

(1972) 07 J&K CK 0005

In the Jammu And Kashmir High Court

Case No : Civil First Miscellaneous Appeal No. 20 of 1971

Smt. Bimla Kapur

APPELLANT

Vs

Rajinder Kapur

RESPONDENT

Date of Decision : 10-07-1972

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1898 (CrPC) — Section 100
Guardians and Wards Act, 1890 — Section 25, 47
Land Acquisition Act, 1894 — Section 54
Representation of the People Act, 1951 — Section 116A

Citation : AIR 1973 J&K 54

Hon'ble Judges : S. Murtaza Fazl Ali, C.J.; Jaswant Singh, J

Bench : Division Bench

Advocate : S. P. Gupta and S. P. Vohra, for the Appellant; Sunder Lal and R. N. Kaul, for the Respondent

Judgement

Jaswant Singh, J.—This is a mother's appeal u/s 47 of the Guardians and Wards Act. 1977 (1920 A. D.) against an ex parte judgment and

order dated November 24, 1970, of the learned District Judge. Srinagar, allowing the application of the respondent u/s 25 of the Act and directing

the appellant to hand over custody of her three minor children namely Neera aged 9, Sanjeev aged 6, and Sameera aged 5 to the respondent, who

is admittedly the father of the minors.

2. Mr. Sunder Lal appearing on behalf of the respondent has raised a preliminary objection to the effect that the appeal is time barred and should

be rejected on that ground. He has urged that the appeal ought to have been filed within 90 days of the passing of the impugned order as required

by Article 156 of the State Limitation Act. 1977, which governs the case and since it has been filed on July 1, 1971. it is clearly barred.

Mr. S. P. Gupta appearing on behalf of the appellant has, however, contended that Article 156 of the Limitation Act applies only to appeals, the

right to file which is given by the CPC and since the right of appeal in the present case is conferred by Section 47 of the Guardians and Wards Act

and no Period of limitation in respect thereof is prescribed in the Act. the appeal cannot be held to be time barred.

3. We have given our careful consideration to the submissions of the learned counsel for the parties and are of the opinion that the preliminary

objection raised by Mr. Sunder Lal is sound and must prevail. It is now well settled by a catena of authorities that Article 156 of the Limitation Act

is not confined to appeals the right in respect whereof is conferred by the Code of Civil Procedure, but applies even to appeals arising under

Special Acts which are governed by the Code (of Civil Procedure) in so far as procedure is concerned.

In *Aga Mohamed v. Cohen*, (1886) ILR 13 Cal 221. a Division Bench of the Calcutta High Court. while dealing with an appeal from the court of

the Recorder of Rangoon to the High Court u/s 49 of the Burma Courts Act (XVII of 1875) held:-

The Limitation Act. Sch II. Art. 156, when it speaks of the CPC is, on the face of it, speaking of a Code which relates to procedure, and does

not ordinarily deal with substantive rights and the natural meaning of an appeal under the CPC appears to us to be an appeal governed by the CPC

so far as procedure is concerned.

In *Ramaswamy Pillai v. Tahsildar of Madura*, AIR 1920 Mad 407. a Division Bench of the Madras High Court while dealing with the question of

the period of limitation for an appeal u/s 54 of the Land Acquisition Act (1 of 1894) observed as follows:-

There seems to be no good reason for saying that an appeal under the CPC means only an appeal, the right to prefer which is conferred by the

Code itself. On the other hand, it would not be straining the language of the article too much to hold that an appeal, the procedure with regard to

which from its inception to its disposal is governed by the Civil Procedure Code, may rightly be spoken of as an appeal under the Code. This

interpretation seems to us to be strengthened by the reference in Art. 156 itself to Art. 151 of the same Schedule. Article 151 provides for appeals

from a decree or order of the High Court in the exercise of its original Jurisdiction. Now, though the right to appeal from such decrees or orders is not given by the CPC but by the Letters Patent Act. vet Art. 156 speaks of such appeals as appeals under the Civil Procedure Code. That also tends to show that what is meant by the Legislature is appeals, the hearing and disposal of which is governed by the rules of procedure laid down in the Civil Procedure Code.

Again in *Dropadi v. Hira Lal*, (1912) 16 Ind Cas 149 = ILR 34 All 496 (FB). Sir Henry Richards C. J. while dealing with an identical questions

said:-

There are several Acts. for example, the Succession Act. the Probate and Administration Act. and the Land Acquisition Act. which make the

CPC applicable to proceedings under the Act and give a right of appeal to the High Court, but do not prescribe any period of limitation for the

appeal. It has always been assumed, probably rightly, that such appeals are appeals under the Code of Civil Procedure, governed by what is now

Art. 156 of Sch. I to the Limitation Act. and by the general provisions of the Act also.

4. The phrase "appeal under the Code of Civil Procedure" occurring in Article 156 of the Limitation Act of 1908 came up for interpretation before

the Supreme Court in *Vidyacharan Shukla Vs. Khubchand Baghel and Others*, . Therein the majority while dealing with the question of limitation

for an appeal under S. 116A of the Representation of the People Act equated the appeal with the one filed under the CPC in the matter of not only

the exercise of power, jurisdiction and authority but also in the matter of procedure to be followed and expressed its approval of the above

interpretation of the expression "appeal under the Code of Civil Procedure" as given by the High Courts of Calcutta, Madras and Allahabad in the

following words:-

A comparison of the terms of Art. 156 and Art. 151 indicates that the emphasis is more upon the Procedure applicable to an appeal than on the

right of appeal conferred under an Act. The phraseology used in Art. 156 describes the nature of the appeal in respect of which a particular period

of limitation is prescribed. It does not refer to a right conferred under the Code of Civil Procedure, but only describes the appeal with reference to

the procedure applicable thereto.

Further it is well established that the Limitation Act and the Code are to be read together, because both are statutes relating to procedure and they

are in pari materia and therefore, to be taken and construed together as one system explanatory of each other. So construed it may reasonably be

held that Art. 156 provides for an appeal governed by the procedure Prescribed by the Code of Civil Procedure.

In AIR 1928 488 (Lahore) , Bhide J. while dealing with a contention similar to the one raised by Mr. S. P. Gupta, observed:-

Though it is true that in an appeal filed u/s 47, Guardians and Wards Act, the Act appears to be silent both as regards the procedure to be

followed in respect of appeals and the period of limitation for the same still as the provisions of the CPC as regards procedure are applicable to

cases under the Guardians and Wards Act, the Procedure in respect of appeals u/s 47. Guardians and Wards Act must be taken to be governed

by the provisions of the Civil Procedure Code, and the period of limitation in respect of the appeal u/s 47 Guardians and Wards Act. would

therefore seem to be 90 days from the date of the order under appeal.

In view of the above mentioned authoritative pronouncements. we are of the view that the present appeal is governed by Article 156 of the State

Limitation Act and ought to have been filed within 90 days of the impugned order.

5. Although no specific prayer has been made either in the memo of appeal or by means of a separate application for condonation of delay in filing

the appeal we have gone through the memo of appeal and the affidavit accompanying it which suggest that the delay in filing the appeal has been

occasioned as the appellant has been busy prosecuting her application before the Additional District Magistrate. Delhi, and her writ petition before

the High Court of Delhi, challenging the arrest of the minors effected in execution of a warrant issued u/s 100 of the Code of Criminal Procedure

for enforcing the impugned order.

No material has, however, been placed before us to show as to when the application before the Additional District Magistrate. Delhi, was filed and

when it was disposed of. There is also nothing on the record to show as to when the application under Art. 226 of the Constitution was made

before the Delhi High Court. The delay intervening between April 15. 1971, when

the order alluded to in para 4 of the memo of appeal was made

and July 1, 1971. when the appeal was filed before this court has also not been satisfactorily explained. Even assuming that the appellant has been

busy prosecuting these applications we do not see how they can furnish a sufficient ground for condonation of the delay in filing the present appeal.

6. In view of our finding that the appeal is time barred, we do not find ourselves called upon to deal with the other formidable contention of the

learned counsel for the appellant that the District Judge. Srinagar, had no jurisdiction to pass an order for the custody of the minors as they have,

according to the respondent's own showing been residing at Delhi with the appellant since May 1968 i. e. more than two years before the making

of the application u/s c of the Guardians and Wards Act.

For the foregoing reasons we uphold the preliminary objection and dismiss the appeal as time barred but leave the parties to bear their own costs

of this court.

7. This will not however debar the appellant from pursuing her application for setting aside the aforesaid ex parte judgment and order which has

been preferred before this court and which shall be transmitted for disposal to the District Judge. Srinagar, as Mufti Baha-Ud-Din Farooqi who

passed the ex parte judgment has since been raised to the bench of this court and has been succeeded by Qazi Miraj-ud-Din who has nothing to

do with the matter.