

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.98 of 2010

Radheshayam, aged about 34 years, S/o Late Shivcharan, R/o Village Churi, Tahsil Manendragarh, Distt. Koriya

---- Appellant

Versus

1. Shivprasad, aged about 50 years, S/o Ishwari, R/o Village Sarastal, Thana and Tahsil Manendragarh, Distt. Koriya
 2. Sitaram, aged about 45 years, S/o Ishwari, R/o Village Churi, Tahsil Manendragarh, Distt. Koriya
 3. Jaikaran, aged about 35 years, S/o Ishwari, R/o Village Sarastal, Thana and Tahsil Manendragarh, Distt. Koriya
- (Plaintiffs)

4. State of Chhattisgarh, through Collector, Koriya/Baikunthpur
5. Shanti, aged about 60 years, W/o Late Shivcharan, R/o Village Churi, Tahsil Manendragarh, Distt. Koriya
6. Lilavati, aged about 42 years, W/o Late Indramani, R/o Village Gutra, Thana and Tahsil Manendragarh, Distt. Koriya
7. Raghunath, aged about 30 years, S/o Late Shivcharan,
8. Ramkailash, aged about 28 years, S/o Late Shivcharan,
9. Ramsubhag, aged about 26 years, S/o late Shivcharan,
10. Ramkeshvar, aged about 24 years, S/o Late Shivcharan

Respondent No.7 to 10 are R/o Village Churi, Tahsil Manendragarh, Distt. Koriya

(Defendants)
---- Respondents

For Appellant / Defendant No.3: -

Mr. Parag Kotecha, Advocate.

For Respondents No.1, 2 & 3 / Plaintiffs: -

Miss Sharmila Singhai, Advocate.

For Respondent No.4 / State: -

Dr. Veena Nair, Deputy Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board14/09/2020

1. Proceedings of this matter have been taken-up for final hearing through video conferencing.
2. This second appeal preferred under Section 100 of the CPC by the appellant herein / defendant No.3 was admitted for hearing on 27-8-2020 by formulating the following two substantial questions of law: -

“1. Whether the first appellate Court was justified in holding that there is no sufficient cause in delay of 45 days in preferring the appeal by recording a finding which is perverse to the record?

2. Whether the first appellate Court was justified in dismissing the appeal on merits after having rejected the application for condonation of delay by recording a finding which is perverse to the record?”

[For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the suit before the trial Court.]

3. The plaintiffs' suit for declaration of title, partition and possession was decreed by the trial Court on 31-1-2009 against which the defendants preferred appeal with a delay of 45 days along with an application for condonation of delay. The first appellate Court firstly, rejected the application for condonation of delay and then also dismissed the appeal on merits against which this second appeal has been preferred by defendant No.3 in which substantial questions of law have been framed which have been set-out in the opening paragraph of this order for the sake of completeness.

4. Mr. Parag Kotecha, learned counsel appearing for the appellant herein /

defendant No.3, would submit that the delay has sufficiently been explained and the first appellate Court is not justified in dismissing the appeal by rejecting the application and simultaneously also dismissed the appeal on merits which is impermissible in law.

5. Miss Sharmila Singhai, learned counsel appearing for respondents No.1, 2 & 3 herein / plaintiffs, would support the impugned judgment & decree.
6. I have heard learned counsel for the parties and considered their rival submissions and went through the record with utmost circumspection.
7. It is correct that the plaintiffs' suit was decreed on 31-1-2009 against which the defendants preferred appeal with a delay of 45 days along with an application for condonation of delay. The first appellate Court rejected the application for condonation of delay and simultaneously also dismissed the appeal on merits. The defendants filed application by showing cause that counsel did not inform them about the delivery of judgment right in time, therefore delay occurred in filing appeal which was duly supported by affidavit; though it was replied by the plaintiffs, but no affidavit controverting the allegation was filed. The defendants having suffered the decree, they would not gain by delaying the filing of appeal and not preferring the appeal right in time.
8. In the matter of N. Balakrishnan v. M. Krishnamurthy¹, the Supreme Court has held that words "sufficient cause" within the meaning of Section 5 of the Limitation Act, 1963 have to be construed liberally. Considering the cause shown by the plaintiffs and further considering

1 (1998) 7 SCC 123

that there is no other evidence and it has not been controverted by the other side, in my considered opinion, delay of 45 days in filing the appeal has been sufficiently explained and as such, delay in filing the appeal is condoned.

9. Now, the question is, whether the first appellate Court is justified in dismissing the appeal on merits even after rejecting the application for condonation of delay?
10. Rule 3A of Order 41 of the CPC which provides for application for condonation of delay in filing the appeal was added vide Civil Procedure Code (Amendment) Act, 1976 (No. 104 of 1976). The objects and reasons for adding this rule were as under:-

“Clause 90, Sub-clause (iii). Where an appeal is filed after the expiry of limitation, it is the practice to admit the appeal subject to the provisions as to limitation being raised at the time of hearing. This practice has been disapproved by the Privy Council which has stressed the expediency of adopting a procedure for securing the final determination of the question as to limitation even at the stage of admission of the appeal. New Rule 3A is being inserted to give effect to the said recommendation.

Clause, 87 (Original Clause 90) (ii)-The Committee are of the view that the court, should not be empowered to grant an interim stay of execution of the decree unless the court has, after hearing under Rule 11 of Order 41 decided to hear the appeal.

Sub-rule (3) in the proposed Rule 3A of Order 41 has been inserted accordingly.”

11. From the aforesaid objects and reasons, it is transparently clear that it gives way to the practice of admitting the appeal, subject to the decision of question of limitation at the time of hearing, this Rule 3A was added. The rule has to be read bearing in mind this object of the legislature.

12. The Supreme Court in the matter of State of M.P. and another Vs.

Pradeep Kumar and another² has highlighted the object of enacting Rule

3A in Order 41 of the Code. Para-19 of the report states as under:-

“19. The object of enacting Rule 3A in Order 41 of the Code seems to be twofold. First is, to inform the appellant himself who filed a time-barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the court has to deal with application for condonation of delay as a condition precedent. Barring the above objects, we cannot find out from the Rule that it is intended to operate as unremediably or irredeemably fatal against the appellant if the memorandum is not accompanied by any such application at the first instance. In our view, the deficiency is a curable defect, and if the required application is filed subsequently the appeal can be treated as presented in accordance with the requirement contained in Rule 3A Order 41 of the Code.”

13. Further, the Supreme Court in the matter of Shyam Sunder Sarma Vs.

Pannalal Jaiswal and others³ has held that rejection of application for

condonation of delay under Rule 3A and consequent dismissal of appeal

on refusal to condone the delay is nevertheless a decision in the appeal.

Para 10 of the report states as under:-

“10. The question was considered in extenso by a Full Bench of the Kerala High Court in *Thambi v. Mathew* MANU/KE/0010/1988 : (1987(2) KLT 848). Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3A of Order XLI introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order XLI of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of

² (2000) 7 SCC 372

³ AIR 2005 SC 226

delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.”

14. The High Court of Madhya Pradesh in the matter of case of Chhitu Vs.

Mathuralal and others⁴, while dealing with the identical fact situation has clearly held that till the date delay is not condoned, it cannot be treated that there is appeal before the Court and held as under:-

“9. The governing expression in the sub-rule (2) shall be finally decided by the court before it proceeds to deal with the appeal under Rule 11 or Rule 13, as the case may be makes it imperative for the appellate court first to decide the question of limitation and puts an embargo on its (Court's) power to proceed further in the appeal. The appeal cannot be heard even on the question of admission much less on merits. In effect there is no appeal before the court unless the delay is condoned. This conclusion gets buttressed from the expression "the appeal is proposed to be filed". The use of this expression even in face of the fact that memorandum of appeal along with the application for condonation of delay in or record, clearly bears out the intention of the legislature that till the delay is not condoned, it cannot be treated in law that there is an appeal before the court.”

15. Thus, the appeal preferred along with application for condonation of delay cannot be heard on admission under Rule 11 of Order 41 of the CPC unless the application for condonation of delay is heard first and question of limitation is decided finally by the first appellate Court and if the Court decides to condone the delay, then appeal shall be placed for admission under Order 41 Rule 11 of the CPC and if the application for condonation of delay is dismissed under Order 41 Rule 3A of the CPC, then consequently, the appeal shall also stand dismissed as a consequence

of rejection of the application for condonation of delay under Section 5 of the Limitation Act, 1963.

16. Thus, from a conjoint reading of the legislative provisions incorporated in Order 41 Rule 3A of the CPC as well as the principle laid down by the Supreme Court in the above-stated cases in this regard, it is transparently clear that unless the application for condonation of delay in filing the appeal is considered under Order 41 Rule 3A(2) of the CPC and it is decided finally by the court condoning the delay in filing the appeal, the first appellate Court cannot proceed to hear the appeal under Order 41 Rule 11 of the CPC on admission, nor can fix a date for final hearing under Order 41 Rule 12 of the CPC. Not only this, Order 41 Rule 3A(3) of the CPC further prohibits the first appellate court to grant interim order in respect of stay of execution of decree by providing that where an application has been made under sub-rule (1) of Rule 3-A of the CPC, the first appellate Court shall not make any order for stay of the execution of the decree against which the appeal is proposed to be filed so long as the Court does not decide after hearing under Rule 11 decides to hear the appeal.

17. Their Lordships of the Supreme Court in the matter of Sukhpal Singh v. Jaswinder Kaur and others⁵ have clearly held as under:-

“8. It also appears that the appeal before the High Court was time barred. It is submitted that the delay had not been condoned by the High Court. If that be so, no order on compromise petition could have been passed. The High Court is required to deal with question of limitation first. In case of delay is condoned, the High Court to proceed in accordance with law and to consider the compromise petition afresh.”

18. The Madhya Pradesh High Court in the matter of Smt. Umrao Bai and

others v. Sardarilal Khatri⁶ has held that the appeal which is barred by limitation and decision and decree without extension of time for filing appeal, they are without jurisdiction and cannot be sustained.

19. Reverting to the facts of the present case in the light of the legal position noticed herein-above, it is quite vivid that once the application for condonation of delay was rejected, the first appeal also stood dismissed by operation of law and therefore appeal could not have been dismissed on merits making the decree without jurisdiction and without authority of law and unnecessary as well. Finally, upon consideration of material on record and after hearing learned counsel for the parties, the matter is remitted to the first appellate Court for hearing and disposal in accordance with law on merits. As the delay in filing the appeal has already been condoned, the first appellate Court would do well to consider and decide the appeal within 45 days from the date of receipt of record and copy of this order. It is made clear that parties will be heard on merits of the judgment & decree of the trial Court. It is further made clear that if physical hearing is not possible, the matter be heard through video conferencing. Records of both the Courts below be sent back forthwith.

20. The substantial questions of law are answered accordingly and the second appeal is allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

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