

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Civil Revision No.2440 of 2016

Date of Decision: 06.03.2019

Rajiv Raj Madhok

...Petitioner

versus

Baldev Raj Madhok and othes

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Kamal Sehgal, Advocate
for the petitioner.

Mr. Rakeshwar Lali Sood, Senior Advocate, with
Mr. P.K. Khindria, Advocate,
for respondent no.1 (i to iv) and 4.

Amol Rattan Singh, J.

By this petition, the petitioner challenges the order of the learned District Judge, Chandigarh, dated January 05, 2016, as also the judgment and decree passed by the learned Civil Judge (Junior Division), Chandigarh, on 26.11.2013.

The aforesaid decree is one passed in a suit filed by respondent herein, seeking a declaration to the effect that he, the present petitioner, (Rajiv Raj Madhok-defendant no.3 in the suit), as also Suniti Madhok, (presently respondent no.4 and also defendant no.4 in the suit), are all owners in possession of House no.123, Sector 9-B, Chandigarh, to the extent of 39.95%, 31.5% and 28.55% shares respectively, therein respondent no.1 herein (plaintiff) also sought a decree of mandatory injunction directing the Chandigarh Administration and the Estate Officer, U.T. Chandigarh

(defendants no.1 and 2 in the suit), to record the 'percentagewise' ownership of the house in the names of the aforesaid three persons, i.e. the plaintiff and defendants no.3 and 4.

That suit having been decreed by the learned Civil Judge (Junior Division), Chandigarh, in favour of the respondent-plaintiff herein, the judgment and decree was appealed against by the present petitioner before the learned District Judge, Chandigarh, on 26/27.10.2014, annexing alongwith the appeal, an application filed under Section 5 of the Limitation Act, 1963 (read with Section 151 of the Code of Civil Procedure, 1908), seeking condonation of a delay of 335 days in filing the appeal.

Vide the impugned order dated January 05, 2016, the learned District Judge has rejected the application, also dismissing the appeal of the petitioner, on the ground of limitation alone.

Hence, the present revision is actually directed against that order.

2. Notice of motion having been issued on 05.04.2016, the matter remained pending on requests for adjournment made, with it finally having been argued on a request made by learned counsel for respondent no.1, i.e. the plaintiff.

3. Mr.Kamal Sehgal, learned counsel for the petitioner, had submitted that earlier a suit had been instituted seeking partition of the suit property (also seeking partition of other property devolving upon the parties to the *lis* from their late father), which suit was decreed in the year 1989, at a time when the present petitioner was a minor. However, when the suit in the current *lis* had been instituted by respondent no.1, the petitioner had duly contested it and therefore he should not be ousted simply on the ground of the delay in filing a first appeal, thereby defeating the substantial right that he

claims to have, in a property which otherwise has devolved upon the contesting parties to the *lis*.

4. Other than the above, Mr. Sehgal at that time had argued that a first appeal in any case cannot be dismissed only on the ground of limitation, without the appellate court deciding all other issues as had been framed by the trial court and consequently, on that score alone, the matter would need to be remanded to the appellate court, even if this court does not hold that dismissal on the ground of limitation was bad, which of course as per learned counsel was wholly bad in the circumstances of the case.

In support of his contention that a court of first appeal is bound to decide all issues, other than limitation alone, Mr. Sehgal had cited the following three judgments of the Supreme Court:-

- i) **Madina Begum and others v. Shiv Murti Prasad Pandey and others** AIR 2016 SC 3554;
- ii) **Vinod Kumar v. Gangadhar** (2015) 1 SCC 391; and
- iii) **Madhukar and others v. Sangram and others** (2001) 4 SCC 756.

5. Mr. Sood, learned senior counsel appearing for respondent no.1 (now substituted by legal representatives, he having passed away), as also for respondent no.4, at that stage firstly submitted that the decree of declaration and mandatory injunction issued by the trial court having already been executed, with the Estate Officer, U.T. Chandigarh having, in the records, mutated the property in the name of all three individuals who are party to the *lis*, as per the percentage of their respective shares therein, the matter would not be remitted by this court to the appellate court, even on the ground put forth by Mr. Sehgal, that all issues are required to be decided by that court.

Other than that, he had sought time at that stage to distinguish

the judgments cited by Mr. Sehgal.

6. On the next date of hearing, Mr. Sood had submitted that as regards the aforesaid judgments, they are wholly inapplicable to the present case, because in those cases the suits filed were contended to have been barred by limitation before the trial courts itself, and after they had been decided by those court (in each case), the courts to which the first appeals had been preferred, had adjudicated upon the issue of the suits being barred by limitation, without going into the remaining issues framed by the trial court, which was held by the Supreme Court to be wholly erroneous, because when issues including limitation have been framed by a court of first instance, then even if the court of first appeal is to hold that the suit itself was instituted beyond limitation, it was still required to adjudicate upon the other issues as had arisen in the suit.

Learned senior counsel submitted that in the present case however, the appellate court, vide the impugned order, has not held that the suit itself, filed by the respondent-plaintiff, was barred by limitation, but has held that the appeal filed by the present petitioner (defendant in the suit) was barred by limitation and consequently, the appeal itself not being maintainable on that ground alone, the other issues were not gone into.

Mr. Sood referred to a judgment of the Supreme Court in **Binod Bihari Singh v. Union of India** (1993) 1 SCC 572, to submit that limitation is a sacrosanct provision of law that has to be looked into even if it is not raised before a court and consequently, the appeal of the present petitioner having been dismissed on the ground of limitation, nothing else was required to be looked into by even the court of first appeal.

7. Other than that, learned senior counsel submitted that each days'

delay not having been explained by the petitioner in his application filed before the 1st appellate court, the impugned order does not require to be interfered with.

Further, he submitted that even after admitting knowledge from a particular date, of the decree passed by the trial court, the petitioner still filed the appeal well beyond 30 days of that date, it having been filed on 27.10.2014 as could be seen from the affidavit accompanying the application seeking condonation of delay before the appellate court.

8. Lastly, Mr. Sood has submitted that even in equity, the petitioner would not have a case, because in the previous suit instituted, in which a decree had been passed by which the suit property in the present *lis* had been ordered to be partitioned by metes and bounds, there was no challenge to that decree by the present petitioner or his predecessor-in-interest, though that decree could not actually be executed on account of a statutory bar on partition of property in Chandigarh by metes and bounds, which consequently had been refused to be done by the Estate Officer U.T. Chandigarh (respondent no.3 herein), who otherwise was not a party to the previous *lis*.

Mr. Sood further submitted that yet, the decree had been acted upon by the parties to the extent of them having occupied their respective shares in terms of that earlier decree, with the suit in the present *lis* having been instituted by respondent no.1 herein (Baldev Raj Madhok) only to give effect to the earlier decree by an alternative method, i.e. instead of partition by metes and bounds, the property was sought to be shown in the records to be jointly held to the extent of the percentages as fell to the share of each owner, in terms of the earlier decree.

9. In rebuttal, Mr. Kamal Sehgal submitted that with the previous

decree not having been executed through a court of law, the petitioner did not challenge the same because it had become inexecutable after 12 years. That contention was sought to be repelled by Mr. Sood, who interjected to say at that stage that the parties having actually acted upon the earlier decree even without any formal execution proceedings having been instituted, the question of any limitation of non-execution did not come in, with the mutation now sought only being one reflecting the respective shares of the parties in the suit property.

10. Learned counsel for the parties had further actually addressed some arguments on the equity in favour of each party as per the merits of the issues arising in the suit (as per the contention of each), which however is not being gone into by this court because the present petition though is one also seeking the setting aside of the decree passed by the trial court on the merits of the issues framed, however naturally such decree not being challengable in a revision, Mr. Sehgal, learned counsel for the petitioner had very fairly submitted that he could only confine his arguments to challenging the order of the learned District Judge, dismissing the appeal against that decree on the ground of limitation.

11. On that, Mr. Sehgal had further submitted that undoubtedly the petitioner had filed the appeal well beyond limitation, the reason however was that the counsel for the petitioner in the trial court had not apprised him of the fact that the suit had been decreed in favour of respondent no.1 on 26.11.2013, and it was only when a letter dated 10.09.2014 was received by him, from the Chandigarh Administration, followed by a letter dated 13.10.2014, upon the application filed by respondent no.1 seeking transfer of the house in terms of the decree issued, that the petitioner contacted his

counsel and then came to know that he had suffered a decree in favour of the respondent herein.

Hence, Mr. Sehgal submitted that with the petitioner having contested the suit instituted by the respondent through out, including after it had been remanded on an earlier occasion by the appellate court to the trial court, limitation should not come in the way of the petitioner for decision of his appeal on merits by a court of first appeal, especially as he has given the reason that he was not aware of the decree having been suffered by him in the year 2013.

12. Having considered the matter, though it is necessary to state at the outset that it has become a habit to always try and cover up delay by putting the 'onus' on the counsel appearing for a party, to the effect that the party was not informed by counsel of a particular decision and therefore could not file the appeal in time, yet what this court would not like lose sight of is that, undoubtedly and admittedly, the petitioner had contested the suit instituted by respondent no.1 through out, by filing a written statement and by leading evidence (as Mr. Sood has not factually refuted even on specific query to him) and had contested the suit even when the matter was remanded to the trial court on an earlier occasion (by the appellate court).

In fact, a perusal of the decree now suffered by the petitioner on 26.11.2013 (copy Annexure P-1), shows that the learned Civil Judge has noticed at the outset that the suit had earlier been decreed on 27.01.2008, with the petitioner having filed an appeal at that stage before the learned District Judge, who had set aside the earlier decree passed and had remitted the matter on 18.02.2013 to the trial court, with a direction that the plaintiff (respondent no.1 Baldev Raj Madhok) be directed to prove his version of the

percentagewise shares of the parties in the suit property, by examining an architect/expert witness.

13. That being so, I would not be inclined to disagree with learned counsel for the petitioner, that in such circumstances, the petitioner should be ousted from contesting the decree on merits before the court of first appeal, with it indeterminable as to whether he was actually informed by his counsel or not, of the fact that a decree had been passed against him on 26.11.2013.

Undoubtedly, the petitioner not having bothered to check with his counsel with regard to the fate of the suit instituted against him for a period of at least 9 to 10 months after the decision, he has to take the blame of negligence, but in my opinion not to such an extent that despite he having contested the suit on two rounds, and having filed an appeal earlier also, he should now be ousted on the ground of limitation, even though the appeal was also filed admittedly beyond 30 days from 10.09.2014, when the petitioner is stated to have first received a letter from Chandigarh Administration in respect of mutation entries to be carried out as per the decree issued.

If limitation for filing an appeal is to be seen from that date, it would run out on 09.10.2014, with the appeal having been instituted on 24.10.2014, as per the affidavit accompanying the application seeking condonation of delay. Thus, even from the date of admitted knowledge of the petitioner, it was filed about 14 days late.

In the impugned order, the learned District Judge has held that the petitioner having himself admitted that for about 10 months he had not bothered to find out the status of the suit from his counsel, he did not deserve the concession of condonation of delay, and therefore the application seeking such condonation, as also the appeal itself, deserve to be dismissed.

As already observed herein above, in my opinion, with the petitioner having contested two rounds of the suit, he having earlier filed an appeal (leading to the second round), he needs to be given the leniency of condonation of delay, but the delay being for a period of about 10 months, it cannot be condoned without sufficient costs imposed upon him, to be paid to the contesting respondents, i.e. the plaintiff (actually his legal representatives now).

14. Consequently, the petition is allowed subject to payment of costs of Rs.30,000/- to respondent no.1, with the impugned order set aside.

The learned appellate court would hear the appeal on merits, and is requested to decide it within a period of 4 months from the date of receipt of a certified copy of this order, the suit that is subject matter of the appeal having been instituted on October 30, 2003, i.e. 15 and a half years ago.

Naturally, nothing observed hereinabove shall be taken by the learned appellate court to be any comment on the merits of the case in favour of or against any party, with the appeal to be decided wholly on the merits of the evidence led by the parties and the legality of the issues arising therein.

March 06, 2019

vcgarg/dinesh

**(AMOL RATTAN SINGH)
JUDGE**

1. Whether speaking/reasoned?	Yes
2. Whether reportable?	Yes