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(1994) 09 GAU CK 0017

Gauhati High Court

Case No: Civil Revision No. 193 of 1994

Radheshyam Agarwal	APPELLANT
Vs	
Ramawter Deepak Kumar Property and Another	RESPONDENT

Date of Decision: Sept. 30, 1994

Acts Referred:

- Limitation Act, 1963 - Article 116(b), 116(b)

Citation: (1994) 2 GLJ 496 : (1995) 1 GLT 206

Hon'ble Judges: A.K.Patnaik, J

Bench: Single Bench

Advocate: S.P.Roy , S.Odwani , R.C.Sancheti, D.K.Bhattacharyya, C.K.Sharma Barua, Advocates appearing for Parties

Judgement

1. This is a revision under section 115, CPC, against the judgment and decree dated 19.3.94 of the Additional District Judge, Kamrup, in TA No. 4 of 1991 confirming the judgment and decree dated 6.7.91 passed by the Assistant District Judge No. 1, Guwahati, in TS No. 149 of 1990.

2. The brief facts of the case are that the petitioner was a tenant in respect of suit premises covered by Holding Nos. 34 and 34A in Ward No. 19 of the Gauhati Municipal Corporation. The opposite party filed TS No. 149 of 1990 in the Court of the Assistant District Judge No 1, Guwahati, for ejectment of the defendantpetitioner and for recovery of arrear rent of Rs. 8.610/ and Rs. 1,844.35 as electricity charges. The suit was decreed exparte on 6.7.91 by the learned Assistant District Judge No. 1, Gauhati. The defendant petitioner filed an appeal against the said exparte judgment and decree before the Additional District Judge, Kamrup, on 16 8.91 which was numbered as TA No. 4 of 1991. The petitioner also filed an application under section 5 of the Limitation Act, 1963 before the learned District Judge, Kamrup, stating therein that the defendantpetitioner came to

know about the exparte judgment and decree dated 6.7.91 only on 15.7.91 and counted from 15.7.91 the appeal was filed within time but as abundant caution, the defendantpetitioner has filed an application for condonation of delay in filing the appeal. The appeal was taken up for hearing by the Additional District Judge, Guwahati on 14.3.94 and by judgment dated 19.3.94 the Additional District Judge, Guwahati, held that limitation for filing the appeal would run from the date of decree and not from the date when the defendantpetitioner came to know about the exparte judgment and decree. Regarding application under section 5 of the Limitation Act for condonation of delay in filing the appeal the learned Additional District Judge was of the opinion that there was no reason to condone the delay in filing the appeal and accordingly rejected the said application.

3. Mr. Bhattacharyya, learned counsel for the petitioner, cited before me the decision reported in AIR 1981 Allahabad 834, wherein a Division Bench of the Allahabad High Court has held that although under Article 116 (a) of the Limitation Act limitation would normally commence from the "date of decree or order", if the judgment is not pronounced in the presence of the parties or their counsel or no notice of the judgment was given to the parties, limitation would commence from the date the appellant acquired the knowledge of the decree or order challenged in the appeal. Alternatively, Mr. Bhattacharyya submitted that in the present case, the petitioner had filed an application under section 5 of the Limitation Act before the learned Additional District Judge, Gauhati, stating therein that he had knowledge of the decree only on 15.7.91 and that he was of the view that limitation would commence from the date of his knowledge of the judgment and decree. This explanation furnished by the petitioner in the application under section 5 of the Limitation Act was sufficient explanation for the delay of 9 days in filing the appeal Accordingly, the learned Additional District Judge Gauhati should not have dismissed the appeal on the technical ground of limitation, but should have decided the appeal on merits,

4. Mr. CKS Baruah, learned counsel for the opposite party, submitted that plain reading of Article 116 (b) of the Limitation Act makes it abundantly clear that limitation of 30 days for filing an appeal is to be counted from the date of decree or order and not from the date of knowledge of the decree or order. He also submitted that the application under section 5 of the Limitation Act filed by the petitioner before the District Judge, Karnrup, a copy of which is annexed to the civil revision petition as Annexure 5, would show that it is not the petitioner but his constituted attorney who had sworn the affidavit in support of the facts stated in the application and he has also not indicated in the affidavit the source of information on the basis of which he has made statements in paragraphs 1 to 6 of the application. He cited the decision of this Court reported in 1989 (1) GLJ 170, wherein this Court has held that the deponent of that affidavit must disclose the source of his Information and the person responsible for the delay should file the affidavit in support of the application for condonation of delay. Mr. CKS Baruah, also cited the decision of this Court in MeSEB vs. Ambu Nath Choudhury, reported in (1993) 2 GHC 211 wherein DN

Baruah, J has held that the matter regarding condonation of delay is at the discretion of the Court before which prayer for condonation is made and where such discretion is exercised reasonably and judicially, the High Court either by way of appeal or revision or writ should not interfere with such an order.

5. The question which arises for determination in this civil revision therefore is whether the learned Additional District Judge, Gaubati, while rejecting the application for condonation of delay under section 5 of the Limitation Act has exercised his discretion judicially and reasonably. Ordinarily, limitation for filing an appeal to any Court other than the High Court under Article 116 (b) of the Limitation Act would be 30 days from the date of decree or order appealed against. But in a case of present type where appeal is filed against exparte judgment and decree pronounced on a date when the appellant was not present in Court, the appellant may file an application under section 5 of the Limitation Act for condoning the delay in filing the appeal on the ground that he came to know of the judgment and decree at a later date and in case the appellate Court finds that the delay has been explained by the appellant, it may condone the delay. In the present case, assuming that the limitation would begin from 6.7.91 when the exparte judgment and decree was delivered by the trial Court, and there was delay of 9 days in filing the appeal on 14.8.91, the defendantpetitioner has filed an application under section 5 of the L imitation Act explaining the delay of 9 days in para 2 of the application in the following manner ;

"2. That the petitioner came to know about the exparte judgment and decree only on 15.7.91 and prior to that the petitioner has no knowledge about said judgment and decree and as such from the date of knowledge the present appeal is within time but however as abundant caution the petitioner has filed the application for condonation of delay in filing the appeal."

From the aforesaid explanation furnished by the petitioner it is clean that the defendantpetitioner had no knowledge about the judgment and decree prior to 15.7.91 and that he was of the bonafide view that the limitation would commence from the date of his knowledge of exparte judgment and decree, ie, from 15.7.91, and the appeal could be filed within 30 days from 15.7.91. It is difficult to reject the aforesaid explanation of the petitioner for the delay of 9 days in filing the appeal inasmuch as there was a decision of Allahabad High Court reported in AIR 1981 Allahabad 834 in support of the view of the petitioner that limitation would be commence from the date of knowledge of the appellant about the decree or order when the judgment was not pronounced in presence of the parties or without notice to the parties. Thus, in my opinion, the learned Additional District Judge Guwahati. has not exercised his discretion reasonably and judicially while considering the prayer for condonation of delay.

6. The decision of this Court in 1989 (1) GLJ 170 in the case of Mukti Nath Das vs. Brinda Das, relied on by Mr. CK.S Baruah is not applicable to the facts of the present case. In the case of Mukti Nath Das vs. Brinda Das it was stated in para 7 of the application for

condonation of delay that the appellant''s Advocate through oversight did not look into the papers carefully and was not aware if any question of limitation would arise and in the affidavit in support of the application sworn by the appellant it was stated that the facts stated in para 7 were true to his information and belief. Referring to Order 19, Rule 3, CPC, Manisana, J held :

■The affidavit, therefore, should be modelled on the lines of Order 19, Rule 3 and where averment is not based on personal knowledge, the source of infotrnation should be clearly deposed. The deponunt has to disclose his source of information so that the other side gets fair chance to verify it and make an effective answer. Slipshod verification of affidavit may lead to its rejection (see Barium Chemicals Lid. vs. Company Law Board, AIR 1967 SC 295 at para 570."

It was further held in the aforesaid judgment that as the Advocate responsible for the delay had not put in the affidavit, the lower appellate Court had rightly rejected the application for condonation of delay. In the present case, the affidavit in support of :he application including the statements in paragraph 2 quoted above has been sworn by the constituted attorney of the defendantpetitioner and he has stated in the affidavit that the statements made in the application including paragraph 2 are true to his knowledge and belief. This is, thus not a case where the verification in the affidavit is based on information of constituted attorney but on his personal knowledge. If the verification of the affidavit of the constituted attorney been on information, it would have been necessary for him to indicate the source of information as per the requirements of Order 19, Rule 3, CPC This is also not a case where it is stated in paragraph 2 of the application that the view of the petitioner that limitation would commence from 15.7.91 was based on some advice given by any particular Advocate, in which case it would have been necessary for the petitioner to file an affidavit of the said Advocate.

7. At any rate, the learned Additional District Judge, Kamrup, Guwahati, in his judgment and order dated 19.3.94 had not disbelieved the case of the petitioner that he came to know of the exparte order or decree on 15.7.91. Further, the learned Additional District Judge, Kamrup, Guwahati, has not disbelieved the explanation of the petitioner that he was of the view that limitation would commence from the date of knowledge of the exparte decree but has held that wrong impression in regard to the correct legal position in the matter of computation of limitation was not acceptable. But as Stated above, in the present case, there was a decision of the Allahabad High Court reported in AIR 1981 Allahabad 834 that limitation will begin from the date of knowledge and not from the date of decree where the appel !ant had no notice of the judgment and the judgment was not pronounced in his presence and it was difficult to ruleout the possibility of the petitioner entertaining a belief that the appeal could'' be filed within 30 days from 15.7.91 when he came to know of the judgment and decree dated 6.7.91. By rejecting the application for condonation of delay and refusing to decide the appeal on merits, the appellateCourt thus failed to exercise a jurisdiction vested on it by law.

8. In the result, therefore, the impugned judgment and decree dated 19.3.94 of the Additional District Judge, Kamrup, Guwahati, in TA No. 4 of 1991 is set aside and the matter is remanded to the appellate Court with the direction that the appellate Court shall decide the appeal on merits and until the appeal is decided, the judgment ''and decree dated 6.7.91 passed by the Assistant District Judge No 1, Guwahati, in TS No 149 of 1990 shall remain stayed.

9. The civil revision is allowed but there shall be no order as to costs.