

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 35 of 2010**

1. Kesri Bai, W/o. Lahan Lal Sahu, aged 60 years, R/o. Village Khamtarai, Tahsil and Distt. Raipur (CG)
2. Urmila W/o. Fattu Lal Sahu, aged 40 years, R/o. Village Maro, Tahsil Bemetara, Distt. Durg (CG)

---- Appellants**Versus**

1. Subhashini W/o. Hesron Isai, aged 40 years, R/o. Village Ganeshpur, Tahsil Simga, Distt. Raipur (CG)
2. State of Chhattisgarh Through the Collector, Raipur (CG)

---Respondents

For Appellants	: Shri Ram Kumar Tiwari, Advocate
For Respondent No.1	: Shri Shobhit Koshta, Advocate
For Respondent No.2/State	: Shri Vinod Netam, Panel Lawyer

Hon'ble Shri Justice Sanjay K. Agrawal**Order on Board****08.02.2021.**

1. This second appeal preferred by the appellant/defendant under Section 100 of CPC has been admitted for hearing on the following substantial question of law :-

“Whether the first appellate Court is justified in condoning the delay in filing the appeal and thereafter simultaneously granting the appeal on merits without admitting the appeal and without giving reasonable opportunity of hearing to the appellants/plaintiffs by recording the finding which is perverse to the record?”

[For the sake of convenience, the parties will herein-after be referred as per their status before the trial Court.]

2. The plaintiffs filed a civil suit for possession of suit land bearing

Khasra No.692 area 1.146 hectare and Khasra No.694 area 0.204 hectare situated at village Dhekuna, PH No.3 Tahsil Simga, Distt. Raipur, which was decreed by the trial Court, against which the defendant preferred an appeal before the first appellate Court under Section 96 of the CPC. The appeal so preferred came up for hearing before the first appellate Court along with application for condonation of delay on 16.9.2009. The first appellate Court firstly heard the application for condonation of delay as the appeal was barred by 8 years and 6 months and allowed the same and thereafter straightaway considered the merits of the matter and allowed the appeal by setting aside the judgment and decree passed by the trial Court. Against the said judgment and decree, the plaintiffs/appellants preferred the second appeal under Section 100 of the CPC, which has been admitted for hearing on the substantial question of law formulated as mentioned in opening paragraph of this judgment.

3. Learned counsel for the plaintiffs/appellants submits that the first appellate Court is unjustified in not following the procedure under Order 41 Rule 11 CPC after condoning the delay application and allowing the appeal finally, as such, the judgment and decree of the first appellate court so far as hearing the appeal on merits is bad in law and the same is liable to be set aside.

4. Per contra, learned counsel for the respondents support the judgment and decree passed by the first appellate Court.

5. I have heard learned counsel appearing for the parties, considered their rival contention and perused the record with utmost circumspection.

6. It appears from the face of the record that by the impugned judgment

and decree, the first appellate Court firstly decided the application for condonation of delay which was barred by limitation. The said application was allowed and the delay of 8 years and 6 months was condoned holding that sufficient cause has been shown in the application and thereafter further considered the appeal on merits and the appeal was also allowed on merits.

7. The first appellate Court on hearing the application for condonation of delay under Order 41 Rule 3A of the CPC along with Section 5 of the Limitation Act, allowed the application and condoned the delay. Once the delay is condoned, the appellate Court could have proceeded for hearing the appeal under Order 41 Rule 11 of CPC. If the appeal is not dismissed under Order 41 Rule 11 of the CPC, the first appellate Court should have fixed for hearing the matter under Order 41 Rule 12 of the CPC and under Order 41 Rule 14 of the CPC for publication and service of notice of day for hearing the appeal.

8. In the instant case, the first appellate Court has not followed the procedure under Order 41 Rule 11 to Rule 16 of the CPC and immediately after condoning the delay, the appeal was allowed.

9. The High Court of Madhya Pradesh in the matter of **Chhitu v. Mathuralal and Ors.**¹ held that till the date, delay is not condoned, it cannot be treated that there is an 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

1) AIR 1981 MP 13

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 is on 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.”

10. The decision of MP High Court in the matter of ***Chhitu (Supra)*** was followed by this Court in ***Shaitan Mal Khatri v. Milku***² and it was held as under:

“**16.** Thus, in the considered opinion of this Court, the first appellate Court has committed illegality in; firstly in hearing the appeal on merits without considering the application for condonation of delay finally under Order 41 Rule 3A(2) of the CPC and, thereafter, dismissing the appeal on merits without deciding the question of limitation finally, which is clearly prohibited by the aforesaid provisions of law. Thus, substantial question of law is answered accordingly in favour of the appellant/defendant and in consequence thereof, appeal deserves to be remitted to the First Appellate Court for deciding afresh on the question of limitation only and, therefore, there is no need to answer the other two substantial questions of law as they relate to merit of the case.”

2) AIR 2014 Chh 143

11. The Full Bench of Madhya Pradesh High Court in the matter of **Maniram and Ors. v. Fuleshwar and Ors.**³ held that only after the application for condonation of delay filed under Order 41 Rule 3A of the CPC or Section 5 of the Limitation Act is decided, the appeal can be disposed of and decided in terms of Order 41 Rule 11 or Rule 13 CPC.

12. Thus, in the considered opinion of this Court, the first appellate Court has committed illegality in not following the procedures envisaged under Order 41 Rule 11, 13, 14 and 16 of the CPC after condoning the delay in filing the appeal. Thus, judgment and decree passed by the first appellate Court so far as merits of the matter is considered, is hereby set aside the matter is remitted to the first appellate court for hearing and disposal of the appeal on merits in accordance with law, within 45 days from the date of receipt of a copy of this order. The first appellate Court will hear the appeal firstly under Order 41 Rule 11 of the CPC and then proceed further. The parties to appear before the first appellate Court on **22.02.2021**. Disposal of the appeal will be intimated to this Court through the Registry.

13. The second appeal is allowed to the extent indicated herein-above. No cost(s).

Sd/-
(**Sanjay K. Agrawal**)
JUDGE

Bini

3) 1996 MPLJ 764