
(2008) 07 AHC CK 0085
In the Allahabad High Court

Shiv Saran Lal Gupta and Another	Vs	APPELLANT
Smt. Usha Kiran Gupta and Others		RESPONDENT

Date of Decision : 24-07-2008

Acts Referred:

Limitation Act, 1963 — Section 30, 5

Citation : (2008) 4 AWC 4182 : (2008) 105 RD 501

Hon'ble Judges : Shishir Kumar, J; Amitava Lala, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amitava Lala, J.—This appeal arises out of the Judgment and order passed by the concerned civil court, Shahjahanpur dated 28th May, 2007, by which the application of the appellants u/s 5 of the Limitation Act, 1963 has been rejected and accordingly the application under Order IX, Rule 13 of the Code of Civil Procedure, 1908 (hereinafter in short called as "C.P.C.") has also been rejected holding it to be barred by time.

The point for adjudication before" us is about maintainability of the appeal. Learned Counsel appearing for both the contesting parties have arrived at a consensus that the appeal will be heard on informal papers, which was accordingly done at the stage of admission.

2. Mr. U.C. Saxena, learned Counsel appearing for the appellants, contended before this Court that the appeal is maintainable from such order since the same was composite one. In support of his contention, he relied upon paragraph 20 of a judgment of the Supreme Court in M/s. Essar Constructions Vs. N.P. Rama Krishna Reddy, Such paragraph 20 is quoted hereunder:

20. Limitation, like the question of jurisdiction may be provided for in a separate statute but it is a defence available in the suit, appeal or application. When the defence is upheld it is the suit or the appeal or the application itself which is dismissed. Of course, the question as far as appeals are concerned may be

debatable having regard to the provisions of Order XLI, of the CPC relating to admission of appeals as an appeal may not be admitted at all because it is barred by limitation. We express no final view in the matter. But there is no corresponding requirement for admission of applications or suits after overcoming the barriers of limitation. A suit which is dismissed on the ground of limitation may be appealed against as a decree. By the same token an application u/s 30 which is dismissed on the ground of limitation is a refusal to set aside the award.

3. On the other hand, Mr. Alok Kumar Yadav, learned Counsel appearing for the contesting respondents, who obtained the decree, opposed the contention of the appellants on the strength of the judgment of the Supreme Court in *Ratan Singh v. Vijay Singh and Ors.* 2001 (1) SCC 469 : 2001 (1) AWC 403 . The relevant discussion on this issue is available in paragraphs 11 and 12 of such Judgment which are as follows:

11. In order that a decision of a Court should become a decree there must be an adjudication in a suit and such adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be of a conclusive nature. If those parameters are to be applied then rejection of application for condonation of delay will not amount to a decree. Consequently, dismissal of an appeal as time-barred is also not a decree. We are aware that some decisions of the High Courts have taken the view that even rejecting an appeal on the ground that it was presented, out of time is a decree within the meaning of the said definition. We are also aware of the contrary decisions rendered by High Courts on the same point. Dealing with some of those decisions a Full Bench of the Calcutta High Court [S.P. Mitra, C.J., Sabyasachi Mukherjee, J. (as he then was) and S.K. Datta, J.] has held in *Mamuda Khateen and Others Vs. Beniyan Bibi and Others*, that "if the application u/s 5 of the Limitation Act was rejected the resultant order cannot be a decree and the order rejecting the memorandum of appeal is merely an incidental order." The reasoning of the Full Bench was that when an appeal is barred by limitation the appeal cannot be admitted at all until the application u/s 5 of the Limitation Act is allowed and until then the appeal petition, even if filed, will remain in limbo. If the application is dismissed the appeal petition becomes otiose. The order rejecting the memorandum of appeal in such circumstances is merely an incidental order. We have no doubt that the decisions rendered by the High Courts holding the contrary view do not lay down the correct principle of law.

12. In such a situation the mere fact that the second appeal was dismissed as a corollary to the dismissal of application for condonation of delay has no effect on the decree passed by the first appellate court.

4. Now the remaining question before us is whether the appellate court will ignore such principle as hypertechnical and proceed with the order impugned in the appeal or not. In discussing so, we have to be forgetful about our mindset

regarding the matters in constitutional jurisdiction. Such jurisdiction is grounded with natural Justice unlike the civil cases, which are grounded on legal justice, meaning thereby when earlier one proceeds on equity, the later one proceeds on law. Therefore, it is right of a party to take the benefit of such situation against a defaulting party. Such right is inherent in nature.

5. It has been already held in *Ratan Singh* (supra) that there is no justification for placing a rigid construction on the provisions of the Limitation Act. But the other profile is that in construing statutes of limitation, considerations of hardships are out of place. What is needed is a liberal and broad-based construction and not a rigid or narrow interpretation of the provisions of the Limitation Act.

6. According to us, whether the Limitation Act will be liberally construed or not, that is depending upon the consideration of the appropriate Court not of this Court, whose jurisdiction itself is in question. If the Court passes an order ignoring such Jurisdiction, it may lead to irregularity even to nullity. Therefore, we should refrain ourselves from making any comment with regard to merit of condoning the delay. We feel what subsequent judgment is more attractive than the earlier one not only because it has been delivered at a later point of time but also for the reasons that it is arising out of civil court's jurisdiction.

7. There is another reason to get HS attracted with the later view.

8. According to us, an appeal can be preferred from certain orders as per Order XLIII, Rule 1 of the C.P.C. Clause (d) under such Rule 1 is applicable herein which speaks as follows:

(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte:

9. The bracketed portion, as aforesaid, is playing a crucial role in this regard. Rejection of an application under Order IX, Rule 13, C.P.C. in a case open to appeal means that the same will arise out of merit. If it is passed on merit, obviously the appeal will lie. But if it is not passed on merit but on limitation then it is not open to appeal. The order is u/s 5 of the Limitation Act alone. Rejection of application under Order IX, Rule 13, C.P.C. in such circumstances is an incidental order as a natural corollary but not an order on the merit to attract Order IX, Rule 13, C.P.C. Therefore, the appeal cannot be held to be maintainable from such order.

10. Another significant factum is that other contesting parties have already applied before this Court of revisional jurisdiction and got the favourable order, against which both review and recall applications were dismissed followed by SLP with the same fate, then what prevented the appellants to make similar application in the revisional Jurisdiction, is unknown to us.

11. Hence, in totality we cannot Admit the appeal and accordingly, the same is dismissed, however, without imposing any cost.

12. In any event, it is open for the appellants to make an appropriate application for redressal of their grievance before the appropriate Court of law, if so advised.

Shishir Kumar, J.

I agree.