(2008) 11 AHC CK 0164

Allahabad High Court

Case No: None

Smt. Geeta Bala Goyal and Another		APPELLANT
	Vs	
Kailash Chandra and Others		RESPONDENT

Date of Decision: Nov. 18, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100, 109, 2, 47
- Constitution of India, 1950 - Article 226
- Limitation Act, 1963 - Section 2, 4, 5

Citation: (2009) 1 AWC 573

Hon'ble Judges: Tarun Agarwala, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Tarun Agarwala, J.

Heard Shri Murlidhar, the learned senior counsel assisted by Shri AJay Kumar Sharma, the learned Counsel for the petitioners and Sri Nirvikar Gupta, the learned Counsel for the contesting respondent. With the consent of the parties, the writ petition is decided finally without calling for a counter-affidavit.

2. It transpires that a suit was decreed by a judgment dated 25.3.1993 and the same was put in execution. When the petitioners came to know about the execution of the decree, they filed an objection u/s 47 of the C.P.C. which is pending consideration. Notwithstanding the aforesaid, the petitioners were advised to file an appeal and, accordingly on 6.4.2005, an appeal was filed under Order XLI, Rule 1 of the C.P.C. along with an application u/s 5 of the Limitation Act to condone the delay in filing the appeal. The decree holders filed their abjections, and subsequently, the appellate court by an order dated 7.8.2008, rejected the application for the condonation of the delay. The petitioners, being aggrieved by the rejection of the

application for the condonation of delay, filed u/s 5 of the Limitation Act, has filed the present writ petition under Article 226 of the Constitution of India.

3. A preliminary objection was raised with regard to the maintainability of the writ petition. The learned Counsel for the respondents submitted that an order passed on an application for condoning the delay is in fact an order passed on the appeal which amounts to a decree, and, therefore, the said order is appealable u/s 100 of the C.P.C. and consequently the writ petition filed under Article 226 of the Constitution of India was not maintainable. On the other hand, the learned Counsel for the petitioner submitted that an order passed on the application u/s 5 of the Limitation Act was not an order which would amount to a decree contemplated u/s 2(2) of the C.P.C. and such an order was revisable and that a writ petition could also be filed under Article 226 of the Constitution of India.

4. In support of his submission, the learned Counsel for the petitioners placed reliance upon a decision of the Full Bench of the Calcutta High Court in Mamuda Khateen and Others Vs. Beniyan Bibi and Others, wherein it was held that the order rejecting a time barred memo of appeal consequent upon the refusal to condone the delay u/s 5 of the Limitation Act, was neither a decree nor an appealable order, and therefore, such an order was revisable. The Full Bench further found that the said order was not a decree contemplated u/s 2(2) of the C.P.C. The learned Counsel also placed reliance upon a decision of the Punjab and Haryana High Court in Des Raj Vs. Om Parkash and Another, which has considered the decision of the Full Bench of the Calcutta High Court as well as the decision of the Full Bench of the Orissa High Court in Ainthu Charan Parida Vs. Sitaram Jayanarayan Firm and Another, The reasoning adopted by the Full Bench of the Orissa High Court is based on the reasoning given by the Calcutta High Court.

5. In the light of the aforesaid judgments, the learned Counsel for the petitioners submitted that the present writ petition under Article 226 of the Constitution of India is maintainable since the order was not a decree, and therefore, was not appealable u/s 100 of the C.P.C.

6. In my opinion, the submissions of the learned Counsel for the petitioners is not correct inasmuch as the Full Bench of the Calcutta High Court has been squarely overruled by the Supreme Court in the case of Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others, wherein the Supreme Court has held that the Calcutta High Court failed to notice the earlier judgments of the Supreme Court.

7. In Raja Kulkarni v. State of Bombay AIR 1954 SC 73, the Court held as under:

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 u/s 100 of the 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. Article 182 (2) of the Indian Limitation Act prescribes three years period of limitation for the execution of a decree or order to run from the date of the final decree or order of the appellate court "when there has been an appeal". The Privy Council construed the latter phrase to mean that any application by a party to the appellate court to set aside or revise a decree or order of a Court subordinate thereto is an ''appeal'' within the meaning of the above provision, even though it is irregular or incompetent, or the persons affected by the application to execute were not parties or it did not imperil the whole decree or order.

8. The Supreme Court held that an application made by a party praying to set aside or revise a decision of the subordinate court was an appeal within the ordinary acceptance of the term and that it was no less an appeal because it was irregular or incompetent for whatever reason.

9. In Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, the Court held-

an order dismissing an application as barred by limitation after rejecting an application u/s 5, Limitation Act to excuse the delay in presentation was held to be one "passed on appeal" within the meaning of Section 109, Civil P.C. 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.

10. The Supreme Court held that an appeal presented out of time was an appeal and an order dismissing it as barred by time was an order passed on the appeal.

11. In Sheodan Singh Vs. Smt. Daryao Kunwar, . the Supreme Court held-

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.

12. Finally, the Supreme Court in the case of Shyam Sunder Sharma (supra) not only overruled the Full Bench decision of the Calcutta High Court but also repelled the contention that an order dismissing the application for condonation of delay was not a decree. Para Nos. 11 and 12 of the said judgment is quoted hereunder:

11. Learned Counsel for the appellant relied on the Full Bench decision of the Calcutta High Court in Mamuda Khateen v. Beniyan Bibi to contend that an order rejecting a time-barred memorandum of appeal consequent upon refusal to

condone the delay in filing that appeal was neither a decree nor an appealable order. On going through the said decision it is seen that though the Full Bench referred to the divergent views on that question in the Calcutta High Court prior to the rendering of the decision of this Court in Mela Ram and Sons it had not considered the decisions of this Court in Raja Kulkarni and in Mela Ram and Sons in coming to that conclusion. In fact it is seen that there was no discussion on that aspect as such, though there was a reference to the conflict of views in the decisions earlier rendered by the Calcutta High Court. Since the ratio of that decision runs counter to the principle laid down by this Court in Mela Ram and Sons obviously the same could not be accepted as laying down as correct law.

12. Learned Counsel placed reliance on the decision in Ratansingh v. Vijaysingh rendered by two learned Judges of this Court and pointed out that it was held therein that dismissal of an application for condonation of delay would not amount to a decree and, therefore, dismissal of an appeal as time-barred was also not a decree. That decision was rendered in the context of Article 136 of the Limitation Act, 1963 and in the light of the departure made from the previous position obtaining under Article 182 of the Limitation Act, 1908. But we must point out with respect that the decisions of this Court in Mela Ram and Sons and Sheodan Singh were not brought to the notice of their Lordships. The principle laid down by a three-Judge Bench of this Court in Mela Ram and Sons and that stated in Sheodan Singh was, thus not noticed and the view expressed by the two-Judge Bench, cannot be accepted as laying down the correct law on the question. Of course, their Lordships have stated that they were aware that some decisions of the High Court have taken the view that even rejecting an appeal on the ground that it was presented out of time is a decree within the definition of a decree obtaining in the Code. Thereafter, noticing the decision of the Calcutta High Court above referred to, Their Lordships in conclusion apparently agree with the decision of the Calcutta High Court. Though the decision of the Privy Council in Nagendra Nath Dey v. Suresh Chandra Dey was referred to, it was not applied on the ground that it was based on Article 182 of the Limitation Act, 1908, and there was a departure in the legal position in view of Article 136 of the Limitation Act, 1963. But with respect, we must point out the decision really conflicts with the ratio of the decisions in Mela Ram and Sons and Sheodan Singh and another decision of this Court rendered by two learned Judges in Rani Choudhury v. Lt. Col. Suraj Jit Choudhury, In Essar Constructions v. N. P. Rama Krishna Reddy brought to our notice, two other learned Judges of this Court left open the question. Hence, reliance placed on that decision is of no avail to the appellant.

13. Apart from the aforesaid decision, the Full Bench of the Kerala High Court in Thambi Vs. Mathew and Another, has held that an appeal presented beyond the limitation was nonetheless an appeal in the eyes of law for all purposes and an order dismissing the appeal was a decree which would be subject to a second appeal. The Kerala High Court also explained that the incorporation of the provision

of Rule 3 (A) of Order XL1 of the C.P.C. as introduced by the Amending Act 104 of 1976 did not in any manner affect that principle and that an appeal registered under Rule 9 of Order XLI had to be disposed of according to law and that the dismissal of the appeal by reason of delay in its presentation was in substance a confirmation of the decree appealed against which was appealable.

14. The learned Counsel for the respondents has also placed a decision of this Court which was given as far back in the year 1884 in the case of Gulab Rai v. Mangli Lal ILR 1884 All 42, wherein Mahmood, J. held that the CPC provided no separate provision which would allow the appellate court to reject a memorandum of appeal on the ground of it being barred by limitation. The Court held:

In the CPC there is no separate provision which allowed the appellate court to "reject" a memorandum of appeal on the ground of its being barred by limitation. Section 543 is limited to cases in which the memorandum of appeal is not drawn up in the manner prescribed by the Code, and it is only by applying Section 54 (c), mutatis mutandis, (as provided by the last part of Section 582), to appeals that the Code can be understood to make provision for rejection of appeals as barred by limitation. However, Section 4 of the Limitation Act clearly lays down that every "appeal presented after the period of limitation prescribed therefore shall be dismissed". It is therefore clear that the order of the District Judge in this case must be taken to be one which falls under the definition of "decree" within the meaning of Section 2 of the Code, as the order, so far as the Judge was concerned, disposed of the appeal.

15. In view of the aforesaid decisions of the Supreme Court and the Full Bench of the Kerala High Court which has also been approved by the Supreme Court in Shyam Sunder''s case (supra), this Court holds that the order rejecting an application u/s 5 of the Limitation Act or an application under Order XLI, Rule 3 (A) of the C.P.C. is in fact an order on an appeal, and therefore appealable u/s 100 of the C.P.C.

16. In view of the aforesaid, the present writ petition is not maintainable and is dismissed. It would be open to the petitioner to take such legal recourse as required under the law.