

(2011) 02 RAJ CK 0038

In the Rajasthan High Court

Case No : Civil Second Appeal No's. 472 of 2009 and 54 of 2010

State of Rajasthan and Others

APPELLANT

Vs

Rajpal Singh Chauhan

RESPONDENT

Date of Decision : 22-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 35, 100, 115, 2(2)
Limitation Act, 1963 — Section 5

Citation : AIR 2011 Raj 101 : (2011) 5 CivCC 425 : (2011) 6 RCR(Civil) 788 :
(2011) 2 RLW 1460

Hon'ble Judges : Narendra Kumar Jain, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Narendra Kumar Jain, J.—Heard learned Counsel for the parties.

2. Since a common question of law is involved in both second appeals, therefore, both appeals were heard together and they are being disposed off by this common Judgment.

3. Learned Counsel for the Respondent has raised an objection about maintainability of these second appeals, which are directed against impugned judgments passed by first appellate court, whereby first appeals of the Appellants have been dismissed as barred by limitation. He submitted that in view of judgment of Hon"ble Apex Court delivered in the case of Ratansingh v. Vijaysingh and Ors. reported in AIR 2001 SC 279 : RLW 2001(3) SC 376 and Full Bench decision of Karnataka High Court in the case of The Commissioner, Hubli-Dharwad Municipal Corpn. v. Shrishail and Ors. reported in AIR 2004 Karn 75 Full Bench, both the second appeals are not maintainable and they are liable to be dismissed as such.

4. In S.B. Civil Second Appeal No. 472/2009, the Plaintiff-Respondent filed a suit for declaration to declare a penalty order passed against him in disciplinary

proceedings, withholding his two annual grade increments with cumulative effect, as null and void. The suit was decreed by the trial court in favour of the Plaintiff vide judgment and decree dated 13.08.2007. Being aggrieved with the same, an appeal was preferred by the Defendants with delay of 45 days. An application u/s 5 of the Limitation Act was filed for condonation of delay in filing first appeal. First appellate court vide judgment dated 22.02.2008 dismissed the application u/s 5 of the Limitation Act and consequently, dismissed the appeal being barred by limitation.

5. In S.B. Civil Second Appeal No. 54/2010, the Plaintiff-Respondent filed a suit for declaration to declare a penalty order passed against him withholding his one annual grade increment with cumulative effect as null and void. The suit was decreed by the trial court vide judgment and decree dated 13.08.2007. Being aggrieved with the same, an appeal was preferred by the Defendants before first appellate court alongwith an application u/s 5 of the Limitation Act for condonation of delay of 41/2 months in filing the appeal. First appellate court vide judgment dated 09.04.2008 dismissed the application u/s 5 of the Limitation Act and consequently, dismissed the appeal being barred by limitation.

6. Since both the first appeals have been dismissed by the first appellate court being barred by limitation, on dismissal of applications u/s 5 of the Limitation Act, therefore, common question of law arises in both the cases.

7. Submission of learned Counsel for the Respondent is that first appellate court has dismissed the applications u/s 5 of the Limitation Act and dismissal of appeals thereafter is only a consequential order, therefore, second appeals are directed against orders dismissing the applications u/s 5 of the Limitation Act. Consequential dismissal of appeals cannot be termed as decree in the eyes of law, whereas second appeal lies only against a decree and not against an order, therefore, both the second appeals are liable to be dismissed as not maintainable.

8. Learned Counsel for the Appellants does not dispute the principle of law laid down by Hon"ble Apex Court in Ratansingh v. Vijaysingh and Ors. case (supra) and made a prayer to grant some more time to file application to convert these second appeals into revision petitions u/s 115 Code of Civil Procedure

9. Learned Counsel for the Respondent opposed the prayer of learned Counsel for the Appellants and submitted that on number of earlier occasions the same prayer was made by learned Counsel for the Appellants but till date no such application has been filed, therefore, no further time should be granted for the said purpose.

10. I have considered the submissions of learned Counsel for the parties.

11. Hon"ble Apex Court in Ratansingh v. Vijaysingh and Ors. (supra) considered the similar controversy and observed that in order that 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. Para 11 of the judgment is reproduced as under:

11. In order that 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, CJ, 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 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. Full Bench of Karnataka High Court in *The Commissioner, Hubli-Dharwad Municipal Corporation v. Shrishail and Ors.* (supra) considered the same controversy and while relying upon above judgment of Hon'ble Apex Court in *Ratansingh v. Vijaysingh and Ors.* (supra) held that order of dismissal of first appeal as barred by limitation is not a decree and second appeal against said order is not maintainable. Full Bench further observed that even if formal decree is drawn, the second appeal is not maintainable and proper course is to file revision petition u/s 115 CPC Para 12 of the judgment is reproduced as under:

12. The question as to whether dismissal of Appeal consequent upon dismissal of application for condonation of delay would amount to decree has been specifically considered and decided by the Supreme Court in *Ratansingh v. Vijay Singh* AIR 2001 SC 279, wherein after referring to "decree" as defined in Section 2(2) CPC in para 10, the Supreme Court has observed as follows in para 11 and it would answer the question to be determined in this reference:

In view of above decision of the Supreme Court, the question for reference is answered by holding that an order rejecting the Memorandum of Appeal following rejection of application for condonation of delay in filing the appeal u/s

5 of the Limitation Act, would not be a decree passed in Appeal and hence, Second Appeal would not lie u/s 100 CPC and order would be revisable u/s 115 Code of Civil Procedure. When once it is held that order dismissing appeal as barred by time, is not a decree, the question of drawing a decree under Order 41, Rule 35 would not arise and mere drawing of decree in the prescribed form would not make such an order a decree and any decree drawn pursuant to such an order is immaterial and would not debar the aggrieved party to file Revision.

13. In view of above discussions, it is clear that order rejecting an application for condonation of delay is not a decree. Consequently, dismissal of an appeal as time barred is also not a decree. Since second appeal is maintainable against a decree and not against an order, therefore, both the second appeals, which are directed against orders dismissing the appeals as time barred, are not maintainable, the same are liable to be dismissed as not maintainable and are hereby dismissed as not maintainable with no order as to costs.

14. Learned Counsel for the Appellants seeks liberty to file revision petition against the impugned judgments. It is needless to mention that the Appellants are always at liberty to file revision petition in accordance with law.

15. A copy of this judgment be placed in connected file i.e. S.B. Civil Second Appeal No. 54/2010.