(1995) 10 GAU CK 0003

Gauhati High Court

Case No: Second Appeal No. 197 of 1986

Md. Juran Ali		APPELLANT
	Vs	
Md. Afnur Ali and Others		RESPONDENT

Date of Decision: Oct. 30, 1995

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 145
- Limitation Act, 1963 - Section 12, 12(1), 12(2), 12(3), 12(4)

Citation: (1998) 3 GLR 61

Hon'ble Judges: M. Sharma, J

Bench: Single Bench

Advocate: B. Ullah, for the Appellant; None, for the Respondent

Final Decision: Allowed

Judgement

M. Sharma, J.
This appeal has been preferred by the Appellant against the judgment and decree dated 1.7.86 passed by the Assistant District Judge No. 2, Kamrup at Guwahati in Title Appeal No. 10 of 1983 dismissing the same and affirming the judgment and decree dated 30.3.83 passed by the Munsiff at Gauhati in Title Suit No. 170 of 1980.

2. The only point for consideration in this Second Appeal is whether the learned lower appellate court was right in rejecting the appeal on the ground of limitation.

3. The present Appellant as Plaintiff filed a suit claiming that he had purchased the suit land measuring 1 Bigha 4 Kat has 19 leachss covered by Dag No. 54 of K.P. Patta No. 250 as described in the schedule of the plaint from the legal heirs of Late Badal Ali by registered deed on 2,12.68 for Rs. 400.00 and took over possession of the same. That mutation was also allowed in the name of the Plaintiff. The opposite parties having failed in the mutation case got the suit land attached by initiating a proceeding u/s 145 Code of Criminal Procedure in which the trial court declared

possession of the suit land in favour of the opposite parties. Against this the revision Petitioner preferred revision before the Session Judge and the same was rejected. Accordingly the Plaintiff/present Appellant filed a suit for declaration of right, title and interest of the Plaintiff over the suit land and also for recovery and for delivery of khas and vacant possession of the suit land. The said suit was dismissed and against this the present Appellant filed appeal before the lower appellate court and the lower appellate court dismissed the appeal on the ground of limitation and therefore did not proceed to discuss the appeal on merits.

4. Mr. B. Ullah, learned Counsel for the Appellant submits that the learned lower appellate court was wrong in dismissing the appeal on the ground of limitation as he failed to follow the provisions u/s 12 of the Limitation Act in computing the time in filing the appeal. Mr. Ullah further submits that in the face of the appeal, it is alleged, there is 26 days delay in filing the appeal, that can not be sustainable on the ground that the appeal was filed against the judgment and decree of the trial court and in that view of the matter limitation has to be computed under the provisions of Section 12(3) of the Limitation Act. Section 12(1), (2) and (3) of the Limitation Act reads as follows:

12. Exclusion of time in legal proceedings - (1) In computing the period of limitations for any sail, appeal or application the day from which such period is to be reckoned, shall be excluded.

(2) In computing the period of limitation for and appeal or an application for leave to appeal or for revision or for review of a judgment the day on which the judgment complained of was pronounced and the time requisute for obtaining a copy of the decree. sentence or order appealed from or sought to be revised or reviewed shall be excluded.

(3) Where a decree or order is appealed from or sought to be revised or reviewed, or Where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment on which the decree or order is founded shall also be excluded.

5. In support of his contention the learned Counsel referred the decision reported in AIR 1973 Gau 60 (v 60 c 18) (Imphai Bench), (Simla Koaglui-Tengkhul v. Wangmazum Tengkhul). In this case his Lordship held that-

Before the Indian Limitation Act, 1963, was enacted there was a sharp difference of opinion amongst the different High Courts in regard to cases when an application for a certified copy of the decree is made after the said decree is drawn up. In dealing with such cases, the Bombay, Calcutta and Patna High Courts held that the period taken in drawing up of the decree would be part of the period requisite for obtaining the copy, while other High Courts took a contrary view. The explanation given in Section 12 of the new limitation Act of 1963, appears to have settled the difference amongst the High Courts about the inclusion or otherwise of the period

of time taken by the court to prepare the decree before an application for a copy thereof is made when such an application is filed after the preparation of the decree. At present, as required under the explanation, the said period shall not be excluded that means, shall be included as time requisite for obtaining the copy.

6. I find sufficient force in the submission of the learned Counsel for the Appellant. It appears that the learned first appellate court mis-conceived the provisions of the section, which he ought to have considered u/s 12 of the Limitation Act, This section provides that for the purpose of computing the period of limitation the time requisite for obtaining a copy of the decree shall be excluded. Sub-section (1) and (2) and Sub-section (4) of Section 12 of the Limitation Act provides that for the purpose of computing the period of limitation, the time taken by the court to prepare the decree before an application for a copy (sic) made shall not be excluded, i.e. shall be included as time requisite for obtaining the copy. The first appellate court was wrong in not considering this aspect of the appeal u/s 12 of the Limitation Act. The further point agitated by the learned Counsel for the Appellant is that the materials on records shows that the office of the appellate court accepted the memorandum of appeal finding it complete under Order 41 and accepted it within time. The learned Counsel has submitted that as the office accepted the appeal within time, the Appellant was under the impression that the appeal is regular and therefore the Appellant need not file condenation petition for condoning the delay, more so, when the appeal is within time u/s 12 of the limitation Act. In support of his contention the learned Counsel referred the decision reported in Udai Bhan Gupta Vs. Hari Shankar Bansal and Others, and also Sastri Yagnapurushadji and Others Vs. Muldas Bhudardas Vaishya and Another, In both these cases the ratio enunciated by the court was that technically, it may be conceded that the memorandum of appeal presented may suffer from infirmity for some reason. Even so, when the memorandum of appeal is accepted by the office of the court, the office recorded the presentation of the appeal to be proper, the appeal is accepted as correct and in that case the presentation of the appeal is accepted to be proper and when finally come up for hearing and some irregularity such as limitation has come, the Appellant must be given opportunity to explain the delay or any irregularity. In the case of Sastri Yagnapurushadji and Others Vs. Muldas Bhudardas Vaishya and Another, the Apex court held that the failure of the of the Registry to invite the attention of the authority concerned to the irregularity committed in the presentation of the said appeal cannot be said to be irrelevant in dealing with the validity of the contention raised by the Appellant as does in this case.

7. In that view of the matter the irregularity has to he detected by the office at the time of filing of the appeal and once the appeal is accepted as regular and if some irregularity is found at the time of hearing of the appeal, the concerned party must be given opportunity to explain such irregularity. In this instant case, apparently the Appellant was not given chance and therefore it suffers the illegality and infirmity on the part of the lower appellate court.

8. In view of my above discussion I find that this case is required to be remanded so that the first appellate court can decide the case on merit. We can not avoid the situation that the case was filed in 1986 and since then it was pending before this Court. But when the vital point of law was not entertained by the court below there is no other way but to remand the appeal to decide it afresh on merit. Accordingly I do so. The first Appellant court is directed to dispose of the appeal on merit within a period of 2 months from the date of receipt of this judgment. Office is directed to send back the records to the First Appellate court immediately to expedite the hearing of the appeal.

9. In the result the appeal is allowed and the impugned judgment and decree is set-aside. No costs.