
(2004) 04 MP CK 0048

In the Madhya Pradesh High Court

Case No : Second Appeal No. 506 of 2003

Smt. Noor Bee (deceased) through L.Rs. and Another

APPELLANT

Vs

Smt. Afroj Bee and Others

RESPONDENT

Date of Decision : 01-04-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(2)

Limitation Act, 1963 — Section 5

Madhya Pradesh/Chhattisgarh Accommodation Control Act, 1961 — Section 12(1)

Citation : (2004) 3 MPHT 271

Hon'ble Judges : S.K. Seth, J

Bench : Single Bench

Judgement

S.K. Seth, J.—Appellants, who are the legal representatives of original tenant Smt. Noor Bee, have preferred this second appeal against the judgment and decree dated 23-7-2003 passed by XVth Additional District Judge, Indore in Civil Appeal No. 43/2003. By the impugned judgment and decree, appeal preferred by the tenant was dismissed and the eviction decree passed by the Trial Court in Civil Suit No. 503-A/98 was maintained.

2. Respondent No. 1 is the widow of Fazil Mohammad and respondent Nos. 2 and 3 are the sons of late Fazil Mohammad. They filed a civil suit against Smt. Noor Bee and appellant No. 4 on the allegations that the respondents are the owner and landlord of house No. 204/3 situated in Juna Risala, Indore. The said house was let out to Smt. Noor Bee on monthly payment of rent of Rs. 100/- for residential purposes. According to plaintiffs, Smt. Noor Bee had not paid the rent since January, 1983. The plaintiffs served a notice. After service of notice, Smt. Noor Bee deliberately sent a money order on 26-10-1994 in the name of late Fazil Mohammad. It was further alleged that Smt. Noor Bee without any permission had delivered the possession of the suit accommodation to appellant No. 4 on 12-4-1994 and left the suit accommodation in order to reside with her son. Plaintiff/landlord determined the tenancy with effect from 30-4-1998 and thereafter filed a suit as mentioned herein above. After institution of the suit and

despite service of summons, defendants did not file any written statement and allowed the Trial Court to proceed ex parte in the suit against them.

Learned Trial Court after recording the evidence of the plaintiff, decreed the suit vide judgment and decree dated 1-9-1999 passed in Civil Suit No. 503-A/98 u/s 12(1)(a)(b) of the M.P. Accommodation Control Act, 1961 and directed defendants to hand over vacant possession to plaintiffs/landlord. Against the said decree, an appeal was preferred by the defendants. The appeal preferred was barred by limitation therefore; an application u/s 5 of the Limitation Act was also filed. After filing of the first appeal defendant No. 1 Smt. Noor Bee expired, therefore, other legal representatives appellant Nos. 1 to 3 were brought on record. Learned Lower Appellate Court after recording the evidence on the question of condonation of delay came to the conclusion that the defendants/tenants failed to make out good and sufficient cause as they could not explain properly each day's delay and accordingly rejected the application u/s 5; as a consequence the appeal was also dismissed. The present appeal is against the said order.

3. After having heard learned Counsel for appellants at length and going through record, in the considered opinion of this Court there is no merit and substance in this appeal. After appreciating the evidence recorded by it, Lower Appellate Court arrived at a finding of fact that appellants could not establish good and sufficient cause for the condonation of delay in preferring the appeal except bald assertion. Learned Lower Appellate Court further found that Counsel engaged by the defendants pleaded no instructions in the Trial Court when despite of service registered notice issued by the Counsel, defendants did not contact him. As result application filed by the appellants u/s 5 of Limitation Act, 1963 was dismissed and consequently appeal too was dismissed. In the case of *Ratansingh v. Vijaysingh and Ors.*, reported in (2001) 1 SCC 469, the Supreme Court had held that rejection of an application for condonation of delay u/s 5 of the Limitation Act and the consequent dismissal of an appeal does not result in a decree inasmuch as there was no adjudication nor determination of the rights of the parties in the suit. After noticing the definition of decree as contained in Section 2(2) of the CPC it was held as under :--

"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 can not 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 can not 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."

In view of the aforesaid and the law laid down by the Supreme Court, this appeal is not maintainable and the same is accordingly rejected.