

(2010) 12 SHI CK 0152
In the High Court Of Himachal Pradesh
Case No : Civil Revision No. 393 of 2001

Sh. Ajay Sharma and Another	Vs	APPELLANT
Shiv Mandir and Shiv Bari Development and Welfare Society and Another		RESPONDENT

Date of Decision : 24-12-2010

Acts Referred:

Civil Procedure Code Amendment Act, 1999 — Section 31
Limitation Act, 1963 — Section 5

Citation : (2010) 12 SHI CK 0152

Hon'ble Judges : Surinder Singh, J;R.B. Misra, J

Bench : Division Bench

Judgement

Surinder Singh, J.—The present Civil Revision petition has been directed by the Plaintiffs feeling aggrieved and dissatisfied by the following order dated 20.9.2001, passed by the learned Additional District Judge, Una in civil Miscellaneous Application No. 89/2001, whereby the execution of ex parte decree was stayed pending application u/s 5 of the Limitation Act.

20.9.2001 Present: Sh. N.K. Sharma, Advocate, for the appellant.

O.R. Seen. Since the appeal is apparently time barred, first application u/s 5 of the Indian Limitation Act has to be decided. The application u/s 5 of the Act be registered, the notice of the same be sent to the Respondents for 16.10.2001.

In the meantime learned Counsel for the Appellant has stated that the operation of the impugned judgment and decree be stayed on his application under Order 41 Rule 5CPC. The said application be also be registered.

Before the registration of the civil appeal, he has argued that application under Order 41 Rule 5 Code of CPC can be entertained and the operation of the impugned judgment and decree can be stayed though the appeal has not so far been registered. In this behalf he has cited the case of Gouse Bi, Petitioner v. Salima Bi, Respondent as reported in AIR 1974 Madras 220 wherein a Division

Bench of the said court had held that even though an appeal is presented beyond the period of limitation and no order has so far been made on the application of condonation of delay, there is deemed to be an appeal pending before the court in view of Order 41 Rule 1 Code of CPC and if an application for interim stay of an execution is made, the court can grant the interim stay under Order 41 Rule 5 CPC.

In view of the aforesaid legal position, the ex parte operation of the impugned judgment where the Appellants/applicants had suffered an ex parte decree is stayed till further orders. Show cause notice be issued asking why the application under Order 41 Rule 5 Code of CPC be not be allowed for 16.10.2001.

2. The order aforesaid is under challenge in this revision petition precisely on the ground that the order impugned could not have been passed by the first appellate Court without condoning the delay in filing the appeal against the ex parte judgment and decree passed.

3. The matter was listed before the then Chief Justice of this Court and vide order dated 23.12.2005, it was referred to the Division Bench of this Court for hearing because of the important question of law involved, viz, "whether in the light of Order 41 Rule 3A, CPC, it is open to an Appeal Court to order stay of the execution of the decree under challenge in an appeal without first disposing of the application for condonation of delay, even in such cases where the appeal Court is convinced that refusal to stay the execution of the decree shall cause immense hardship to the Appellant, or that even otherwise, based on some stated facts and circumstances the Appellant was genuinely prevented from filing the appeal in time and on this ground also, as well as on some related grounds some interim relief should be granted to the Appellant?. Other incidental and related aspects of the matter shall also have to be gone into by the Division Bench."

4. The factual matrix giving rise to this revision petition can be stated thus. Petitioners herein had filed a civil suit No. 137 of 1994 on 28th June, 1994 against general public in the Court of the then Sub Judge, Amb, seeking declaration to the effect that the Petitioner herein is sole trustee of Temple and structure of "Lord Shiva" and is entitled for managing the affairs of the said temple, no other person has any right to interfere in the management of the Plaintiff with a consequential relief of injunction to restrain general public causing interference or obstructing in the management and control of the temple and its property. The claim of the Petitioners has been that he is lineal male descendant of one Shri Nanku who was appointed before the independence by the British Government trustee of the said temple of "Lord Shiva" locally known as "Thakur Dwara of village Ambota" vide deed dated 12.7.1860.

5. None appeared to contest the claim of the Petitioners/Plaintiffs despite publication through beating of drums and publication on notice in daily "Dainik Jagaran" news paper as such Plaintiff was asked to lead ex parte evidence. On

the basis of such ex parte evidence, suit was decreed on 25.4.1995 in favour of the Plaintiff.

6. The challenge to the ex parte judgment and decree passed by the learned trial Court was made before the learned first appellate Court in the year 2001, i.e., after a period of about 5 years by filing an appeal and an application under Order 41 Rule 5 of the Code of CPC for seeking stay was also moved. To condone the delay in filing the appeal, an application u/s 5 of the Limitation Act duly supported by the affidavit was also filed.

7. Without notice to the opposite party, the learned Additional District Judge, Una passed the impugned order dated 20.9.2001 reproduced above, whereby the execution of the ex parte decree was stayed which has been assailed in this revision petition.

8. Notice was issued to the Respondents in this revision petition on 20.12.2001 by this Court and on the stay application "status quo" was ordered.

9. During the course of hearing, after admission, the above question was referred for determination to the Division Bench of this Court on 23.12.2005.

10. We have heard the learned Counsel for the parties and have examined the legal aspect of the matter.

11. Order 41 Rule 3-A reads as under:

[3-A. 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, 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 omitted by the Code of CPC (Amendment) Act 1999 (46 of 1999, Section 31(vi) (w.e.f. 1.7.2001) 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.]

[emphasis ours]

12. The above provision was inserted by the Code of CPC (Amendment Act), 1976 vide Section 87 which came into existence w.e.f. 1.2.1977.

13. The learned first Appellate Court while passing the impugned order, put its reliance on Gouse Bi v. Salima Bi AIR 1974 Mad 220 but whereas in R.C. Chaudhary Vs. M/s. Prestige Finance and Chit Fund Co. Pvt. Ltd.,

14. We while noting the intention of the legislature in connection with the aforesaid provisions (Order 41 Rule 3-A CPC) hold that it is mandatory to move an application for condonation of delay and condition precedent to move such an application and the appeal even for grant of interim relief of stay of execution of the decree cannot be entertained and no such relief can be granted so long as the Court does not, after hearing under Order 11, decides to hear the appeal. In order words, if there is no application for condonation of delay, appeal has to fail. But if the application has been moved then the Court has to decide that application as per the provisions of Order 41 Rule 3-A of the code of Civil Procedure. In absence of an application for condonation of delay u/s 5 of the Limitation Act appeal itself is non-existent for all intents and practical purposes. A similar view has also been taken in Managing Director, Thanthal Periyar Transport Corpn., Villupuram v. K.C. Karthiyayini AIR 1995 Mad 102 , Naran Anappa Sheti Vs. Jayantilal Chunilal Sahah, , Des Raj Vs. Om Parkash and Another,

15. Further a full Bench of the Orissa High Court in Ainthu Charan Parida Vs. Sitaram Jayanarayan Firm and Another, observed that notice of application u/s 5 is required to be issued and matter has to be decided before the Court proceeds to deal with the appeal. Until this is not done, there can be no adjudication of the rights of the parties.

16. The Supreme Court in Rattan Singh v. Vijay Singh and Ors. (2001) 1 SCC 469 held that an appeal, which is time barred is in a state of limbo, till the application u/s 5 of the Limitation Act is not decided. Similarly in Gagandeep Pratishthan Pvt. Ltd. and Others Vs. Mechano and Another, the apex Court held that an application for condonation of delay in filing an appeal should be heard before the Court proceeds with the matter.

17. Therefore, against the aforesaid settled proposition of law, in our view without passing any order on the application u/s 5 of the Limitation Act, in terms of Order 41 Rule 3-A of the Code of Civil Procedure, issuance of stay order in appeal is wrong and illegal.

18. The learned first appellate court was required to first ensure the compliance of sub Rule (1) of Order 41 Rule 3-A of the Code of CPC by the Appellant then proceed to decide the application u/s 5 of the Limitation Act preferred along with the appeal, as per provisions of Order 41 Rule 3-A (2) and (3) of the Code of CPC after fixing a day for hearing the Appellant or his pleader and hearing him accordingly if he does not appear on that day dismiss the appeal by delivering a judgment and decree has to be drawn up and notify its dismissal to the court from whose decree the appeal is preferred. But if the court sees no reason to reject the application without issuing of a notice to the Respondent, notice thereof is required to 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. Further, where an application has been moved under Sub-rule (1), Court shall not make an order for the stay of the execution of the decree against which

appeal is proposed to be filed so long as the Court, does not, after hearing under Rule 11, decide to hear the appeal.

19. For the reasons aforesaid, keeping in view the intent of legislature, we are of the opinion that the impugned order is not a valid one, hence not sustainable in the eyes of law, therefore, set aside.

20. The answer to the above query would be that the application u/s 5 of the Limitation Act accompanying the appeal shall be considered first by the appellate Court, so long as it is not decided, the appeal remains in limbo and no order as such can be passed in the civil appeal as well as on the stay application in any circumstances.

21. Since the order impugned is set aside, the parties are hereby directed to be present before the learned Additional District Judge on 7.1.2011.

22. Petitioners herein shall file reply to the application u/s 5 of the Limitation Act and the learned Additional District Judge shall dispose of the application u/s 5 of the Limitation Act first. In case he decides to condone the delay, it is only thereafter the appeal and the application for stay shall be considered and decided by him.

23. Since the matter is pending for the last 8 years, we hope and trust that the learned Additional District Judge shall take up the matter on priority and shall make every endeavour to dispose of the application u/s 5 of the Limitation Act within four weeks w.e.f. from 7.1.2011.

Record of the learned trial court be sent forthwith, so as to reach the first appellate court well before the date fixed.