

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.9 of 2009**

Basna Lal @ Basant, aged about 47 years, S/o –
Ramlal Kenwat, R/o Village – Mahmandpara Lalkhadan,
Tahsil & District – Bilaspur (CG)

----- Appellant/Plaintiff

Versus

1. Durgesh Gorakh S/o Bagulal Gorakh, R/o Tikrapara
Bilaspur, Tahsil & District – Bilaspur (CG)
2. Hanuman Prasad, aged about 56 years, S/o Harilal,
Caste-Kachhi, R/o Dayalband, Bilaspur, Tahsil &
District-Bilaspur
3. The State of Chhattisgarh Through The Collector,
Bilaspur (CG)

----- Respondents/Defendants

For Appellant/Plaintiff :

Mr. Vijay Kumar Mishra, Advocate

For Respondent No.1/Defendant No.1:

Mr. Prakash Tiwari, Advocate

For Respondent No.2/Defendant No.2:

None present though served.

For Respondent No.3/State:

Mr. Martin Siddiqui, Dy.A.G.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

17/07/2020

1. This second appeal has been taken-up for final
hearing through video conferencing.
2. This second appeal preferred by the appellant/
plaintiff was admitted for hearing on following
substantial questions of law:-

"1. Whether the Courts below have committed an error of law by non- suiting the plaintiff with respect to the suit land bearing Khasra No.18/3 area of 0.74 decimal inspite of there being a sale deed (Ex.P/1) executed in his favour at an earlier point of time than the one executed in favour of defendant No.1 ?"

"2. Whether the first appellate Court is justified in dismissing the appeal as barred by limitation, by recording a finding which is perverse to record and thereafter proceeded to decide the appeal on merits ?"

3. The imperative facts required for determination of above-stated substantial question of law are as under:-

[For the sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court]

(3.1) The plaintiff's suit for declaration of title and permanent injunction was dismissed by the trial Court by its judgment and decree dated 31.1.2008, against which, he preferred first appeal with an application for condonation of delay for condoning the delay of 18 days. The first appellate Court noticed the parties on the application for condonation of delay and took-up the matter for hearing and by the impugned judgment and decree, the first appellate Court firstly dismissed the application for condonation of delay finding that there is no sufficient cause for delay in preferring

the appeal and thereafter proceeded to consider the appeal on merits and also dismissed the appeal on merits, against which, this second appeal under Section 100 of the CPC has been preferred by the appellant/plaintiff, in which two substantial questions of law have been formulated and set-out in opening paragraph of this judgment.

4. Mr. Vijay Kumar Mishra, learned counsel for the appellant/plaintiff, would submit that the first appellate Court is absolutely unjustified in dismissing the appeal as barred by limitation as sufficient cause has been shown as the plaintiff was suffering from illness and he was advised for bed-rest and therefore, he could not prefer appeal right in time and filed the appeal with a delay of 18 days. He would further submit that the first appellate Court has further committed illegality in dismissing the appeal on merits after rejecting the application for condonation of delay which is without jurisdiction and without authority of law, as such, delay of 18 days in filing the appeal be condoned and the judgment & decree of the first appellate Court be set-aside and the appeal be remitted to the first appellate Court for hearing and disposal of first appeal on merits in accordance

with law.

5. On the other hand, Mr. Prakash Tiwari, learned counsel for respondent No.1/defendant No.1, would support the impugned judgment and decree.

6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

7. The first appellate Court firstly dismissed the appeal as barred by limitation and thereafter proceeded to consider the appeal on merits and ultimately dismissed the appeal on merits also.

Answer to substantial question of law No.2:-

8. This Rule 3A of Order 41 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 ad 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.

9. From the aforesaid objects and it reasons, it is transparently clear that it give 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.

10. The Supreme Court in the matter of **State of M.P. and another Vs. Pradeep Kumar and another**¹ 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

¹ 2000 (7) SCC 372

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."

11. Further, the Supreme Court in the matter of

Shyam Sunder Sarma Vs. Pannalal Jaiswal and others²

has held that rejection of application for condonation of delay under Rule 3(a) 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 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."

12. The High Court of Madhya Pradesh in the matter of case of **Chhitu Vs. Mathuralal and others**³, 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."

13. Thus, the appeal preferred alongwith application for condonation of delay cannot be heard on admission under Rule 11 of Order 41 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 Indian Limitation Act.

14. Thus, the legislative provisions incorporated in Order 41 Rule 3A CPC as well as the principle laid down by the Supreme Court in above stated case 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 Code and it is decided finally by the court condoning the delay in filing the appeal, 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 Code of Civil Procedure. Not only this, Order 41 Rule 3A(3) CPC further prohibits to 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 has been filed, 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.

15. Their Lordships of the Supreme Court in the matter of Sukhpal Singh v. Jaswinder Kaur and others⁴ 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."

16. The Madhya Pradesh in the matter of Smt. Umrao Bai and others v. Sardarilal Khatri⁵ 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.

17. Reverting to the facts of the present case in light of legal position noticed hereinabove, it is

4 AIR 2017 SC 1358

5 AIR 1997 MP 62

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 dismissed on merits making the decree without jurisdiction and without authority of law and unnecessary as well.

Answer to substantial question of law No.1:-

18. Upon consideration of material available on record, and after hearing the learned counsel for the parties and taking the principles of law enunciated by the Supreme Court in the matter of **N. Balakrishnan v. M. Krishnamurthy**⁶ that the sufficient cause has to be construed liberally, the delay of 18 days in preferring the appeal is condoned.

19. The matter is remitted to the first appellate Court for hearing and disposal of appeal in accordance with law after hearing the parties. The parties are directed to appear before the first appellate Court on **17th August, 2020**. Notice will be issued to unrepresented respondent No.2. No notice is required to be issued to the respondents who are represented now. Since the appeal was decided in the

6 (1998) 7 SCC 123

year 2008 and 12 years has already been elapsed, the first appellate Court shall conclude the hearing of the appeal within 45 days from the date of appearance of the parties.

20. The second appeal is allowed to the extent indicated hereinabove.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-