

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.275 of 2003

1. Jangli (Dead), S/o Sani Uraon.

(Deleted)

2. Imsay, S/o Sani Uraon.

3. Prem Sai, S/o Sani Uraon.

1 to 3 all R/o Village Ambatoli, P.S. & Tahsil Kusmi, District Surguja, C.G.

(Dfd. No.1 to 3)

4. Rati (Dead) Through LRs, S/o Thupa Uraon.

4.a. Leranga, S/o Late Rati, aged about 60 years,

4.b. Fulsai, S/o Late Rati, aged about 45 years,

Both are R/o Village Ambatoli, P.S. and Tahsil Kusmi, District Balrampur – Ramanujganj (C.G.)

5. Sundar, S/o Sanichar Uraon.

6. Thuiya (Dead) Through LRs, S/o Budu Uraon.

6.a. Bhukhan, S/o Late Thuiya, aged about 35 years.

6.b. Rajiendar, S/o Late Thuiya, aged about 51 years.

Both are R/o Village Ambatoli, P.S. and Tahsil Kusmi, District Balrampur – Ramanujganj (C.G.)

7. Sukhna, S/o Budu Uraon.

8. Dharmu (Dead) Through LR, S/o Budu Uraon.

8.a. Karam Sai, S/o Late Dharmu, aged about 28 years, R/o Village Ambatoli, P.S. and Tahsil Kusmi, District Balrampur – Ramanujganj (C.G.)

Nos.5 and 7 both are R/o Village Madguri, P.S. & Tehsil Kusmi, District Surguja, C.G.

(Defendants of Counter Claim)

---- Appellants/

Versus

1. Smt. Lalmuni, D/o Late Bhuliya Uraon, R/o Village Ambatoli, Madguri, P.S. & Tehsil Kusmi, Distt. Surguja, C.G.
(Plaintiff)

2. The State of M.P. (Now C.G.), through Collector, Surguja, Ambikapur, C.G.

---- Respondents

For Appellants: Mr. A.K. Prasad, Advocate.

For Respondent No.1: Mr. Awadh Tripathi and Mrs. Pritha Ghoshal, Advocates.

For Respondent No.2: Mrs. Astha Shukla, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

22/09/2016

1. The substantial questions of law involved, formulated and to be answered in the appeal preferred by the defendants are as under: -

1. Whether the first appellate Court is justified in reversing the judgment and decree dated 5-11-1997/7-11/1997 dismissing the suit in absence of any appeal preferred by the plaintiff before the first appellate Court?
2. Whether the first appellate Court is justified in dismissing the counter claim of the defendants by allowing the appeal by recording a perverse finding that the counter claim was barred by limitation?

and / or

3. Whether the first appellate Court is justified in reversing the judgment and decree dated 5-11-1997/7-11-1997 without there being an application for condonation of delay in filing the appeal by the plaintiff, as the appeal was

admittedly filed after the expiry of the period of limitation?

2. In order to answer the substantial questions of law, following facts are required to be noticed: -
3. Plaintiff Smt. Lalmuni filed a suit for declaration of title and possession in relation to the land described in Schedule B of the plaint in which after service of summons, the defendants appeared and by filing written statement denied the averments made in the plaint and also made counter claim in relation to the suit land of Schedule A of the plaint as well as the lands of Schedule Ka for declaration of title and possession.
4. The trial Court by judgment dated 5-11-1997 and decree dated 7-11-1997 dismissed the suit on the preliminary ground as not maintainable and however, the trial Court proceeded with the counter claim. Ultimately, by judgment and decree dated 8-9-1998, the counter claim was allowed and it was decreed that the defendants are title holders of lands described in Schedule B and Schedule Ka. This time, the plaintiff preferred an appeal on 22-12-1998 along with her memo of appeal in which she has stated in the cause title that the appeal is being preferred against the judgment dated 7-11-1997 and 8-9-1998 paid court fees accordingly, but no application for condonation of delay was filed while preferring the appeal, as the appeal was filed on 12-10-1998 which was registered on 22-12-1998 and as the suit was dismissed on 5-11-1997 / 7-11-1997 and certified copy was obtained on 26-12-1997. The first appellate Court though

initially registered the appeal as one against the judgment and decree dated 8-9-1998 by which the counter claim was decreed which is apparent from the order of the first appellate Court dated 13-10-1998 as well as the order dated 22-12-1998, but ultimately, in the final judgment, appeal against the judgment and decree dated 5-11-1997 / 7-11-1997 dismissing the suit was held to be within limitation as filed within 30 days from 11-9-1998 and further set aside the judgment and decree dated 5-11-1997 / 7-11-1997 and also set aside the judgment and decree dated 8-9-1998 on merits as well as on the question that the counter claim of the defendants was barred by limitation.

5. The defendants, aggrieved against the judgment and decree of the first appellate Court decreeing the suit of the plaintiff and dismissing their counter claim on merit as well as barred by limitation, have preferred this second appeal under Section 100 of the CPC in which substantial questions were framed on 4-8-2016 and also today i.e. on 22-9-2016, additional substantial question of law was framed and incorporated in the opening paragraph of this judgment. The respondents were put to notice and with the consent of parties, the matter is heard finally.
6. Mr. A.K. Prasad, learned counsel appearing on behalf of the appellants / defendants, would submit that though the appeal is said to have been preferred against the judgment and decree dated 5-11-1997 / 7-11-1997, but the record would show that

the certified copy of decree dismissing the suit was delivered to the plaintiff on 26-12-1997 and the appeal was preferred on 12-10-1998 without an application for condonation of delay and therefore in view of bar contained in Order 41 Rule 3A(1) of the CPC, the appeal was not the validly presented appeal. Even otherwise, no order condoning the delay was passed by the appellate Court and the first appellate Court has committed grave legal error in holding that the plaintiff was entitled to prefer appeal within 30 days from the judgment dated 8-9-1998 ignoring the fact that suit was already dismissed as back as on 5-11-1997 / 7-11-1997. Therefore, the judgment and decree passed by the first appellate Court deserve to be set aside.

7. Mrs. Pritha Ghoshal, learned counsel appearing on behalf of respondent No.1 / plaintiff, would submit that the first appellate Court is absolutely justified in condoning the delay of 30 days from the date of granting the counter claim on 8-9-1998. The plaintiff preferred joint appeal questioning the judgment and decree dated 5-11-1997 / 7-11-1997 and the judgment and decree dated 8-9-1998, and court fees on both the appeals was paid by the plaintiff and that cannot be said to be non est in the eye of law. Even otherwise, if the Court comes to the conclusion that the application for condonation of delay was not filed, an opportunity be granted to prefer application for condonation of delay. She would further submit that the first appellate Court has recorded finding on merits of the counter claim as well as on limitation. Therefore, the appeal deserves

to be dismissed.

8. I have heard learned counsel for the parties, gone through the record with utmost circumspection and also considered their rival submissions extensively.
9. It is not in dispute that the plaintiff's suit for declaration of title and permanent injunction was dismissed on 5-11-1997 / 7-11-1997 and the trial Court proceeded with the counter claim but till the decision of the judgment and decree in the counter claim, the plaintiff did not prefer any appeal against the decree dismissing the suit on 5-11-1997 / 7-11-1997. It is also not in dispute that the plaintiff preferred joint appeal against the judgment and decree dated 5-11-1997 / 7-11-1997 dismissing the suit and granting counter claim, on 12-10-1998 and court fees for challenging the appeal as well as the counter claim was paid by the plaintiff, though it appears from the perusal of the order sheet dated 13-10-1998 as well as the order sheet dated 22-12-1998 that the appeal was preferred only against the judgment and decree dated 8-9-1998, but thereafter, at the time of judgment, the first appellate Court recorded in opening paragraph of its judgment that appeal has been preferred against the judgment and decree dated 5-11-1997 / 7-11-1997 and also against the judgment and decree dated 8-9-1998, and in paragraph 8 of the judgment, the first appellate Court has held the appeal against the judgment and decree dated 5-11-1997 / 7-11-1997 to be within limitation holding that it has been

filed within the period of 30 days from the judgment and decree dated 8-9-1998. It is also on record that the copy of the judgment and decree dated 5-11-1997 / 7-11-1997 dismissing the suit was delivered to the respondent / plaintiff on 26-12-1997 which was filed along with the appeal preferred before the first appellate Court.

10. Order 41 Rule 3A of the CPC, sub-rule (1), provides that when an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, meaning thereby that if such a procedural provision is not followed and if appeal is not accompanied by application for condonation of delay, it can be filed subsequently and the appeal cannot be dismissed on the said ground itself.

11. The Supreme Court in the matter of **H. Dohil Constructions Company Private Limited v. Nahar Exports Limited and another**¹ following its earlier decision in the matter of **State of M.P. v. Pradeep Kumar**², has clearly held that non-filing of application for condonation of delay along with the memo of appeal when presented after the expiry of prescribed period of limitation would not result in rejection of appeal and application for condonation of delay can be filed subsequently.

1 (2015) 1 SCC 680

2 (2000) 7 SCC 372

12. It is correct to say that the appeal preferred by the plaintiff was not validly presented in absence of application for condonation of delay and in view of the fact that the appeal was barred by limitation on the date of filing before the first appellate Court i.e. on 12-10-1998. The first appellate Court has committed legal error in entertaining the appeal holding that it has been filed within the period of limitation reckoning the limitation from 11-9-1998. Such a finding is apparently, prima facie, not correct, as the suit has already been dismissed independently way back on 5-11-1997 / 7-11-1997 and no appeal was preferred till 12-10-1998, therefore the plaintiff was required to file application for condonation of delay while preferring appeal against decree dismissing the suit. In the circumstances, the judgment and decree of the first appellate Court entertaining the appeal without having a duly constituted application for condonation of delay deserves to be and is hereby set aside. However, in view of the provisions contained in Order 41 Rule 3A of the CPC and the judgments of the Supreme Court in H. Dohil Constructions Company Private Limited (supra) and Pradeep Kumar's case (supra), the plaintiff is granted time of one month to file a duly constituted application for condonation of delay in filing the appeal and on filing such an application, the first appellate Court would consider it afresh in accordance with law and thereafter proceed further.

13. This would bring me to the next part of the judgment by which the decree granted by the trial Court dismissing the counter

claim holding it to be barred by limitation and also rejecting the counter claim on merits.

14. So far as the counter claim is concerned, issue No.8 was framed whether the counter claim preferred by the defendants is barred by limitation. The trial Court has clearly recorded a finding that the defendants have not adduced any evidence to demonstrate that the counter claim of the defendants is barred by limitation and no argument has been advanced, therefore, the counter claim is held to be within limitation. The appellate Court, however, reversed that finding. Paragraph 9 of the counter claim made by the defendants clearly states that in the year 1988, the plaintiff has forcefully dispossessed the defendants and cause of action arose in the year 1988 to which the plaintiff in his reply to written statement / counter claim has simply stated that there is no cause of action that has arisen in 1988 and no specific plea of limitation has been taken in the said written statement filed against the counter claim. The plea of limitation has been taken in paragraph 12 of the written statement that it is barred by limitation, but it has neither been duly pleaded nor evidence has been adduced on behalf of the plaintiff to substantiate his plea of limitation.

15. It is well settled that question of limitation is a mixed question of law and facts, it requires investigation of facts and therefore the party taking the plea of limitation is required to establish such plea by leading legal evidence of clinching nature. (See **Surjit**

Kaur Gill and another v. Adarsh Kaur Gill and another³.)

16. No evidence was led by the defendants as recorded by the trial Court to establish the plea of limitation before the trial Court to hold that the counter claim was barred by limitation. Therefore, the first appellate Court is absolutely unjustified in dismissing the counter claim as barred by limitation and thereafter proceeding to decide the counter claim on merits.
17. At this stage, Mr. A.K. Prasad, learned counsel appearing for the appellants / defendants, would submit that since the counter claim has been held to be barred by limitation by the trial Court and the trial Court after holding the counter claim to be barred by limitation has considered the counter claim of the appellants / defendants on closed mind since the plaintiff is being given opportunity to file application for condonation of delay in filing the appeal, the finding of the first appellate Court on merits is also liable to be set aside and it be left open to the first appellate Court to consider such counter claim on merits, as joint appeal was preferred before the first appellate Court.
18. I have gone through the findings of the first appellate Court and I find force in the argument of Mr. A.K. Prasad that the findings are not in accordance with law and are perverse to the record. Even otherwise, part of the judgment of the first appellate Court has been set aside and the appeal is being remanded back to the first appellate Court for giving an opportunity to the plaintiff to file application for condonation of delay and to consider the

fact that appeal was preferred and counter claim was also dismissed barred by limitation. Thus, it would be appropriate to set aside that part of judgment of the first appellate Court also for deciding the appeal as a whole on merits. As a consequence, the substantial questions of law are answered accordingly and the appeal is allowed subject to following directions: -

1. The first appellate Court would give an opportunity to the plaintiff to file application for condonation of delay in preferring the appeal so far as the judgment and decree dated 5-11-1997 / 7-11-1997 are concerned and if such application is filed within one month from the date of appearance before the first appellate Court i.e. 24-10-2016, the first appellate Court would consider firstly the application and then proceed in accordance with law accordingly.
2. After consideration of application for condonation of delay, if the appeal is found to be within limitation then the first appellate Court would try to dispose of the appeal against both the challenges of judgment and decree dated 5-11-1997 / 7-11-1997 preferred by the plaintiff and judgment and decree dated 8-9-1998 preferred by the defendants jointly in which the plaintiff will be required to explain the delay from 7-11-1997 to 12/13-10-1998.
3. So far as the appeal against judgment and decree dated

8-9-1998 is concerned, the first appellate Court would consider it on merits after giving parties the opportunity of hearing.

19.No order as to cost(s).

20.A decree be drawn accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma