

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Jurisdiction Case No.1814 of 2008

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Bibi Bani Fatma, wife of late Khwaja Afjal Imam, Resident of Mohalla Baksariatola, P.O. Mehendru, P.S. Sultanganj, District- Patna

.... Petitioner
(Respondent No. 1 in the appeal and cross Objector)

Versus

Md. Salahuddin Khan, son of Late Md. Reyaz Khan, Advocate High Court and lecturer, Patna Law College, resident of Mohalla Buraria Tola, P.S. Sultanganj, P.O. Mahendru, District- Patna, having present address at Bengal Law House, Chohatta, P.O. P.S. Bankipur, P.S. Pirbahore, Patna 800004

.... Opp. Party
(Appellant in the appeal)

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Appearance :

For the Petitioner/s : Mr. Nawal Kishore Singh

For the Respondent/s : Mr. Salahuddin Kha (In person)

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

and

HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL ORDER

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

12 17-08-2015

Heard learned counsel for the petitioner and the opposite party appearing in person.

The application has been filed for rehearing of the Second Appeal No. 352/1989 and restoration of the cross-objection filed and admitted for hearing with the said appeal after recall of the order/judgment dated 23.6.2008 passed by a Division Bench of this Court by which the said appeal was dismissed ex parte and the cross-objection was dismissed for want of prosecution.

The opposite party appearing in person at the outset raises a preliminary objection to the maintainability of the

present application submitting that since the judgment in appeal was not pronounced against the petitioner she has no right to apply to the court to rehear the appeal.

It is further submitted by the opposite party that a cross-objection may be heard in case the original appeal is withdrawn or is dismissed for default but certainly not in a case where the appeal itself has been found to be not maintainable, as in the present matter.

From the order dated 23.6.2008 passed in the appeal, it is evident that it was held by this Court that the Second Appeal preferred by the defendant-appellant is not maintainable.

In support of his aforesaid proposition opposite party relies upon a decision of a Division Bench of the Calcutta High Court in the case of M/s. Malhati Tea Syndicate Limited Vs. Revenue Officer, Jalpaiguri and others: AIR 1973 Calcutta, 78, in para 24 of which it has been held as follows:-

“24. Learned Advocate for the respondent contended that although the appeal is incompetent, the cross-objection should be treated to be competent and dealt with by this court accordingly. We are unable to accept this contention either. This is not a case of dismissal of appeal for default, nor a case of withdrawal of the appeal. The appeal itself

being incompetent the cross-objection arising out of the same must also fail.”

He further relies upon a Division Bench decision of the Gujarat High Court in the case of Chanchalgaori Ramanlal & Ors. V. Narendrakumar Chandulal and Ors. : AIR 1986 Gujarat, 55. In paras 4 and 10 of the said judgment it has been held as follows:

“4. To illustrate by another instance, where a person who is not a party to a suit files an appeal without leave of Court against a decree, that would not be an appeal maintainable in law and naturally, therefore, no party who wants to object to any decree or any part of decree could file cross-objection in such appeal. May be that a party who files an appeal has no decree against him which could be challenged in the appeal and, therefore, in law, no relief can be obtained by him in the appeal. In such case also, there is no validly instituted appeal. We need not multiply instances. Suffice to say that if an appeal does not lie and such an appeal has been filed, any cross-objection in such an appeal does not call for adjudication on the merits. If there is a properly instituted appeal which is entertainable by a Court and is entertained by the Court, the cross-objection filed therein would be as good as an appeal against a decree and that will have to be disposed of on the merits even in cases where the appellant thereafter

seeks to withdraw the appeal or the appeal is dismissed for default.

10. It may be necessary to advert to the view expressed in the earlier cases in view of the recent decisions to which we have referred. We do not think that the request to treat the cross-objections as an independent appeal should succeed. Any person aggrieved by the decree of a Court of first instance has the right to file the appeal against the decree and has also an additional right conferred under Order 41, Rule 22 of filing cross-objections to the decree. One need not wait for filing cross-objections. He can independently file an appeal if he is aggrieved in which case he has to file such appeal within a specified time. If it is not so filed and there is no reasonable cause for excusing delay, whatever case he may have on the merits, he will lose. But he may choose to file a cross-objection which is an additional right conferred by the Code of Civil Procedure. The time within which he could file a cross-objection is not related to the time within which he could file an appeal, for the former depends on the filing of appeal by the other side. He has to file the cross-objections within the time specified in Order 41, Rule 22 which is evidently dependent on the notice on the appeal filed by the other party. In such a case, normally he gets an extended time. He then has no obligation to file a copy of the decree which is an

obligation of the person who files an appeal. In the case of cross-objections that would be competent because the decree is on the file in the appeal and by a rule of procedure the right is conferred on the respondent to file cross-objections which would be an appeal for all practical purposes. But, this is not to say that a cross-objection is an appeal. It is not possible to say that a cross-objection can automatically be converted into an appeal, and there is no question of such conversion arising in this case.”

He further relies upon a decision of the Supreme Court in the case of Municipal Corporation of Delhi & Ors. Vs. International Security and Intelligence Agency Ltd.: AIR 2003 SC 1515, in paras 23 and 24 of which it has been held as follows:-

“23. Illustratively, we may refer to some judicial opinion as to non-maintainability of cross-objections consequent upon the non-maintainability of the original appeal. In M/s. Malhati Tea Syndicate Limited Vs. Revenue Officer, Jalpaiguri and others, AIR 1973 Calcutta 78, a Division Bench of Calcutta High Court presided over by P.B.Mukherji, CJ (as his Lordship then was) held the cross-objection liable to fail in view of the original appeal itself failing



in view of its having been filed in the name of a company which was no longer in existence. In *Dhani Ram V. Smt. Sushila Devi*, AIR 1977 HP 83, R.S.Pathak, CJ (as his Lordship then was) held that though Order 41 Rule 22 speaks of an appeal, it contemplates a valid appeal which ordinarily calls for consideration on its merits. It is such an appeal the pendency of which would entitle the respondent to file a cross-objection. An appeal which is barred by time is not a valid appeal and the cross-objections too shall have to be rejected. In *Chanchalgauri Ramanial and others Vs. Narendrakumar Chandulal and others*, AIR 1986 Gujarat 55, a Division Bench presided over by Hon'ble the Chief Justice held that a cross-objection filed in a validly instituted appeal against a decree is as good as an appeal and shall have to be disposed of on merits but if an appeal does not lie any cross objection in such an appeal would not call for adjudication on merits. In *Charity Commissioner V. Padmavati and others*, AIR 1956 Bom 86, the CJ speaking for the Division Bench held that in a time-barred appeal where the delay was refused to be condoned the appeal itself was rendered not maintainable and the cross-objection would not survive for consideration. In *M.L.A. Alagappa Chettiar V. Chockalingam Chetty and others*. (supra), Wallis, C.J. opined that the right of respondent to proceed



by way of memorandum of objections is strictly incidental to the filing of the original appeal in time and it is open to a party against whom a memorandum of objections has been filed to set up the bar that the original appeal was filed out of time. We are in respectful agreement with the view of the law taken by several High Courts and noticed hereinabove. The cross-objection is available to be heard if the original appeal is available for hearing on merits. A view to the contrary has been taken by a Division Bench of Allahabad High Court in Shankar Lal and another V. Sarup Lal and another, (1912) 34 ILR Allahabad 140 and Nanak Bakhsh and others Vs. Wazir Singh and others, (1909) 4 IC 625 (Punjab Chief Court). Both the decisions are not supported by any convincing reasoning or logic and to say the least do not lay down the correct law, in our opinion.

24. The original appeal filed by the respondents herein was found to be not maintainable as not covered by any of the clauses (i) to (vi) of subsection (1) of Section 39 of the Act. It was dismissed as incompetent. The question of the memo of appeal filed in the High Court by the appellants herein being treated as cross-objection and being taken up for hearing on merits does not arise. Independently treated as an original appeal the same was held to be hopelessly barred by time



as the delay was not explained satisfactorily. On this aspect we are not persuaded to take a view different from the one taken by the High Court. The appeal filed in the High Court by the appellants herein has been rightly held liable to be dismissed as time-barred and is not available to be heard and decided as cross-objection in view of the original appeal filed in the High Court by the respondents herein having failed as incompetent.”

Learned counsel for the petitioner, on the other hand, submits that the counsel for the petitioner in the appeal could not appear on account of circumstance beyond his control and his absence has resulted in injustice to the petitioner and thus the appeal and the cross-objection are required to be restored and reheard. In support of his stand, learned counsel relies upon a decision of the Supreme Court in the case of Savithri Amma Seethamma V. Aratha Karthy: AIR 1983 SC 318, in the first part of para-2 of which it has been held as follows:-

“2. Now it is obvious that the appellant could not appear at the hearing of the revision application preferred by the first respondent because the Advocate engaged by him was occupied in another Court and this fact was stated by the learned Advocate in the affidavit



made by him in support of the application for rehearing. We are, therefore, of the view that on the facts and circumstances of the present case, the appellant had sufficient cause for not being present at the hearing of the revision application and the learned single Judge of the High Court ought, in the circumstances, to have allowed the application and re-heard the civil revision petition applying the principle underlying Order XLI, Rule 21 of the Code of Civil Procedure.

From a consideration of submissions of learned counsels for the petitioner and the opposite party, we are not inclined to accept the submission of learned counsel for the petitioner. Evidently, the appeal has been dismissed as not maintainable by the order dated 23.6.2008 and once it has been shown that the appeal itself was not maintainable, the cross-objection, consequent upon the said appeal, would not survive for consideration as held by the Apex Court in the case of Municipal Corporation of Delhi (supra) and the Division Bench decisions of Calcutta High Court and Gujarat High Court relied upon by opposite party and approved by the Apex Court in the said decision.

So far as the reliance by learned counsel for the petitioner upon the decision in the case of Savithri Amma

Seethamma (supra) is concerned, the same has no application to the facts of the case as in the said case the civil revision application had been allowed ex parte in favour of the petitioner of the case and thus it was held that applying the principle of Order 41 Rule 21 of the Code of Civil Procedure, the application for restoration ought to have been allowed and the civil revision re-heard.

Evidently, in the present matter the judgment has not been pronounced against the respondent (petitioner herein) and thus a petition itself under Order 41 Rule 21 CPC would not be maintainable as that is a pre-condition for filing of such petition.

Thus, the application is dismissed as not maintainable.

(Ramesh Kumar Datta, J)

S.Pandey/-

(Sudhir Singh, J)

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