
Smt. Bhagwati Devi and Others Vs Smt. Angoori Devi and Others

First Appeal From Order No. 1371 of 1999

Court: Allahabad High Court

Date of Decision: July 26, 2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 22 Rule 10, Order 40 Rule 1, Order 41 Rule 19, Order 41 Rule 21, Order 41 Rule 3A#Government of India Act, 1915 " Section 108#Limitation Act, 1908 " Article 182#Limitation Act, 1963 " Article 136, 31, 5

Citation: (2011) 7 ADJ 766 : (2011) 5 AWC 5322

Hon'ble Judges: Shishir Kumar, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Shishir Kumar, J.

The present appeal from order has been filed against the judgment and order dated 5.10.1999, by which the application

for restoration as well as the application u/s 5 of the Limitation Act has been rejected.

2. The facts arising out of the present appeal are that a partition Suit No. 50 of 1961 was filed by the Respondent No. 1 Smt. Angoori Devi. The

said suit was decreed. The final decree was also prepared on 23.10.1981. The said decree has attained finality and has not been challenged in any

Court of law. During pendency of suit, a receiver was appointed, which was discharged on an application made by Smt. Angoori Devi vide order

dated 13.3.1984. After disposal of the suit, the Appellant against order dated 13.3.1984 preferred Misc. Appeal No. 293 of 1994 under Order

43, Rule 1(s) CPC which was dismissed on 17.4.1996 for want of prosecution. Thereafter, a restoration application with an application for

condonation of delay was filed, which was rejected by order dated 5.10.1999 by rejecting delay condonation application. This order has been

challenged before this Court.

3. A preliminary objection was taken on behalf of the Respondents that Misc. Appeal No. 293 c-f 1994, filed before District Judge, under Order

43 Rule 1(s) itself was not maintainable because under said provision only appeal provided is against the order passed under Order 40 Rule 1/4

CPC The order dated 13.3.1984, challenged in misc. appeal, was not an order under Order 40 Rule 1/4 CPC It was an order discharging

receiver after disposal of the suit, therefore, the appeal before District Judge itself was not maintainable. The appeal filed before District Judge was

an appeal under Order 43, Rule 1(s) Code of Civil Procedure., therefore, no further appeal is contemplated against such order. Order 43 is

enacted u/s 104 Code of Civil Procedure. Section 104(2) CPC creates a bar for institution of further appeal against an order passed in an appeal

under Order 43 Code of Civil Procedure. because appeals against Order 43 are appeal against order and not against decree, hence the bar u/s

104(2) CPC will apply. The misc. appeal was filed by incompetent person who was having no power of attorney of the Appellants. The District

Judge has also recorded a] finding that even the vakalatnama of the appeal was not on record and, therefore, the appeal itself is incompetent. The

Appellant has already died in 1991, hence no restoration application was maintainable. Once appeal against final order i.e. under Order 43 Rule

1(s) CPC is not permitted and barred by Section 104(2) Code of Civil Procedure, no appeal will lie before this Court against an order rejecting

delay condonation application in support of restoration application filed in such appeal.

4. Learned Counsel for the Respondents has placed reliance upon paras 39 and 43 of the judgment in Shah Babulal Khimji Vs. Jayaben D. Kania

and Another, which is being quoted below:

39. With due deference to the Hon"ble Judges we are of the opinion that the decision of the Allahabad High Court on this point is based on a

serious" misconception of the legal position. It is true that Section 104 was introduced by the Code of 1908 and the aforesaid Section, as we have

already indicated, clearly saved the Letters Patent jurisdiction of the High Court. From this, however, it does not necessarily follow that the

restriction that there is no further appeal from the order of a Trial Judge to a larger Bench would be maintainable or permissible. In the first place,

once Section 104 applies and there is nothing in the Letters Patent to restrict the application of Section 104 to the effect that even if one appeal lies

to the Single Judge, no further appeal will lie to the Division Bench. Secondly, a perusal of Clause 15 of the Letters Patent of the Presidency High

Courts and identical clauses in other High Courts, discloses that there is nothing to show that the Letters Patent ever contemplated that even after

one appeal lay from the subordinate Court to the Single Judge, a second appeal would again lie to a Division Bench of the Court. All that the

Letters Patent provides for is that where the Trial Judge passes an order, an appeal against the judgment of the said Trial Judge would lie to a

Division Bench. Furthermore, there is an express provision in the Letters Patent where only in one case a further or a second appeal could lie to a

Division Bench from an appellate order of the Trial Judge and that is in cases of appeals decided by a Single Judge u/s 100 of the Code of Civil

Procedure. Such a further appeal would lie to a Division Bench only with the leave of the Court and not otherwise. The relevant portion of Clause

15 of the Letters Patent may be extracted thus:

And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras, Bombay, Fort William in Bengal from the

judgment.. of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and

that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court

or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made (on or after the first day of February, 1929) in

the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the

superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal.

43. Thus, in these two cases it was clearly held that where a Trial Judge had passed an order in an appeal against an order passed by the district

judge under order 43 Rule 1, a further appeal under the Letters Patent was not maintainable. This view is fully supported by the express language

in which Clause 15 of the Letters Patent has been couched, as referred to above. Thus the latter decision of the Allahabad High Court in Ram

Sarup's case (supra) was clearly wrong in holding that an appeal under the Letters Patent would lie even against an appellate order of the Trial

Judge passed under Order 43, Rule 1 even though it was prohibited by Section 104 (2) of the Code.

5. Further reliance has been placed upon paras 3,4 and 5 of the judgment in Rameshwar Nath Sinha Vs. Rajendra Prasad Dwivedi, which show

that against a final order passed in a revision, no appeal lies. Even a revision will not lie in view of the decision of the Full Bench of this Court

reported in Jupiter Chit Fund (Pvt.) Ltd. Vs. Dwarka Dishes Dayal and Others, . As such, it is not conceivable that even though an appeal does not

lie against the final order in the revision, an appeal would lie against an interlocutory order disposing of an application under Order 22, Rule 10

CPC in a revision.

6. Further reliance has been placed upon paras 42 and 43 of the judgment in Mohd. Tahir Khan v. Mohd. Yunus Khan and Ors. 2006 (4) ADJ

728, which is being quoted below:

42. Now suppose an Appellate Court while dealing with an Appeal filed u/s 104(1) read with Order XLIII, Rule 1 of the CPC against an order

passed by the Trial Court in a pending Suit, passes an order, and such order passed by the Appellate Court in such an Appeal is covered under

any of the Clauses (a) to (w) of Rule 1 of Order XLIII of the Code of Civil Procedure, then the question arises as to whether any further Appeal

against such an order of the Appellate Court may be filed u/s 104(1) read with Order XLIII, Rule 1 of the Code of Civil Procedure.

43. The answer to the said question is provided by Sub-section (2) of Section 104 of the CPC which lays down that ""no Appeal shall lie from any

order passed in Appeal under this Section.

Learned Counsel for the Respondents has also placed reliance upon various other judgments i.e.-

(1) Kaptan Singh and Ors. v. Jagdish Singh and Anr., 2008 (3) ADJ 275. Relevant is paras 7 to 12.

(2) Subedar and Ors. v. Ram Kunwari and Ors. 1984 All LJ 145. Relevant is para 7.

(3) P.S. Sathappan (Dead) by Lrs. Vs. Andhra Bank Ltd. and Others, Relevant is paras 113 and 150.

(4) Chandi Prasad and Others Vs. Jagdish Prasad and Others,

(5) Resham Singh Pyara Singh Vs. Abdul Sattar,

7. On the other hand, Learned Counsel for the Appellants has submitted that order rejecting application u/s 5 of Limitation Act filed in support of

restoration application amounts to rejection of appeal, as such, the appeal itself is maintainable. He has placed reliance upon a judgment in Shyam

Sundar Sarma Vs. Pannalal Jaiswal and Others, and P.S. Sathappan (Dead) by Lrs. Vs. Andhra Bank Ltd. and Others, Section 96 CPC creates

a substantive right for appeal from every decree. The procedure of such appeals is provided under Order 41 CPC Order 41 Rule 19 provides for

readmission of appeal dismissed in default. Order 41 Rule 21 provides for rehearing of appeal, where the same has been decided ex parte. These

are analogous to provisions of Order 9 Rule 9 and Order 9 Rule 13 CPC which respectively provided for restoration of suit dismissed in default

and for setting aside an ex parte decree to enable the decision on merit after hearing the Defendants. Against the order of the trial Court under

Order 9 Rule 9 or 13 CPC or order of appellate Court under Order 41 Rule 19 or 21 rejecting restoration of suit or refusing to readmit and

rehear, an appeal can be preferred u/s 104 CPC read with Order 43 Rule (1)(c) or (1)(d) or (1)(t) Code of Civil Procedure., as the case may be.

Section 104 (2) provides that no appeal shall lie from any order passed in appeal under this Section. Thus a second appeal is prohibited against the

appellate order. Section 106 CPC provides that an appeal against an order made by trial Court shall lie to the Court to which an appeal would lie

from the decree in the suit and if the order is made in exercise of appellate jurisdiction that appeal would lie to High Court.

8. As regards the preliminary objection raised on behalf of the Respondents regarding maintainability of the appeal, Learned Counsel for the

Appellants submits that order impugned has been passed rejecting application u/s 5 of the Limitation Act. The misc. appeal which was sought to be

readmitted was itself an appeal under Order 43 Rule 1(s) CPC and the order refusing to readmit the same is not appealable in view of Section

104(2). Learned Counsel for the Appellants submits that if the argument of the Respondents is accepted, then word ""appeal"" appearing in Clause

(t) of Rule (1) of Order 43 must be read as ""appeal not being an appeal against an order"" or ""appeal against original decree"". It is settled in law that

while reading a provision no word should be added or ignored and plain meaning should be given to the words used in the provision. Further,

Clause (t) relates to any order passed by appellate Court, hence necessarily an appeal against it will lie in the nature of appeal to second highest

appellate authority, which is clear from provisions of Section 106. Clause (t) of Order 43 Rule 1(1) covers all appeals whether filed under Sections

96 and 100 or 104 which is apparent from the scheme of Order 43 where rejection of restoration application in case of suits by Clause (c), (d)

and (n) has been made appealable in a case open to appeal, but no such limitation has been placed in Clause (t) that said appeal is confined only to

cases open to further appeal. The restoration proceeding are not in continuation of appeal, which has already been concluded and stand disposed

off. The restoration application is independent and separate proceeding. There is no merger of orders passed in appeal and the orders passed on

restoration application. The cases cited by Respondents is not applicable to the present case, therefore, Learned Counsel for the Appellants

submits that appeal against Order 43 Rule 1(t) is maintainable being saved by Section 104(1) and Section 104(2) do not apply to it. He has placed

reliance upon paras 9, 10 and 12 of the judgment of the apex Court in Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others, which is being

quoted below:

9. The specific question involved, came to be considered by this Court in Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, This

Court held that an appeal presented out of time is an appeal and an order dismissing it as time barred is one passed in an appeal. This Court

referred to and followed the view taken by the Privy Council and by this Court in the two respective decisions above referred to. This Court

quoted with approval the observations of Chagla C.J. in K.K. Porbunderwalla Vs. Commissioner of Income Tax, Bombay City, to the following

effect:

....although the Appellate Assistant Commissioner did not hear the appeal on merits and held that the appeal was barred by limitation his order was

u/s 31 and the effect of that order was to confirm the assessment which Had been made by the income tax Officer.

In Sheodan Singh Vs. Smt. Daryao Kunwar, rendered by four learned Judges of this Court, one of the questions that arose was whether the

dismissal of an appeal from a decree on the ground that the appeal was barred by limitation was a decision in the appeal. This 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.

In *The Board of Revenue, Madras Vs. Raj Brothers Agencies*, this Court approved the decision of the Madras High Court which had applied the

principle stated in *Messrs Mela Ram and Sons (supra)*.

10. The question was considered in extenso by a Full Bench of the Kerala High Court in *Thambi v. Mathew* 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 alongwith 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. Learned Counsel placed reliance on the decision in *Ratansingh v. Vijaysingh and Ors.* (2001) 1 SCC 469 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 *Messrs Mela Ram and Sons* and *Sheodan Singh (supra)* were not brought to the notice of

their Lordships. The principle laid down by a three Judge Bench of this Court in *M/s. Mela Ram and Sons (supra)* and that stated in *Sheodan*

Singh (Supra) 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 Courts 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 Dew. Suresh Chandra Dev (supra) 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 that the decision really conflicts with the ratio of the decision in Messrs Mela and

Sons and Sheodan Singh (supra) and another decision of this Court rendered by two learned Judges in Rani Choudhury Vs. Lt.-Col. Suraj Jit

Choudhury, In M/s. Essar Constructions Vs. 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.

9. Further reliance has been placed upon para 4 of the judgment in Umardeen v. Additional District Judge, Muzaffarnagar and Ors. 2007 (10)

ADJ 586, which is being quoted below:

4. The same view was followed by a Full Bench of Orissa High Court in Ainthu Charan Parida Vs. Sitaram Jayanarayan Firm and Another, The

Apex Court in APE Belliss India Ltd. Vs. Union of India and Others, approved if the reasoning of the Full Bench of Calcutta High Court in

Mamuda Khateen (Supra) that when an appeal is barred by limitation, the appeal cannot be admitted at all until the application u/s 5 of the Indian

Limitation Act is allowed and until then the appeal petition even if filed, will remain in limbo. If the application is dismissed the appeal petition

becomes otiose and the order rejecting the memorandum of appeal in such circumstances is merely an incidental order and is not a decree. It thus

appears that the order impugned in the revision rejecting the application u/s 5 of the Limitation Act had sealed the fate of the application under

Order 9, Rule 13, Code of Civil Procedure. The order that would subsequently have to be passed dismissing the application under Order 9, Rule

13, CPC would be a mere consequential and incidental order. The order rejecting the application u/s 5 is the main order in such a case and the

rejection of the application u/s 5 of the Limitation Act tantamounts to the rejection of the application under Order 9, Rule 13 Code of Civil

Procedure. The order was therefore appealable under Order 43, Rule 1 (Cal), Code of Civil Procedure

10. He has further placed reliance upon a judgment in Smt. Geeta Bala Goyal and Anr. v. Kailash Chandra and Ors. 2009 (1) ADJ 350. Taking

support of the aforesaid judgment, he has submitted that the order rejecting an application u/s 5 of the Limitation Act or an application under Order

41 Rule 3(A) CPC is in fact an order on an appeal, and therefore the said order is appealable u/s 100 Code of Civil Procedure

11. In such circumstances, Learned Counsel for the Appellants submits that appeal filed by the Appellants is maintainable and it has to be heard on

merits.

12. I have considered the submissions of the parties and perused the record. From the record it appears that the Suit No. 50 of 1961 was filed by

the Respondent No. 1 and that was decreed in the year 1981. It also appears that the judgment has become final. An order was passed on

13.3.1984 discharging the appointment of the receiver. Against that order, an appeal was preferred under Order 43 Rule 1(s) Code of Civil

Procedure, that was dismissed on 17.4.1996. Then, a delayed restoration application alongwith an application for condonation of delay was filed

to readmit the misc. appeal. The application u/s 5 was rejected on 5.10.1999. Therefore, this appeal from order has been filed against the order

dated 5.10.1999 under Order 43 Rule 1(t) Code of Civil Procedure. From the perusal of the various provisions it appears that this appeal is not

an intra Court appeal or Letters Patent Appeal. This is an appeal under the provisions of CPC i.e. under Order 43 Rule 1(t) CPC read with

Section 104 Code of Civil Procedure., hence any law concerning Letters Patent Appeal or appeal u/s 96 CPC shall not apply. The appeal against

decree are filed under Order 41 read with Section 96 CPC The present appeal is not an appeal arising out of Section 96 CPC or under Order 41

Code of Civil Procedure., but it is an appeal under Order 43 Rule 1 read with Section 104 CPC Under Order 43 and Order 42 the procedure of

Order 41 has been made applicable, but it does not mean that it is an appeal under Order 41 or 42 CPC The procedure has been made

application only ""so far as may be"".

13. As regards the contention of the Appellants, the case law cited on behalf of the Respondents shows that bar u/s 104(2) CPC shall apply and

appeal shall be barred. Further, it has been held in para 5 of the judgment in Rameshwar Nath Sinha Vs. Rajendra Prasad Dwivedi, that in case

no appeal lies against the main order, then no appeal shall lie against an interlocutory order, deciding certain applications.

14. As regards the contention raised by the Appellants placing reliance upon supreme Court judgment in Shyam Sunder Sarma's case (supra), in

that case the appeal was dismissed against an ex parte decree as time barred by rejecting application for condonation of delay. In that case

supreme Court has held that such dismissal when it confirms the decision of the trial Court on merits, itself amounts to the appeal being heard and

finally decided on merits whatever may be the ground for dismissal of appeal. From the perusal of the record it appears that this appeal was under

Order 43 Rule 1(s), therefore, Section 104(2) is attracted and no further appeal will lie. The objection taken by the Respondents to this effect that

it was a misc. appeal before District Judge under Order 43 Rule 1(s), as the said appeal itself was not maintainable, therefore, any further appeal

cannot be held to be maintainable in view of the judgment of Rameshwar Nath Sinha (supra) in paras 4 and 5 of which this Court has observed

that effect of legal position would be that appeals under Order 43 Rule 1(1) can logically be filed only if an order under Rule 10 of Order 22 is

passed in a suit pending trial. No such appeal would lie against an order under Rule 10 of Order 22 in a pending appeal on account of the bar

created u/s 104(2) CPC Further, Court has observed that against a final order passed in a revision, no appeal lies. Even a revision will not lie in

view of the decision of the Full Bench of this Court reported in AIR 1979 Add. 218. As such, it is not conceivable that even though an appeal

does not lie against the final order in the revision, an appeal would lie against an interlocutory order disposing of an application under Order 22,

Rule 10 CPC in a revision. Order 43 Rule 1 provides for an appeal from certain orders under the provisions of Section 104 CPC Thus appeals

under Order 43 Rule 1 are appeals under the provisions of Section 104 CPC Section 104(2) creates a bar against filing an appeal against an order

passed in appeal under that Section. In other words, if an order under Order 22 Rule 10 CPC is passed in an appeal under the provisions of

Section 104, no further appeal against that order would lie in view of the bar created u/s 104(2) Code of Civil Procedure

15. The appeal filed before District Judge was an appeal under Order 43 Rule 1(s), therefore, no further appeal will lie. Learned Counsel for the

Appellants is not able to show from the record or judgment that appeal filed by the Appellants before District Judge was not under Order 43 Rule

1(s). As regards reliance placed upon judgment of the apex Court in P.S. Sathappan" case (supra), that was a case in which the apex Court was

considering regarding the applicability of the Letters Patent Appeal. In that context the Apex Court has said in paras 144 and 145 that the bar u/s

104 (2) would not apply if an appeal was provided in any other law for the time being in force. The Court has further said that an appeal permitted

by ""any other law for the time being in force"" will not be hit by Section 104(2). Section 104(1) CPC expressly saves a Letters Patent Appeal and

in that context analyse Section 104 CPC Sub-section (1) of Section 104 CPC provides that an appeal from orders enumerated under Sub-section

(1) which contemplates an appeal from the orders enumerated therein, as also appeals expressly provided in the body of the Code or by any law

for the time being in force. The Apex Court in the context of aforesaid fact held that bar will not apply if an appeal was provided in any other law

for the time being in force, therefore, such decision relied upon by the Learned Counsel for the Appellants is not applicable to the present case.

Shyam Sunder Sarma"s case (supra) was also not a case under Order 43 Rule 1 CPC It was a case u/s 96 / regular appeal. The question of

maintainability of misc. appeal and further misc. appeal under Order 43 Rule 1 CPC was not decided in that judgment, therefore, the said

judgment will also not help the Appellants.

16. In view of the aforesaid facts and circumstances, as narrated above, in my opinion, this appeal filed by the Appellants itself is not maintainable,

as such, it is hereby dismissed.

17. Interim order, if any, is discharged.

18. No order as to costs.