

(1989) 11 GAU CK 0012

Gauhati High Court

Case No: M.A. (F) 58/82

Smti. Purnima Purkayastha

APPELLANT

Vs

Shri Animesh Bhattacharjee and
Others

RESPONDENT

Date of Decision: Nov. 17, 1989

Acts Referred:

- Assam Land and Revenue Regulation, 1886 - Section 80, 81
- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 19
- Forest Act, 1927 - Section 17
- Land Acquisition Act, 1894 - Section 18
- Limitation Act, 1963 - Article 122

Citation: (1990) 1 GLR 403

Hon'ble Judges: B.L. Hansaria, J

Bench: Single Bench

Advocate: S.K. Senapati and B.L. Singh, for the Appellant; G.N. Sahewalla, for the Respondent

Final Decision: Allowed

Judgement

B.L. Hansaria, J.

A suit was filed by the Appellant which was registered as T.S. 43/76. The prayer in the suit was to declare a deed of gift as fraudulent, void and inoperative. The suit came to be dismissed, An appeal was preferred against the decree of dismissal. The same was registered as T.A. 54 of 1981. The appeal came up for hearing on 23.11.1981 on which date the engaged counsel Shri P.N. Deb being indisposed could not appear in the Court and so his son Shri P.K. Deb filed a petition seeking adjournment. The petition was allowed and the appeal was fixed for hearing on 1.12.1981. On that date, no steps were taken on behalf of the Appellant because of which the appeal came to be dismissed for default. A petition wider Order 41 Rule

19 of the CPC was filed on 25.2.1982 seeking re-admission of the appeal. This application was dismissed on 15.3.1982 on the ground of limitation. Feeling aggrieved, this appeal has been preferred by the Plaintiff-Appellant.

2. There is no dispute that the period of limitation under Article 122 of the Limitation Act is 30 days to be counted from "the date of dismissal". As the appeal has been dismissed on 1.12.1981 and as the petition for re-admission was filed on 25.2.82 it was apparently beyond 30 days of the date of dismissal. The., question, however, is as to whether the limitation has to be counted in a case of the present nature from the date of dismissal as mentioned in Article 122, as aforesaid, or from the date of knowledge of dismissal.

3. In this connection, I have noted certain decisions of the Apex Court which have interpreted provisions of the present nature finding place in different statutes. The first decision to be referred in this connection was that of [Raja Harish Chandra Raj Singh Vs. The Deputy Land Acquisition Officer and Another](#), which had dealt with the period of limitation prescribed by Section 18 of the Land Acquisition Act. The proviso to that section has stated that every application for reference has to be made, inter alia, "within six months from the date of the Collector's award". While dealing with this provision, it was held by the Apex Court that "where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned".

4. In [Madan Lal Vs. State of U.P. and Others](#), the Court was concerned with the period of limitation fixed for filing of appeal under the provisions of the Indian Forests Act, 1927. As per Section 17 of that Act limitation was to be counted from "the date of the order". The Court opined that terminus a quo has to be the knowledge of the order if the same has been passed without notice to and in absence of the Appellant.

5. This question came to be examined further in the [Assistant Transport Commissioner, Lucknow and Others Vs. Nand Singh](#), which dealt with the filing of the appeal under the provisions of Uttar Pradesh Motor Vehicles Taxation Act, 1935. In this case, the decision in Harish Chandra (supra) was followed. To reinforce the rationale given in Harish Chandra, it was stated that ordinarily and generally speaking an order would be effective against the affected person only when it comes to his knowledge either directly or constructively, otherwise not. On the facts of that case, it was held that the aggrieved party had no means to know about the order against him till the communication in question was received by him.

6. The aforesaid three decisions of the Apex Court were followed by a Division Bench of this Court in Sher Ali v. Assam Board of Revenue (1981) 1 GLR 283, which examined this question relating to presenting an application u/s 81 of the Assam

Land & Revenue Regulation which requires that the application has to be filed within one year of a sale becoming final u/s 80. It was held that the limitation would not start to run till the defaulter knows about the order making the same final.

7. In view of what has been stated above, I am of the opinion that the limitation in the present case could not have run from 1.12.1981, but must be reckoned from the date when the Appellant had come to know about the dismissal of the appeal. A perusal of the petition under Order 41, Rule 19 shows that the Appellant came to know about the dismissal of the appeal only on 3.2.1982 as she was living at the relevant time in Alipur Duar. This being the position and the application having been filed on 25.2.1982, it has to be held that the same was within the period of limitation. The application could not, therefore, be rejected as being barred by limitation.

8. Having come to the aforesaid conclusion, the matter could have been sent back to the appellate Court to decide as to whether on merits, the Appellant had a good case or not. This would have lengthened the litigation and, as such, learned Counsel of both the parties have fairly stated that the merit of the petition may be examined by this Court itself to avoid delay. I have accordingly done so.

9. On this aspect of the case, Shri Senapati has submitted that as the engaged counsel of the Appellant was lying ill even by 1.12.1981, no steps could be taken on behalf of the Appellant on the aforesaid date. It is further submitted that as the Appellant was living in Alipur Duar she had no knowledge about the illness of her engaged counsel and so, she could not take any step to engage some other counsel to appear on her behalf before the learned appellate Court on 1.12.1981. It is, therefore, submitted on the strength of [Rafiq and Another Vs. Munshilal and Another](#), that the Appellant may not be penalised for non-appearance of any counsel on her behalf on 1.12.1981. There is sufficient force in the submission of Sri Senapati. In this connection reference may also be made to the decisions of the Apex Court in *Goswami Krishna Murarilal Sharma v. Dhan Prakash*, (1981) 4 SCC 574 and [Smt. Lachi Tewari and Others Vs. Director of Land Records and Others](#), which have held that for the lapse, if any, of an engaged counsel, the litigant should not suffer. It was stated in *Rafiq* (supra) that in the present legal system prevailing in the country where the parties generally appear through their advocates, the obligation of the parties is to select their counsel, brief him, pay the fees and then leave the matter to the learned Advocate to do the rest. As personal appearance of the party is not required at the time of hearing of the appeal, non-appearance of the Appellant in person cannot be a ground to dismiss the appeal. If the Appellant happens to be at a far-flung area she could have no knowledge about the death and/or state of health of the lawyer because of which the engaged lawyer may not appear on a fixed date.

10. In view of all the above, I am satisfied that there was sufficient cause for the absence of the Appellant on 1.12.1981. The impugned order is therefore, set aside

and the appellate Court below is directed to re-admit the appeal and dispose of the same on merits.

11. In the result, the appeal is allowed as indicated above.