

(1995) 05 KL CK 0013

High Court Of Kerala

Case No: S.A. No. 329 of 1994-E

Raghunathan Nambiar

APPELLANT

Vs

Janu

RESPONDENT

Date of Decision: May 31, 1995

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 1, 96

Citation: (1995) 1 KLJ 754

Hon'ble Judges: P.K. Balasubramanyan, J

Bench: Single Bench

Advocate: K.I. Mayankutty Mather and V.V. Asokan, for the Appellant; Gracious Kuriakose, for the Respondent

Judgement

P.K. Balasubramanyan, J.

A Plaintiff whose suit was dismissed in the Court of the first instance filed an appeal u/s 96 of the CPC before the first appellate Court. The appeal was accompanied by a certified copy of the decree appealed from and a certified copy of the judgment. An application was filed for time to produce the printed copy of the judgment of the Court of first instance since under Rule 258 of the Civil Rules of Practice, the judgment of the trial Court required to be printed. The appellate Court granted the Plaintiff" time to produce the printed copy of the judgment and provisionally accepted the appeal filed by the Plaintiff.

2. The Plaintiff did not produce the printed copy of the judgment within the time granted. Consequently the appellate Court on 16th March 1992 dismissed the appeal for default on the ground that the printed copy of the judgment was not produced.

3. The Court of first instance had dismissed the suit of the Plaintiff on 2nd March 1991. The Plaintiff had applied for the printed copy of the judgment and decree in addition to the certified copies produced with his earlier appeal A.S. 80 of 1991

which had been dismissed for default. On obtaining the printed copy of the judgment and the certified copy of the decree, the Plaintiff filed a fresh appeal A.S. 48 of 1993 before the appellate Court on 13th January 1993. That appeal was in time going by the printed copy of the judgment and the certified copy of the decree that accompanied the Memorandum of Appeal. On 30th September 1993 the appellate Court dismissed that appeal in its view that the appeal was not maintainable in view of the dismissal of the earlier appeal A.S. 80 of 1991 filed by the Plaintiff and that the remedy of the Plaintiff lay in making an application for restoration of the appeal A.S. 80 of 1991 and to proceed with that appeal after producing therein the printed copy of the judgment. This dismissal of the appeal that was accompanied by the printed copy of the judgment as not maintainable is challenged by the Plaintiff in this Second Appeal.

4. As held by this Court in *Muthukaruppan v. Chellayi* 1973 K.L.J. 265 the acceptance of the earlier appeal A.S. 80 of 1991 filed along with the certified copy of the judgment of the trial Court was only a provisional acceptance in terms of Rule 258 of the Civil Rules of Practice and the Plaintiff was obliged to produce the printed copy of the judgment of the trial Court within the time granted by the appellate Court for that purpose or within any extended time that may be obtained for that purpose. The Plaintiff did not produce the printed copy of the judgment and consequently the dismissal of A.S. 80 of 1991 for non-production of the printed copy of the judgment was clearly justified. But the Plaintiff contends that so long as there is an obligation on him to produce the printed copy of the judgment appealed from and going by the ratio of *Muthukaruppan's* case (1) the judgment on the basis of which the question of limitation has ultimately to be reckoned is the printed copy of the judgment, nothing stood in the way of his filing an appeal on the basis of the printed copy of the judgment and the certified copy of the decree and if on a scrutiny of the said copies that accompanied the Memorandum of Appeal it was found that the appeal was in time, the Court was found to accept that appeal as a validly constituted one and was bound to hear and dispose it of on the merits. Learned counsel for the Plaintiff relied on the decision of the Patna High Court in *Suraj Deo v. Pratap Rai* AIR 1923 Pat. 514 in support of the proposition that the dismissal of the earlier appeal for default does not prevent the entertainment of the subsequent appeal, A.S. 48 of 1993, filed by him. In the said decision the High Court of Patna has taken the view that since the dismissal for default does not amount to a decree and would also not operate as *res judicata*, there was nothing in law which prevented the entertaining of a properly constituted fresh appeal provided that the fresh appeal was within time prescribed by the Limitation Act.

5. Under Order 41, Rule 1 of the CPC a Memorandum of Appeal has to be accompanied by a copy of the decree appealed from and a copy of the judgment on which it is founded unless of course the appellate Court dispenses with the production of the judgment. Rule 258 of the Civil Rules of Practice insists that when a copy of the judgment is applied for, for the purpose of appeal, the copy shall be

printed if the length of the judgment exceeds 700 words. Rule 258(2) provides that in a case where the party who is bound to produce a printed copy of the judgment files an appeal without production of the printed copy, he was obliged to file a petition for the provisional acceptance of the manuscript or typed copy of the judgment he produced with the appeal particularly stating that he had applied for a printed copy of the judgment but had not received the same. It is therefore clear that the acceptance of the appeal A.S. 80 of 1991 filed in the first instance by the Plaintiff was only a provisional acceptance of that appeal and the dismissal of that appeal on the ground that the Plaintiff did not produce the printed copy of the judgment within time was perfectly justified in terms of the provisions noticed above. But the dismissal of that appeal for non-production of the printed copy of the judgment cannot be treated as a final adjudication of the appeal in view of the fact that the appeal itself had not been finally accepted but had only been provisionally accepted in terms of Rule 258(2) of the Civil Rules of Practice. When an appeal is dismissed for default for non-production of the printed copy of the judgment it can only mean that the appellate Court has withdrawn the provisional permission given by it to the Appellant to appeal against the decree of the trial Court without producing the printed copy of the judgment along with the Memorandum of Appeal. It is therefore not possible to hold that the dismissal of the earlier appeal can have the effect of precluding the filing of a proper appeal by the Plaintiff accompanied by the printed copy of the judgment as insisted by Rule 258 of the Civil Rules of Practice and the certified copy of the decree. The only condition at that stage is that the appeal should be in time going by the printed copy of the judgment and the certified copy of the decree that accompany the Memorandum of Appeal. In that view I hold that the lower appellate Court was not justified in holding that the fresh appeal filed by the Plaintiff accompanied by the printed copy of the judgment and the certified copy of the decree which was in time was not maintainable and the remedy of the Plaintiff lay only in seeking a restoration of the original provisional appeal which had been rejected for non-production of the printed copy of the judgment.

In the view I have taken as above, I set aside the dismissal of A.S. 48 of 1993 and remand that appeal to the Subordinate Judge's Court of Tellicherry for being heard and disposed of on merits after verifying whether the said appeal is in time on the basis of the printed copy of the judgment and decree produced along with the Memorandum of Appeal. If the appeal is not in time on that basis, the lower appellate Court will reject that appeal as belated. If the appeal is in time on the basis of the printed copy of the judgment and the certified copy of the decree produced along with the Memorandum of that Appeal, the lower appellate Court will hear and dispose of the appeal on merits. The parties will appear before the Subordinate Judge's Court, Tellicherry for further orders on 25th July 1995.