

(1996) 09 CAL CK 0035

In the Calcutta High Court

Case No : F.A.M.T. No. 2251 with 2252 and 2473 of 1996

University of Calcutta and others

APPELLANT

Vs

Ram Prosad Ghosh and others

RESPONDENT

Date of Decision : 27-09-1996

Acts Referred:

Calcutta High Court (Appellate Side) Rules — Rule 2, 3, 48, 53
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, 100A, 148
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 96
Limitation Act, 1963 — Section 51

Citation : AIR 1997 Cal 163

Hon'ble Judges : S.N. Chakravarty, J; S.B. Sinha, J

Bench : Division Bench

Advocate : B.R. Bhattacharjee and Ms. Nandini Mitra, for the Appellant; Dilip Kumar Mitra, Alauddin Mondal, Sanjay Mondal and K.K. Bandopadhyay, for the Respondent

Judgement

1. The question which, inter alia, arises for consideration in these appeals is as to whether this Court is denuded of the power to entertain an appeal which is not accompanied with a certified copy upon expiry of 30 days from the date of judgment of the learned single Judge. Our attention has been drawn to a decision of a Division Bench of this Court in the case of Biswanath Ghosh v. State of W. B. reported in 97 CWN 199, wherein it has been held that although the Memorandum of Appeal can be filed within the period of 30 days without being accompanied by a certified copy of the judgment by reason of an alleged practice of this Court such appeal cannot be entertained on the expiry of 30 days if the same is not accompanied by a certified copy.

2. Mr. Bhattacharjee, learned counsel appearing on behalf of the appellant, inter alia, submitted that the said judgment proceeded with a total misconception, inasmuch as, the learned trial Judge had not considered the matter upon proper interpretation of the provision of Chapter VIII of the Appellate Side Rules vis-a-

vis Rules 48 and 53 of the writ Rules framed by this Court in exercise of its jurisdiction under Art. 226 of the Constitution. From a perusal of the said judgment, it is apparent that their Lordships had taken into consideration the provisions of S. 100A of the CPC which cannot be said to have any application whatsoever in the matter of entertainment of the appeal under clause 15 of the Letters Patent. A bare perusal of the aforementioned provision would clearly show that a statutory right has been conferred upon a litigant to prefer an appeal from a judgment and order passed by a , learned single Judge of this Court to a Division Bench. Such a statutory right, there cannot be any doubt, can be curtailed only by reason of statute. Section 100A of the CPC is one of such statutes. Such is not a position in these cases as appeals have been preferred from the judgments and orders passed by a learned single Judge to a Division Bench. In terms of Rule 48 of the writ Rules of this Court, the Rules as applicable to the appeals filed from the judgment and order passed on the Original Side and Appellate Side as the case may be are to apply in such appeals.

3. Although prima facie we do not find any justification for such a Rule, inasmuch, this court entertains an application under Article 226 of the Constitution of India in exercise of its original jurisdiction and thus by reason of rules laying down procedural matters, the jurisdiction of this Court to entertain a writ petition in terms of clause 2 of Art. 226 of the Constitution of India cannot be sub-divided into two different jurisdiction on the ground of territorial limits by at this stage we do not intend to go into the said question.

4. It is not disputed that in terms of Rule 53 of the Writ Rules, CPC applies but such application of the provision of the C.P.C. must be held to be mutatis mutandis, inasmuch as, Chapter VIII of the Appellate Side Rules clearly provides for the manner in which appeal under clause 15 "of the Letters Patent is to be filed. Rules 2 and 3 of Chapter VIII read thus:--

"2. Every appeal to the High Court under S. 15 of the Letters Patent from a judgment of a Division Bench, or a Judge sitting singly, on the Appellate Side of the High Court, shall be presented to the Deputy Registrar, or such other officer as the Registrar may appoint, within 60 days from the date of the judgment appealed from, unless the Court in its discretion, on good cause shown, shall grant further time.

3. The memorandum of appeal shall be drawn up in accordance with the provisions of Order XLI, Rule I, Civil Procedure Code, and shall be subscribed by an Advocate of the Court. It need not be accompanied by a copy of the judgment appealed from. It shall be the duty of the officer to whom the memorandum is presented under Rule 2 above to endorse thereon the date of presentation and send the same to the Stamp Reporter, who shall satisfy himself that there is a declaration by the Judge who passed the judgment that the case is a fit one for appeal, and that it is in order and within time."

5. A bare perusal of Rules 2 and 3 of Chapter VIII in no uncertain terms would

show that a memorandum of appeal need not be accompanied by a copy of the judgment appealed from.

6. If such a provision is contained in the rule itself, in our opinion, no alleged practice prevailing in this court can stultify the said statutory rules nor an embargo can be placed by taking shelter under such practice so as to debar the Court from considering an appeal on merits or considering an application u/s 5 of the Limitation Act on its own merits only because the Memorandum of Appeal is not accompanied by a certified copy.

7. A substantive right of appeal is granted by Section 96 of the C.P.C. and Clause 15 of the Letters Patent. Such a right cannot be nullified or curtailed by reason of an appellant's failure to comply with the formalities to prefer an appeal in the form prescribed under Order 41 Rule 1 although Rule 3 confers such right upon the appellant. It is one thing to say that this Court has no jurisdiction at all to entertain such an appeal but it would be another thing to say that upon entertainment of such an appeal, the court may consider the question as to whether the appellant has come out with sufficient cause for not preferring the appeal within the prescribed period.

8. Although Order 41 Rule 1 as amended by 1976 Act provides for an appeal against a decree; keeping in view the provisions of Rule 3 of Chapter VIII of the Appellate Side Rules there cannot be no doubt that the form of such Memorandum of Appeal must be in the form prescribed under Order 41 Rule I C.P.C. Even under O.41, R. 1 the Court has ample jurisdiction to allow the appellant to dispense with filing of a copy of the judgment with the Memorandum of Appeal. The question has been considered in details by a Full Bench of this Court in *Chairman, Budge Budge Municipality Vs. Mongru Mia and Others*, which has been followed by a Division Bench of this Court in *Dr. Surendra Nath Vs. S.M. Murshed*, wherein it has been held that a copy of the judgment need not accompany the Memorandum of Appeal. It was held :--

"The question, therefore, is whether when an application under Article 226 of the Constitution in matters arising outside the original jurisdiction of this Court is disposed of by" a Judge sitting singly and an appeal is preferred against his judgment, it is necessary for the appellant to annex to the memorandum of appeal certified copy of the judgment appealed from or of the formal order made thereon or of both? Chapter VIII of the (Rules of the Appellate Side which deals with appeals under Clause 15 of the Letters Patent does not obviously deal with such appeals because these appeals were unknown when the rules contained in Chapter VIII were framed. It is, therefore, difficult to suppose, as was pointed out by the Chief Justice in *Chairman, Budge Budge Municipality Vs. Mongru Mia and Others*, that these rules would govern the procedure for presentation of an appeal against an order under Article 226 of the Constitution in a matter arising outside the original jurisdiction-of this Court. Order XLI, Rule 1 of the CPC which deals with appeals from original decrees cannot apply. There is no statutory provision which prescribes the formalities to be complied with or the procedure

to be adopted in dealing with such appeals. On the Original Side of this Court in similar cases provision is made in Chapter XXXI of the Rules of the High Court, Original Side. Rule 2 of that chapter provides that every memorandum of appeal from the Original side shall be in form No. I and shall be drawn up in the manner prescribed "by Order XLI, Rule I of the CPC and shall be presented to the Registrar, accompanied by a copy of the "decree or order" appealed from."

It was further held:--

"My conclusion, therefore, is that an appellant who seeks to file an appeal against an order of a single Judge disposing of an application under Article 226 of the Constitution in a matter arising outside the Ordinary Original Civil Jurisdiction of this Court, need not annex to the memorandum of appeal either a certified copy of the judgment appealed from or of the formal order which may have been or be drawn up in such cases. This appeal was, therefore, duly registered by this Court. I may add that a similar view was taken by a Bench of this Court on an office report in F.M.A.T. No. 121 of 1952 (B). The order of this Court is dated the 13th February, 1952."

9. The said decisions are binding on this Court.

10. In the case reported in Smt. Jodhayan Vs. Babu Ram and Others, the Apex Court clearly held that where a court has granted time to the appellant to file certified copy of the judgment and decree within certain time, h should not dismiss the appeal straightway but may exercise its jurisdiction u/s 148 C.P.C. by extending time prescribed therefore. In the case reported in Shakuntala Devi Jain Vs. Kuntal Kumari and Others, the Apex Court has held that the appellate court can dispenser with the filing of a copy of the judgment.

11. In such a situation, in our opinion, the right to prefer an appeal, although the Memorandum of Appeal is not accompanied by a certified copy, cannot be taken away only because a practice has developed which has no sanctity in law. In any event in terms of Section 151 the Court has an inherent power to issue such direction which would subserve the ends of justice. Reference in this connection may be made to Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, .

12. The questions raised in these-appeals must be considered keeping in view the questions which always arise before this Court while exercising its jurisdiction under Article 226 of the Constitution of India, namely, (1) Constitutional jurisdiction of this Court is exercised in order to grant speedy, effective and cheap remedy in public law. (2) Procedural steps are required to be taken in aid of justice.

13. Reference in this connection may be made to Kalipada Das alias Mahanto and Others Vs. Bimal Krishna Sen Gupta (Dead) by Lrs.,

(3) The Rule of procedure must be read, considered or interpreted with the overriding object that the ends of justice must prevail. .

14. It is interesting to note that Chapter XXXI of the Original Side Rules provides that the Court may in a given case grant leave to prefer an appeal although the memo is not accompanied by a certified copy of the judgment and decree subject of arose to an undertaking given to file the same as and when the same is made available. It cannot be envisaged that when a litigant litigating in original side of this court can get a benefit of preferring an appeal with the leave of the Court without filing a certified copy of the judgment, such a right would be denied to him only because he per force had to file writ application on the appellate side of the court. Such a procedure would be discriminatory. Furthermore, even assuming that such a practice exists, it is accepted at the bar that such a practice is not a long standing one.

15. It is now well known that a rule of practice cannot be exalted into a rule of limitation. In any event, in a case of conflict between the statutory rules and the practice the statutory rule shall prevail. A practice contrary to or inconsistent with a statutory rule could not have come into existence at all and if the same has come into existence, it should be done away with inasmuch as the same would not be in accordance with law. The practice is evolved by the Court only in absence of any statute of statutory rules. When there exists a statutory rule, neither a practice can be evolved nor can be followed.

16. In this view of the matter we are of the opinion that apart from Rule 3 of Chapter VIII, this court "has ample jurisdiction both u/s 151 of the CPC as also under Order 41 Rule 1 thereof to dispense with the filing of a certified copy of the judgment.

17. We also cannot shut our eyes to the fact that this court comes across a large number of cases where notice intimating passing of an ex parte interim order is communicated on 29th or 30th day so as to render filing of an appeal within a period of 30 days from the date of passing of such a judgment and impossibility.

18. It is unfortunate that all these aspects of the matter were not brought to the notice of the learned Judges deciding the case of Biswanath Ghosh ((97) CWN 199). The earlier division bench decision of this Court in Dr. Surendra Nath Vs. S.M. Murshed, was also not brought to its notice. It is further well known that a division bench is bound by a judgment passed by another " division bench and if an order is passed without considering the same, the latter division bench would not be binding on the subsequent bench inasmuch as it is bound to follow the earlier division bench decision.

19. It is also a settled law that a decision is not an authority on a point which had not been argued before it. In this view of the matter the decision of the division bench in Biswanath Ghosh is "not binding upon this bench.

20. It is interesting to note that the learned Judge deciding the case of Biswanath Ghosh themselves had referred to the decisions of the Apex Court in Municipal Corporation of Delhi Vs. Gurnam Kaur, and held that if an order or judgement is passed in ignorance of the terms of the statutes or if an order

delivered without argument and without reference to the provisions of the Act and without citation of the authority, the same would be per incuriam. The decision of the Division Bench in Biswanth Ghosh's case ((97) CWN 199) which is based on practice and/or convenience of the Court, having been rendered without considering the relevant rules as also the decision of the Supreme Court and this Court, the same must be held to have been rendered per incuriam and/or passed sub-silentio.

21. Before parting with this case we may record that the learned Judges while passing the said judgment have also taken into consideration the fact that an inconvenience may be caused to the Judges in disposing of the appeal without there being a copy of the judgment passed by the learned trial judge. It is true that while exercising the appellate power, the appeal court is required to go through the judgment passed by the learned trial Judge, but such a purpose maybe achieved not only by calling for the records from the Court of the learned trial Judge, but also by directing the parties to file certified copies of such judgment as and when they are made available. Moreover, copies of such judgment are normally incorporated in the paper books and/or supplementary paper books. While considering the question of convenience of the Judges, this court cannot forget to take notice of irreparable injury which may be caused to the litigant. It may also be noticed that the purported ground of convenience as has been held in the aforementioned case is also not of much assistance inasmuch as when an appeal is filed within the prescribed period, even then no copy of the judgment would be required to be filed. The inconvenience of the bench even in that case would not be removed even by calling for the records of the learned trial Judge. It is accepted at the Bar that there are numerous cases where an ex parte interim order had been communicated to the party affected adversely thereby either immediately prior to the expiry of thirty days or even thereafter and if in such cases this court is precluded from entertaining a memo of appeal Without the certified copy of the judgment, an irreparable loss or injury may be caused to the parties. In a given case upon entertaining such an appeal the court may consider- as to whether the appellant was justified in filing the appeal after the prescribed period of limitation. In such case, the court may even dismiss the application for condonation of delay as this court while exercising its jurisdiction under Article 226 of the Constitution of India not only acts as a court of law but also as a court of equity. It's endeavour should be, in our opinion, to consider the grievance of the litigating parties on their own merits and not by throwing the memorandum of appeal on either hyper-technical ground or on the ground of existing practice.

22. We also take judicial notice of the fact that certified copies are not supplied within a reasonable period in this court. This court in a large number of cases has to pass judicial orders directing the department to supply certified copies within a stipulated period.

23. Thus in a case, if for one reason or other an appellant cannot prefer an

appeal within a period of 30 days, in the prevailing situation he would not be able to do so for a long time which in a given case may result in immense hardship and/or irreparable injury.

24. For the reasons aforementioned, we are of the opinion that this Court has jurisdiction to direct that the memorandum of appeal be considered although the same is not accompanied by any certified copy of the judgment even upon expiry of the period of limitation from the date of passing of the judgment. We may also make it clear that, we have not gone into the Question as to what would be the period of limitation for preferring the appeal as that did not fall for our consideration at this stage.

25. Although several other reasons can be assigned in support of our judgment, we are of the opinion that the reasons assigned hereinbefore are sufficient for the purpose of arriving at a conclusion that in view of the decision of the Supreme Court of Municipal Corporation of Delhi Vs. Gurnam Kaur, the judgment passed by a Division Bench of this Court in Biswanath Ghosh's ((97) CWN 199) matter has to be held to have been rendered per incuriam and as such, does not create any binding precedent.

26. We must make it clear that we have only considered the question as to whether this Court at the thresholds cannot entertain an appeal or not and we make it clear that upon entertaining an appeal this court in given cases may issue such direction or directions upon the appellant or pass such order or orders which may be necessary in the facts and circumstances of each case. We further make it clear that such entertainment of appeals does not mean that the court will not pass an order on merit on applications filed by the appellants for condonation of delay in -terms of Section 5 of the Limitation Act.

27. Let the applications u/s 5 as also for stay be placed on Thursday next. By that date the respondents, if they so desire, may file affidavit-in-opposition to the said applications. It is made clear that keeping in view the submissions of Mr. Bandopadhyay, this court may make an endeavour to dispose of the entire appeal at this stage if possible.

28. The applications for leave to appeal are accordingly disposed of without any order as to costs.

29. Order accordingly.