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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RSA 133/2019 & CM APPL. 30572/2019, CM APPL. 33032/2022

RAJ KUMAR

..... Appellant

Through: Mr.Kumar Anish Ali,
Mr.Zubair Ali, Mr.Yassar Wali and M.
Rana, Advs.

versus

GHANSHYAM DAS GUPTA (DECEASED) THR LRS

..... Respondents

Through: Ms.Prachi Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T (O R A L)

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01.08.2022

1. This appeal, under Section 100 of the Code of Civil Procedure, 1908 (CPC) arises out of RCA 49/2018, which was dismissed by the learned Additional District Judge, (“the learned ADJ”) *vide* the impugned judgment dated 9th April, 2019, on the ground of delay, by dismissing the application preferred by the appellant for condonation of delay in filing the appeal.

2. That a second appeal, under Section 100 of the CPC, does lie against a first appellate order, which dismisses an application for condonation of delay and consequently rejects the first appeal as time barred, stands authoritatively decided by a Full Bench of the High



Court of Madhya Pradesh in *Maniram v. Mst. Fuleshwar*¹, which follows the decisions of the Supreme Court in *Melaram v. Income Tax Commissioner*², *Raja Kulkarni v. State of Bombay*³ and *Rani Chaudhary v. Lt. Col. Suraj Jit Chaudhary*⁴. Paras 8, 16, 17, 18 and 19 to 21 of the report in *Maniram*¹ are reproduced thus:

“8. The basic point that, therefore, arises for consideration is as to what is the effect of dismissal of an appeal consequent to dismissal of an application under section 5 of the Limitation Act and/or an application under Order 41, Rule 3A of the Civil Procedure Code and whether the order dismissing the appeal in the above manner would amount to a decree in which there is merger of a decree of the trial Court and, therefore, an appeal under section 100, Civil Procedure Code would be competent?

16. In *Melaram & Sons v. Income Tax Commissioner*², the Supreme Court while interpreting the provisions of sections 31 and 33 of the Income Tax Act held after considering various decisions:

“On the principles laid down in these decisions, it must be held that an appeal presented out of time is an appeal, and an order dismissing it as time-barred is one passed in appeal.”

In the above case, the observations in *Nagendra Nath v. Suresh Chandra*⁵, have been quoted regarding the construction of the word “appeal” as below:—

“There is no definition of *appeal* in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to

¹ 1996 MP LJ 764 (FB)

² AIR 1956 SC 367

³ AIR 1954 SC 73

⁴ AIR 1982 SC 1397

⁵ AIR 1932 PC 165



set-aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent.”

Thus, even if an appeal is presented beyond the period of limitation and may, therefore, be held to be incompetent, still it is an appeal and an order of dismissal of such an appeal as time-barred is one passed in appeal.

17. In *Raja Kulkarni v. State of Bombay*³, it has been laid down that:

“Whether the appeal is valid or competent is a question entirely for the Appellate Court before whom the appeal is filed to determine and this determination is possible only after the appeal is heard, but there is nothing to prevent a party from filing an appeal which may ultimately be found to be incompetent, e.g., when it is held to be barred by limitation or that it does not lie before that Court or is concluded by a finding of fact under section 100 Civil Procedure Code. From the mere fact that such an appeal is held to be unmaintainable on any ground whatsoever, it does not follow that there was no appeal pending before the Court.”

18. In *Rani Chaudhary v. Lt. Col. Suraj Jit Chaudhary*⁴, *Melaram*²'s case (supra) was followed and it was observed:—

‘In the present case, the appeal was dismissed as barred by limitation. That it was an appeal even though barred by time is clear from *Mela Ram & Sons v. CIT*², where Venkatarama Ayyar, J., speaking for the Court, after referring to *Nagendra Nath Dey v. Suresh Chandra Dey*⁵, *Raja Kulkarni v. State of Bombay*³, and *Promotho Nath Roy v. W.A. Lee*⁶, held that “an appeal presented out of time is an appeal, and an order dismissing it as time-barred is one passed in appeal.” There can be no dispute then that in law what the respondent did was to file an appeal and that the order

⁶ AIR 1921 Cal. 415



dismissing it as time-barred was one disposing of the appeal.”

19. Thus, the dismissal of an appeal on the ground of limitation will nevertheless be an order in appeal even though there was no decision on merits and the effect of the order is, in fact, confirming the findings and judgment against which an appeal is preferred.

20. The above question was also considered by the Kerala High Court in the case of **Thambi v. Mathew**⁷. In the above case, various decisions of the Supreme Court were considered and it was held that dismissal of an appeal on the ground of limitation would amount to confirmation of decree of the trial Court on the merits of the case and the decision of the appellate Court would operate as *res judicata* on the question of title raised in the connected appeal. It has also been held therein after considering the decision of the Supreme Court in **Sheodan Singh v. Daryao Kunwar**⁸, that the decision of the trial Court gets merged in the appellate Court's decree even when the appeal is dismissed on a preliminary ground or as time-barred.

21. Reference may also be made to **Promotho Nath Roy v. W.A. Lee**⁶ wherein it is held that an order dismissing an appeal as barred by limitation after rejecting an application under section 5 of the Limitation Act to condone the delay in presentation was held to be one passed in appeal.”

3. This Court is in respectful agreement with the said decision.

4. Ms. Prachi Gupta, learned Counsel for the respondent did not seriously contest the maintainability of the present appeal. However, she submits that a second appeal under Section 100 of the CPC would lie only on substantial questions of law, which arise from the First Appellate order. The substantial questions of law which have been

⁷ AIR 1988 Ker. 48

⁸ AIR 1966 SC 1332



framed by the appellant in the present appeal are predicated on the order dated 2nd January, 2018 passed by the learned Civil Judge in Suit No. 98228/16. She reiterates that the substantial questions of law, in a Section 100 appeal preferred consequent to the dismissal of the first appeal on limitation, have necessarily to emerge out of the order of the First Appellate Court and that the appellant could not seek to urge questions of law arising out of the order of the learned Trial Court.

5. This submission, as urged by Ms. Gupta may be debatable. A Constitution Bench of the Supreme Court, in *Sheodan Singh*⁸ examined in considerable detail the effect of the decision by a First Appellate Court rejecting the appeal on the ground of limitation, after refusing to condone delay. Though the controversy before the Supreme Court, in that case, was whether, in such circumstances, the order of the Trial Court could constitute *res judicata*, the findings of the Supreme Court as italicised hereinbelow in para 14 of the report, are of some relevance:

“14. This brings us to the main point that has been urged in these appeals, namely, that the High Court had not heard and finally decided the appeals arising out of Suits Nos. 77 and 91. One of the appeals was dismissed on the ground that it was filed beyond the period of limitation while the other appeal was dismissed on the ground that the appellant therein had not taken steps to print the records. It is therefore urged that the two appeals arising out of Suits Nos. 77 and 91 had not been heard and finally decided by the High Court, and so the condition that the former suit must have been heard and finally decided was not satisfied in the present case. Reliance in this connection is placed on the well-settled principle that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been



on the merits. Where, for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits would not be res judicata in a subsequent suit. But none of these considerations apply in the present case, for the Additional Civil Judge decided all the four suits on the merits and decided the issue as to title on merits against the appellant and his father. It is true that the High Court dismissed the appeals arising out of Suits Nos. 77 and 91 either on the ground that it was barred by limitation or on the ground that steps had not been taken for printing the records. Even so the fact remains that the result of the dismissal of the two appeals arising from Suits Nos. 77 and 91 by the High Court on these grounds was that the decrees of the Additional Civil Judge who decided the issue as to title on merits stood confirmed by the order of the High Court. *In such a case, even though the order of the High Court may itself not be on the merit the result of the High Court's decision is to confirm the decision on the issue of title which had been given on the merits by the Additional Civil Judge and thus in effect the High Court confirmed the decree of the trial court on the merits, whatever may be the reason for the dismissal of the appeals arising from Suits Nos. 77 and 91. In these circumstances though the order of the High Court itself may not be on the merits, the decision of the High Court dismissing the appeals arising out of Suits Nos. 77 and 91 was to uphold the decision on the merits as to issue of title and therefore it must be held that by dismissing the appeals arising out of Suits Nos. 77 and 91 the High Court heard and finally decided the matter for it confirmed the judgment of the trial court on the issue of title arising between the parties and the decision of the trial court being on the merits the High Court's decision confirming that decision must also be*



deemed to be on the merits. To hold otherwise would make res judicata impossible in cases where the trial court decides the matter on merits but the appeal court dismisses the appeal on some preliminary ground thus confirming the decision of the trial court on the merits. It is well settled that where a decree on the merits is appealed from, the decision of the trial court loses its character of finality and what was once res judicata again becomes res sub-judice and it is the decree of the appeal court which will then be res judicata. But if the contention of the appellant were to be accepted and it is held that if the appeal court dismisses the appeal on any preliminary ground, like limitation or default in printing, thus confirming toto the trial court's decision given on merits, the appeal court's decree cannot be res judicata, the result would be that even though the decision of the trial court given on the merits is confirmed by the dismissal of the appeal on a preliminary ground there can never be res judicata. We cannot therefore accept the contention that even though the trial court may have decided the matter on the merits there can be no res judicata if the appeal court dismisses the appeal on a preliminary ground without going into the merits, even though the result of the dismissal of the appeal by the appeal court is confirmation of the decision of the trial court given on the merits. Acceptance of such a proposition will mean that all that the losing party has to do to destroy the effect of a decision given by the trial court on the merits is to file an appeal and let that appeal be dismissed on some preliminary ground, with the result that the decision given on the merits also becomes useless as between the parties. We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal."

(Emphasis Supplied)

6. The Supreme Court has, therefore, in the afore italicised passage from ***Sheodan Singh***⁸, held that, where a Trial Court disposes



of a suit on merits, and the first appeal is dismissed on limitation, the decision of the First Appellate Court must also be deemed to be on merits, inasmuch as it confirms the decision on merits returned by the Trial Court.

7. A possible sequitur to this may be that a second appeal, under Section 100, would be maintainable, on substantial questions of law which arise out of the decision of the Trial Court.

8. In the present case, however, one need not labour to that extent, as, the reasoning of the First Appellate Court, in rejecting the petitioner's application for condonation of delay, is *ex facie* perverse. As such, even if one were to restrict the scope of examination to the impugned order dated 9th April 2019, a case for interference does exist.

9. It is well settled that a perverse finding by a court below itself amounts to a substantial question of law⁹.

10. As such, this Court frames the following substantial question of law which arises for consideration in the present case:

“Whether the decision of the learned First Appellate Court, to refuse to condone the delay on the part of the appellant in preferring the First Appeal and, thereby, denying the appellant his right to First

⁹ *Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd.*, AIR 1962 SC 1314; *Krishnan v. Backiam*, 2007 (12) SCC 190; *Kulwant Kaur v. Gurdial Singh Mann*, 2001 (4) SCC 262



Appeal, is not perverse?”

11. The perversity in the impugned order is clear from the following passage, which contains the reasoning of the learned ADJ:

“In the present case, as already mentioned, in support of the application, along with the application, the applicant did not file any document and only after arguments were concluded and the matter was reserved for order, the applicant handed over copies of some documents to the court staff. A perusal of the said documents reveals that during the period 07.3.1998 to 17.3.1998 and subsequently, during the period 05.4.1998 to 09.4.1998, much before the institution of the suit against him, the applicant was under treatment at the St. Stephen's Hospital, Delhi. The said documents further reveal that during the period 10.6.2017 to 14.6.2017, in connection with heart ailment, the applicant remained under treatment at Max Super Speciality Hospital, Shalimar Bagh, and subsequently, on 05.7.2017, 09.8.2017, 28.11.2017, 02.4.2018 and 11.3.2019 the applicant consulted Dr. N.C. Krishnamani at Fortis Hospital, Shalimar Bagh as Out Door Patient. No document has been filed on behalf of the applicant to show that after expiry of prescribed period of limitation, that is during the period 08.02.2018 to 23.02.2018, due to sickness the applicant was confined to bed, or he was admitted in any hospital, or was otherwise incapable to look after day to day affairs, which prevented him from preferring the appeal during the said period.”

12. The afore-extracted passage from the impugned order speaks for itself. The learned ADJ has acknowledged, elsewhere in the impugned order, that the delay in filing the appeal was only of 16 days. Though learned Counsel for the respondent joins issue on this, as this is a second appeal preferred by the appellant, the Court has to proceed on the premise that the delay was of 16 days. That being so,



the afore-extracted passage from the impugned order of the learned ADJ acknowledges the fact that the appellant was under treatment for cardiac ailments and in fact consulted the cardiologist on 5th July, 2017, 9th August, 2017, 28th November, 2017, 2nd April, 2018 and 11th March, 2019. The learned ADJ has, nonetheless, refused to condone delay on the ground that there was no proof of sickness during the period 8th February, 2018 to 23rd February, 2018, which was the period of delay in preferring the appeal.

13. The right of first appeal is a sanctified statutory right. It is not to be lightly denied. Where the delay is not unconscionable, and is on the ground of indisposition, ordinarily, the court should be lenient in its approach.

14. This Court is of the view that the decision of the learned ADJ to refuse to condone the delay of 16 days in preferring the appeal does not take into account all the circumstances which were cited to justify the delay and is, therefore, perverse.

15. Learned Counsel for the respondent very fairly submitted that the matter may be remanded to the learned ADJ for considering the appeal of the appellant on merits.

16. Accordingly, the substantial question of law framed hereinabove is answered in favour of the appellant. The impugned order is quashed and set aside. RCA 49/2018 shall stand remanded to the learned ADJ for consideration on merits.



17. The appeal stands allowed accordingly, with no orders as to costs.

C.HARI SHANKAR, J

AUGUST 1, 2022/kr

