

(1976) 06 CAL CK 0025
In the Calcutta High Court
Case No : C.R. No. 2024 (W) of 1973

Patai Sheikh and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 08-06-1976

Acts Referred:

Calcutta High Court (Appellate Side) Rules, 1976 — Rule 2, 43
Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Article 117

Citation : AIR 1976 Cal 427 : (1976) 1 CALLT 338 : (1976) 2 CompLJ 1 : 80
CWN 766 : (1976) 2 ILR (Cal) 540

Hon'ble Judges : Sankar Prasad Mitra, C.J.; Salil Kumar Datta, J

Bench : Division Bench

Advocate : Sankardas Banerjee and Ajit Sarkar, for the Appellant; Pradipta Roy, for the Respondent

Judgement

Sankar Prasad Mitra, C.J.—On an application under Article 226 of the Constitution Mr. Justice Anil Kumar Sen delivered judgment on the 1st March, 1973. The appellants before Us applied for a certified copy of the judgment on 20th March, 1973. Due to the delay in applying for certified, copy they lost 19 days.

2. The certified copy was ready for delivery on the 27th April, 1973, at 4.80 p. m. The appellants took delivery of the certified copy on April 30, 1973. The appeal was filed on June 11, 1973. The Stamp Reporter did not accept the Memorandum of Appeal on the ground that it was presented 33 days after the expiry of the period of limitation. The appellants thereafter presented an application u/s 5 of the Limitation Act on the 13th June, 1973, whereupon Civil Rule No. 2024 (M) of 1973 was issued. The Rule has now come up for hearing.

3. Mr. Sankardas Banerjee appearing for the appellants contends that the appellants lost 19 days between the 1st March, 1973 and the 20th March, 1973: They lost 42 days between the 30th April, 1973 and the 11th June, 1973. The

total is 61 days. But out of these 61 days, 2 days, namely, Saturday the 9th June, 1973 and Sunday the 10th June, 1973, would have to be excluded. The appeal therefore has been filed within 59 days.

4. Mr. Banerjee's contention is that the appeal is not barred by limitation at all. He relied on Chapter VIII, Rule 2 of the Appellate Side Rules. This Rule reads:

"Every Appeal to the High Court u/s 15 of the Letters Patent from a judgment of a Division Bench, or a Judge sitting singly, on the Appellate Side of the High Court, shall be presented to the Deputy Registrar, or such other officer as the Registrar may appoint, within 60 days from the date of the judgment appealed from, unless the Court in its discretion, on good cause shown, shall grant further time."

5. Mr. Banerjee has relied on a recent Division Bench judgment of Mr. Justice N.C. Mukherji sitting with Mr. Justice B.C. Roy in F. M. A. T. No. 666 of 1975 (Rabindra Nath Chakrabarty v. Union of India). The judgment was delivered on the 28th May, 1976. The Division Bench, it appears, has held that an appeal under Clause 15 of the Letters Patent from the judgment of a single Judge exercising writ jurisdiction under Article 226 of the Constitution on the Appellate Side is governed by Rule 2 of Chapter VIII of the Appellate Side Rules.

6. It appears that the Division Bench's attention was not drawn to the judgment of the Special Bench consisting of Chakravarti, C. J., Das, J., Banerjee, J. K. C. Das Gupta, J., and S. R. Das Gupta, J., in the case of Chairman, Budge Budge Municipality Vs. Mongru Mia and Others, . The Special Bench has held that the issue of writs contemplated by Article 226 is exercise of original jurisdiction. It is not original in the limited and technical sense of ordinary original civil jurisdiction of the Letters Patent which carries certain territorial limits but it is original as distinguished from appellate. The jurisdiction cannot be revisional because it is not connected with revising any order of a Court subordinate to the High Court as contemplated by Section 115 of the Code of Civil Procedure, nor does it appertain to the general power of superintendence conferred by Section 107 of the Government of India Act 1915, now Article 227 of the Constitution. The Special Bench is of the view that the period of limitation of an appeal from a judgment of a single Judge given in the exercise of jurisdiction under Article 226 is governed by Article 151 of the Limitation Act 1908 (corresponding to Article 117 of the Limitation Act, 1963) and is 20 days (now 30 days) from the date of order.

7. We have no doubt that if this judgment of the Special Bench had been shown to the Division Bench, its decision would have been otherwise.

8. It may be relevant to examine the provisions of Clause 15 of the Letters Patent in this connection. An analysis of these provisions reveals that an appeal lies from the judgment of one Judge of the High Court or one Judge of any Division Court. But this judgment (1) shall not be a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the

exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court, (2) shall not be an order made in the exercise of revisional jurisdiction, (3) shall not be a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act 1915, and (4) shall not be a sentence or order passed in the exercise of criminal jurisdiction.

9. This is the first part of Clause 15 of the Letters Patent. In the second part of Clause 15 it is stated that notwithstanding anything hereinbefore provided an appeal shall lie from a judgment of one Judge of the High Court or one Judge of any Division Court in the exercise of any appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court, where the Judge who passed the judgment, declares that the case is a fit one for appeal. In other words, a second appeal lies to the High Court provided that the Judge who passed the judgment declares that the case is a fit one for appeal. The same view was also taken by the Special Bench referred to above at page 45 of 57 Cal WN = (at p. 448 of 1953 AIR).

10. In view of what we have stat-ed above it is clear that, an appeal from a judgment of a single Judge under Article 226 of the Constitution is governed by the first part of Clause 15 of the Letters Patent. This being a judgment in the exercise of original jurisdiction of the Court, it would be governed, as we have stated, by Article 117 of the Limitation Act, 1963 in the absence of any specific provision.

11. It seems to us that Rule 2 of Chapter VIII of the Appellate Side Rules on which Mr. Banerjee has placed reliance is applicable to second appeals only. In fact, all the Rules in Chapter VIII relate to second appeals. Take, for instance, Rule 3 which is as follows:

"The memorandum of appeal shall be drawn up in accordance with the the provisions of Order XLI, Rule 1, Civil Procedure Code, and shall be subscribed by an Advocate of the Court. It need not be accompanied by a copy of the judgment appealed from. It shall be the duty of the officer to whom the memorandum is presented under Rule 2 above to endorse thereon the date of presentation and send the same to the Stamp Reporter, who shall satisfy himself that there is a declaration by the Judge who passed the judgment that the case is a fit one for appeal, and that it is in order and within time."

12. It is clear that Rule 3 refers to second appeals only as envisaged by the second part of Clause 15 of the Letters Patent. Rule 6 gives the Form in which separate registers shall be opened for the entry of appeals under Chapter VIII. In the second column of this Form, the number of the Original Appeal to the High Court along with certain other particulars have to be stated. This again shows that the Chapter relates to second appeals. The matter is clinched by Rule 11 of Chapter VIII which runs as follows:

"The paper books prepared for use at the hearing of the original appeal shall be used at the hearing of the Appeal u/s 15 of the Letters Patent."

13. It is therefore clear beyond doubt that Rule 2 of Chapter VIII applies to second appeals and not to an appeal from a judgment of a single Judge within the meaning of the first part of Clause 15 of the Letters Patent.

14. Mr. Banerjee also relied on Rule 43 of the Rules of this Court relating to Applications under Article 226 of the Constitution. Rule 43 runs thus:

"Appeals from final orders in this jurisdiction shall be made in the same manner as appeals from original orders in the Original Side and appeals from orders in the Appellate Side according as they arise out of "Original Side" and "Appellate Side" applications and all rules applicable thereto in the rules of the Original and Appellate Side, respectively shall apply thereto mutatis mutandis."

15. According to Mr. Banerjee this shows that writ appeals on the Appellate Side and those on the Original Side are being treated separately and in matters of limitation also if any special rule has been framed on the Appellate Side that special rule would apply to writ appeals on the Appellate Side.

16. We do not agree with Mr. Banerjee, Rule 43 merely refers to the manner in which an appeal has to be preferred. "Manner" means "the way in which a thing is done or happens": Vide Concise Oxford Dictionary, 5th Edition, page 741. It has nothing to do with the period for limitation of appeals.

17. We are therefore of opinion that the present appeal is barred by limitation in view of the provisions of Article 117 of the Limitation Act 1963.

18. Our attention was drawn to two decisions. In *The Union of India (UOI) Vs. Ram Kanwar and Others*, the Court was considering Rule 4 of the Rules and Orders of the Punjab High Court. This Rule provided a limitation of thirty days in respect of appeal under Clause 10 of the Letters Patent for the High Court of Lahore. It was held:

"Rule 4 is made by the High Court in exercise of legislative power conferred upon the said High Court under Clause 27 of the Letters Patent. As the said rule is a law made in respect of special cases covered by it, it would certainly be a special law within the meaning of Section 29(2) of the Limitation Act."

19. Clauses 10 and 27 of the Letters Patent for the High Court of Lahore are almost in pari materia with Clauses 15 and 37 respectively of the Letters Patent for the High Court at Calcutta. Rule 2 of the Chapter VIII of the Appellate Side of the Calcutta High Court like the aforesaid Rule 4 is thus a special law within the meaning of Section 29(2) of the Limitation Act 1963, though it applies, as we have seen, to second appeals.

20. The next case cited is AIR 1972 1935 (SC) in which the Court was considering the provisions of Rule 17 of the Bombay Employees' State Insurance Rules, which provided twelve months' limitation for applications to court in

respect of claims u/s 75 of the Act. The Court noticed that a law of limitation may involve substantive rights when it extinguishes them and it may be procedural when it concerns with the remedies. It was further held that provisions affecting "substantive rights must be dealt with by legislature itself and is not to be inferred from the rule-making power conferred for regulating the procedure unless that is specifically provided for." About the decision in The Union of India (UOI) Vs. Ram Kanwar and Others, which was noticed along with other cases it was observed that "in that case no question was raised as to whether Rule 4 was dealing with a procedural matter or dealt with a substantive right." It was further observed:

"These cases are of little assistance and if at all they lay down the principle that interlocutory proceedings before the court do not deal with substantive right and are concerned with mere procedure and can be dealt with by rules made under the power conferred on the High Court to regulate the procedure."

21. The Court took the view that "the safest course would be to examine each case on its own facts and circumstances and determine, for instance, whether it affects substantive right and extinguishes them or whether merely concerns as a procedural rule only dealing with remedies." After considering in particular the statute and the relevant rule, the Court was of opinion that the impugned Rule 17 affected substantive rights of employees to receive benefits under the Act. This power could not be deemed to have been parted with by the Legislature except by clear and unambiguous "terms or by necessary amendment. The view taken by the High Court of Bombay which struck down Rule 17 providing a limitation of twelve months against the provision of three years under Article 137 of the Limitation Act was affirmed.

22. The Supreme Court in the later case did not consider if the Rule 4 could be a special law within the meaning of Section 29(2) of the Act as held by the earlier decision in The Union of India (UOI) Vs. Ram Kanwar and Others, which was an appeal (sic) under Article 226 and not an interlocutory proceeding. In view of the conscious declaration of law in Ram Kunwar's case that Rule 4 framed by the High Court is an exercise of its legislative power under Clause 27 of Letters Patent of Lahore High Court (Clause 37 of our High Court) and thus a special law within meaning of Section 29(2) of the Limitation Act, 1963 it appears that the decision is binding on this Court till the law is declared otherwise by the Supreme Court. We may also mention here that even according to the decision in AIR 1972 1935 (SC) the limitation against appeals from decisions made by the Single Judge in Original Civil Jurisdiction is thirty days, as provided in Article 117 of the Limitation Act 1963.

23. Mr. Banerjee has submitted to us also that the delay in filing this appeal should be condoned. In paragraph 7 of the petition u/s 5 of the Limitation Act, the reasons for the delay have been stated. Paragraph 7 of the said petition reads thus:

"That the petitioners state that the petitioner No. 1 who is the senior member of the petitioners" family and who has been managing and/or looking after the properties and effects of the family inter alia the conduct of the above case C. R. 7893 (w) of 1969, after instructing for taking certified copy but before receipt of the said certified copy of order fell seriously ill laid down with Hepatitis and prolonged fever which confined him to bed under continued treatment of Dr. B.N. Sen of Barnia Hospital from 23-4-1973 to 8-6-1973 and thus became incapable either to come to Calcutta or to receive advice and/or give instruction to the learned Advocate of the petitioners for preferring the above appeal and that on 9-6-1973 on receipt of his medical check up and advice the petitioner No. 1 although still lying in a very weak state of health could somehow come down to Calcutta on 10-6-1973 and receive advice and/or give instruction to prefer the above appeal which was filed accordingly on 11-6-1973 as above.

A true copy of the Medical Certificate issued by the attending physician as above has been annexed hereto and marked with letter "A".

24. The above paragraph has been affirmed as true to the knowledge of the petitioner No. 1.

25. On the facts and in the circumstances of the instant case, we are inclined to accept the explanation given. We therefore make an order condoning the delay in filing this appeal. But as a condition precedent we direct that the petitioner shall pay to the respondents' advocate, Mr. Pradipta Roy, a sum of Rs. 170/- (Rupees one hundred seventy) being the assessed cost of this application. The sum is to be paid within four weeks from date. In default, the order of condonation of delay shall stand vacated. The Rule is thus made absolute.

26. The learned advocate for the petitioners would take a receipt from Mr. Roy and file the same in the Department.

27. The appeal may now be registered, if otherwise in form.

S.K. Datta, J.

28. I agree.