

(2014) 04 CHH CK 0045
In the Chhattisgarh High Court
Case No : Second Appeal No. 370 of 2005

Shaitan Mal Khatri

APPELLANT

Vs

Milku

RESPONDENT

Date of Decision : 25-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11, Order 41 Rule 12, Order 41 Rule 3A, Order 41 Rule 3A(2), Order 41 Rule 3A(3)
Limitation Act, 1963 — Section 5

Citation : AIR 2014 Chh 143 : (2014) 3 CGLJ 116

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : Prafull N. Bharat, Advocate for the Appellant; R.N. Jha, Prafull N. Bharat, Advocates and Akhil Agrawal, Panel Lawyer, Advocate for the Respondent

Judgement

Sanjay K. Agrawal, J.

1. The substantial questions of law formulated and to be answered in this defendant's second appeal are as under:--

"1. Whether the impugned judgment and decree confirming the decree passed by the trial Court is based on misreading of evidence and passed by overlooking the material evidence available on record and as such perverse ?

2. Whether in the absence of any positive evidence adduced by the plaintiff to establish that the sale deed dated 29.09.1978 is null and void, the Courts below were justified to declare the sale deed as void by shifting the onus of proof upon the defendant ?

3. Whether the lower appellate Court was justified in rejecting the application for condonation of delay in preferring the first appeal solely on the ground that the same has been filed with inordinate delay, without considering the explanation offered by the defendant for the same ?"

The imperative facts required to be noticed for adjudication of this appeal are as

under:

[For the sake of convenience, the parties will be referred in the instant judgment as were referred in the suit.]

2.1. Respondent No. 1/plaintiff filed a suit for declaration of title, confirmation of possession and to declare that the registered sale deed dated 29.09.1978 as null and void and not binding upon the plaintiff. Defendant filed his written statement and claimed that he has purchased the suit property from one Subrati by registered sale deed dated 29.09.1978.

2.2. The trial Court framed as many as nine issues on the basis of pleadings of the parties and by its judgment and decree dated 16.10.1997, decreed the suit in favour of the plaintiff.

2. On appeal being preferred by defendant No. 1 before the first appellate Court along with application for condonation of delay in filing the appeal as the appeal was barred by two years and two months, the first appellate Court did not consider the application for condonation of delay finally and held that the suit is barred by limitation and decided the appeal, on merits, leading to filing of this Second Appeal u/s 100 of the CPC by the defendant No. 1, which has been admitted for hearing on the substantial questions of law formulated as mentioned in opening paragraph of this judgment.

3. Mr. Prafull N. Bharat, learned counsel appearing for the appellant/defendant would submit that the first appellate Court has committed palpable error of jurisdiction in dismissing the appeal on merits, without considering the application for condonation of delay finally. He would further submit that finding recorded by First Appellate Court dismissing the appeal without considering the sufficiency of the cause for delay in filing the appeal, is equally bad in law and consequently the impugned judgment and decree is liable to be set aside.

4. Per contra, Shri R.N. Jha, learned counsel appearing for the respondent No. 1/ plaintiff would submit that the judgment and decree passed by the trial Court is strictly in accordance with law and no substantial question of law is involved in this appeal with utmost circumspection.

5. I have heard learned counsel appearing for the parties, considered the rival submissions made therein and perused the records of both the courts below including judgment and decree impugned.

Answer to 3rd substantial question of law

6. The trial Court delivered its judgment and decree on 16.10.1997 and the first appeal was filed on 29.2.2000 before the first Appellate Court alongwith application for condonation of delay in filing the appeal u/s 5 of the Indian Limitation Act. First Appellate Court, though noticed the respondent No. 1/ plaintiff on the application for condonation of delay in filing the appeal but in fact did not consider the application for condonation of delay before hearing the

appeal on merits; and on 29.04.2005 heard the appeal on merit and, thereafter, by the impugned judgment dated 30.04.2005 held that the appeal is barred by limitation as there is inordinate delay of two years and two months in filing the appeal without considering and deciding the application u/s 5 of the Indian Limitation Act finally and then proceeded to consider the appeal on merits and ultimately dismissed the appeal on merits as well.

7. The short question to be considered is whether the first appellate Court was right in considering the appeal on merits, finally without deciding the application u/s 5 of the Indian Limitation Act for condonation of delay in preferring the appeal.

8. In order to decide the aforesaid point, it would be proper to notice Order 41 Rule 3A of the CPC; and Order 41 Rule 11 of the CPC which read as under:--

"1. Form of appeal--What to accompany memorandum-

(1) XXX XXX XXX

(2) XXX XXX XXX

(3) XXX XXX XXX

(3-A) Application for condonation of delay.--(1) 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 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, 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 the hear the appeal."

"11. Power to dismiss appeal without sending notice to lower court--[(1) The Appellate Court after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day may dismiss the appeal.]

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

(4) Where an Appellate Court, not being the High Court, dismisses an appeal

under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment."

9. This Rule 3A of Order 41 was added vide CPC (Amendment) Act, 1976 (No. 104 of 1976). The objects and reasons for adding this rule were as-under:--

Clause 90, Sub-clause (iii). Where an appeal is filed after the expiry of limitation, it is the practice to admit the appeal subject to the provisions as to limitation being raised at the time of hearing. This practice has been disapproved by the Privy Council which has stressed the expediency of adopting a procedure for securing the final determination of the question as to limitation even at the stage of admission of the appeal. New Rule 3A is being inserted to give effect to the said recommendation.

Clause, 87 (Original Clause 90) (ii)-The Committee are of the view that the court, should not be empowered to grant ad interim stay of execution of the decree unless the court has, after hearing under Rule 11 of Order 41 decided to hear the appeal. Sub-rule (3) in the proposed Rule 3A of Order 41 has been inserted accordingly.

10. From the aforesaid objects and its reasons, it is transparently clear that it give way to the practice of admitting the appeal, subject to the decision of question of limitation at the time of hearing, this Rule 3A was added. The rule has to be read bearing in mind this object of the legislature.

11. The Supreme Court in case of State of M.P. and Another Vs. Pradeep Kumar and Another, has highlighted the object of enacting Rule 3A in Order 41 of the Code. Para 19 of the report states as under:--

19. The object of enacting Rule 3A in Order 41 of the Code seems to be twofold. First is, to inform the appellant himself who filed a time-barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the court has to deal with application for condonation of delay as a condition precedent. Barring the above objects, we cannot find out from the Rule that it is intended to operate as unremediably or irredeemably fatal against the appellant if the memorandum is not accompanied by any such application at the first instance. In our view, the deficiency is a curable defect, and if the required application is filed subsequently the appeal can be treated as presented in accordance with the requirement contained in Rule 3A Order 41 of the Code.

12. Further, the Supreme Court in case of Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others, has held that rejection of application for condonation of delay under Rule 3(a) and consequent dismissal of appeal on refusal to condone the delay is nevertheless a decision in the appeal. Para 10 of the report states as under:--

10. The question was considered in extenso by a Full Bench of the Kerala High Court in *Thambi Vs. Mathew and Another*, . Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3A of Order XLI introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order XLI of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.

13. The High Court of Madhya Pradesh in case of *Chhitu Vs. Mathuralal and others* AIR 1981 MP 13, while dealing with the identical fact situation has clearly held that till the date delay is not condoned, it cannot be treated that there is appeal before the Court and held as under:--

9. The governing expression in the sub-rule (2) 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 makes it imperative for the appellate court first to decide the question of limitation and puts an embargo on its (Court's) power to proceed further in the appeal. The appeal cannot be heard even on the question of admission much less on merits. In effect there is no appeal before the court unless the delay is condoned. This conclusion gets buttressed from the expression "the appeal is proposed to be filed". The use of this expression even in face of the fact that memorandum of appeal along with the application for condonation of delay in or record, clearly bears out the intention of the legislature that till the delay is not condoned, it cannot be treated in law that there is an appeal before the court.

14. Thus, the appeal preferred alongwith application for condonation of delay cannot be heard on admission under Rule 11 of Order 41 unless the application for condonation of delay is heard first and question of limitation is decided finally by the first appellate Court and if the Court decides to condone the delay, then appeal shall be placed for admission under Order 41 Rule 11 of the CPC and if the application for condonation of delay is dismissed under Order 41 Rule 3A of the CPC, then consequently the appeal shall also stand dismissed as a consequence of rejection of the application for condonation of delay u/s 5 of the Indian Limitation Act.

15. Thus, the legislative provisions incorporated in Order 41 Rule 3A CPC as well as the principle laid down by the Supreme Court in above stated case in this regard, it is transparently clear that unless the application for condonation of delay in filing the appeal is considered under Order 41 Rule 3A(2) of the Code

and it is decided finally by the court condoning the delay in filing the appeal, First Appellate Court cannot proceed to hear the appeal under Order 41 Rule 11 of the CPC on admission, nor can fix a date for final hearing under Order 41 Rule 12 of the Code of Civil Procedure. Not only this, Order 41 Rule 3A(3) CPC further prohibits to the first appellate court to grant interim order in respect of stay of Execution of decree by providing that where an application has been made under sub Rule 1 of Rule 3-A has been filed, the first appellate Court shall not make any order for stay of the execution of the decree against which the appeal is proposed to be filed so long as the Court does not decide after hearing under Rule 11 decides to hear the appeal.

16. Thus, in the considered opinion of this Court, the first appellate Court has committed illegality in; firstly in hearing the appeal on merits without considering the application for condonation of delay finally under Order 41 Rule 3A(2) of the CPC and, thereafter, dismissing the appeal on merits without deciding the question of limitation finally, which is clearly prohibited by the aforesaid provisions of law. Thus, substantial question of law is answered accordingly in favour of the appellant/defendant and in consequence thereof, appeal deserves to be remitted to the First Appellate Court for deciding afresh on the question of limitation only and, therefore, there is no need to answer the other two substantial questions of law as they relate to merit of the case.

17. For the reasons mentioned hereinabove, the appeal is allowed. Order impugned dated 16.10.1997 being not sustainable in law, deserves to be and is hereby set aside. Civil Appeal No. 47-A of 2002 is restored to the original file of Additional District Judge, Bastar at Jagdalpur for hearing and disposal of the appeal in accordance with law. The First Appellate Court is further directed to consider the application for condonation of delay as mandated under Order 41 Rule 3A of the CPC.

18. No notice is required to be issued, as the parties are represented through their respective counsel before the first appellate Court. The First Appellate Court is directed to dispose off the appeal within a period of three months from the date of receipt of copy of this order.

19. Parties are directed to appear before the first appellate Court on 12th May, 2014. No order as to costs.