
(2008) 03 AHC CK 0212
In the Allahabad High Court

Vijay Kumar Gupta

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 10-03-2008

Acts Referred:

Stamp Act, 1899 — Section 47

Citation : AIR 2008 All 119 : (2008) 2 AWC 1885 : (2008) 104 RD 629

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sunil Ambwani, J.—Heard Shri S.K. Mishra, learned Counsel for the petitioner. Shri Prashant Mathur, learned standing counsel appears for the respondents.

2. In a proceeding u/s 47A of the Stamp Act initiated on a report of the Asstt. Commissioner, Stamps dated 2.2.2004, the Asstt. Commissioner, Stamps by his ex parte order dated 30.5.2007 directed recovery of deficiency of Rs. 1,73,200 and penalty of Rs. 1,000 with interest at 1.5% per month, with the findings that the summon were duly served. The petitioner filed an application to recall the order dated 30.5.2007. The application was dismissed on 4.10.2007 on the ground that there is presumption of service of notice by registered post. The petitioner filed a Stamp Appeal No. 13 of 2007 on 24.10.2007 challenging both the orders. The Commissioner, Meerut Division has dismissed the appeals on 16.1.2008 on the objections raised by the District Government Counsel (Revenue) that separate appeals are required to be filed against the orders. The Commissioner has given liberty to the petitioner to file appeals against ^ both the orders separately.

3. Learned counsel for the petitioner contends that the Commissioner could not have rejected the appeal and should have given choice to the petitioner to either prefer an appeal on merits against the ex parte order, or the order by which the application to set aside the ex parte order was rejected. Shri Prashant Mathur,

learned standing counsel submits that the appeal should have been preferred separately and though the appeal against the order rejecting the application to set aside the ex parte order dated 4.10.2007 was within time, the appeal against the ex parte order dated 30.5.2007 was delayed beyond 60 days, and that provisions of Limitation Act are not applicable to stamp appeals to condone the delay. Shri S.K. Misra submits that he came to know about the order dated 30.5.2007 only on 20.9.2007.

4. The law with regard to filing of separate appeals was clarified in *Bhanu Kumar Jain Vs. Archana Kumar and Another*, . The Supreme Court held:

When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order IX, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously, but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation I appended to Order IX, Rule 13 of the Code a petition under Order IX, Rule 13 would not be maintainable. The Explanation/appended to said provision does not suggest that the converse is also true. However in a case where the application under Order IX, Rule 13 gets dismissed first the doctrine of "issue estoppel" as also "cause of action estoppel" may arise. As such when an application under Order IX, Rule 13 of the Code is dismissed, the defendant can only avail a remedy available there against viz. to prefer an appeal in terms of Order XLIII, Rule 1 of the Code. Once such an appeal is dismissed, the appellant cannot raise the same contention in the first appeal. If it be held that such a contention can be raised both in the first appeal as also in the proceedings arising from an application under Order IX, Rule 13, it may lead to conflict of decisions which is not contemplated in law.

The dichotomy can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him u/s 96(2) of the Code on the merit of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the Court can also be a possible plea in such an appeal.

5. The Commissioner was hearing the appeal filed against both the orders. He could not have rejected the appeal and directed the petitioner to file separate appeals. The only course open to him was that he would have given an option to the appellant to confine his appeal against either of the orders. The rejection of the appeal against both the orders with liberty to file separate appeals was an error in exercise of jurisdiction.

6. The petitioner submits that given an option he would elect to keep the appeal against the order dated 4.10.2007 rejecting application to recall the ex parte order alive and would like to make submissions for condonation of delay before the Commissioner.

7. The Limitation Act is applicable to the Courts. A special statute may apply the provisions of limitation either by reference or by incorporation or may provide for the power of condonation of delay in the statute itself. In this case I am not concerned with the question of condonation of delay as that would depend upon the date of knowledge of the order and can be argued separately before the Commissioner.

8. The writ petition is allowed. The order dated 16.1.2008 is set aside. The appeal No. 13 of 2007-08 shall be confined to the validity of the order dated 4.10.2007. It will be open to the petitioner to file a separate appeal against the ex parte order dated 30.5.2007, claiming limitation from the date of knowledge and making such arguments as may be open to him before the Commissioner for condonation of delay including the time spent in proceedings in the High Court.