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(2008) 4 ALLMR 747 : (2008) 6 BomCR 81 : (2008) 3 MhLj 209

Bombay High Court (Nagpur Bench)

Case No: Second Appeal No. 508 of 2005

Rajkumar Zape and Others	APPELLANT
Vs	
Shantaram Amrutrao Waghmare, Sanjay Shriram Mankar, Bhiku Devidas Gawande and Joint Charity Commissioner, Amravati Region	RESPONDENT

Date of Decision: Feb. 27, 2008

Acts Referred:
Bombay Public Trusts Act, 1950 â€" Section 20, 22, 22A, 28, 54#Civil Procedure Code Amendment Act, 1976 â€" Order 41 Rule 3A, Order 41 Rule 9#Limitation Act, 1963 â€" Section 12, 14, 4, 5

Citation: (2008) 4 ALLMR 747 : (2008) 6 BomCR 81 : (2008) 3 MhLj 209

Hon'ble Judges: C.L. Pangarkar, J

Bench: Single Bench

Advocate: R.L. Khapre, for the Appellant; A.J. Thakkar, for the Respondent

Final Decision: Allowed

Judgement

C.L. Pangarkar, J.
Rule. Heard finally with consent of parties.

2. This second appeal is at the instance of objectors before Assistant Charity Commissioner.

3. The facts giving rise to this appeal are as follows There is a trust known as Bhagaji Maharaj Sansthan at Ruikhed, Tq.Akola, Distt.Akola. On

5/7/2001, an application u/s 22 of the Bombay Public Trust Act was submitted by Shantaram and others requesting the Assistant Charity

Commissioner to effect the change. It was mentioned in the said application that a meeting of trustees was held on 11/11/1981 in which one

Nilkanth Zape, Bhiku Gawande and Shantaram Waghmare were elected as trustees. A request was also made to delete the name of one

Champabai, who had expired on 14/9/1996. Along with this application, another application was made. In the said application, it was stated that

applicant Shantaram and others did not know that a change is required to be reported to the Charity Commissioner and therefore, they could not

make the application within time. A prayer was therefore made in the said application to condone the delay in submitting the application for change.

Further, yet another application was made by those applicants "Shantaram and others" for permission to lead an evidence for condonation of

delay. The learned Assistant Charity Commissioner did not allow Shantaram and others to lead an evidence. He found that delay was inordinate

and therefore, he rejected the delay condonation application. As a consequence of this, he also rejected the change report. Applicant Shantaram

and others, therefore, preferred an appeal before the Joint Charity Commissioner. The Joint Charity Commissioner condoned the delay in

submitting the application and remanded the matter back to the Assistant Charity Commissioner and directed him to proceed with the enquiry into

the change on merits. Being aggrieved by that order, the respondents preferred an appeal before the District Judge u/s 72 of the Bombay Public

Trust Act. The Additional District Judge, dealing with the said appeal, dismissed the said appeal. Being aggrieved by that order of dismissal of the

appeal/application u/s 72 of the Bombay Public Trust Act, this second appeal is preferred.

4. I have heard the learned Counsel for the appellants and the respondents.

5. Following substantial question of law arises for determination.

Whether an appeal lies against the order of the Assistant Charity Commissioner rejecting the delay condonation application in a change report

-REASONS

6. In the instant case, as stated earlier, Shantaram and others i.e. the present respondents filed a change report upon meeting held on 11/11/1981.

They contended that they were not aware of the law that the change is required to be reported and hence there was a delay in submitting the

change report. The Assistant Charity Commissioner had rejected the application for condonation of delay and the appeal before the Joint Charity

Commissioner was preferred. Shri Khapre, learned Counsel for the appellants, submitted that appeal before the Charity Commissioner itself was

not maintainable and therefore, the order passed by the Joint Charity Commissioner and confirmed by the District Judge needs to be set aside.

7. A change report is required to be submitted u/s 22 of the Bombay Public Trust Act within 90 days. Since a limitation is fixed by Section 22 of

the Bombay Public Trust Act itself, it would be necessary to first find out if any application could be entertained beyond limitation and whether aid

of Section 5 of the Limitation Act could be taken. The foremost objection that is taken is that Section 5 of the Limitation Act would not apply to

the application u/s 22 of the Bombay Public Trust Act as Section 75 of the Act makes Sections 4, 5, 12 and 14 of the Limitation Act applicable

only to appeals. Shri Khapre, learned Counsel for the appellants, submitted that, therefore, it follows that Section 5 of the Limitation Act can be

applied to appeals under Bombay Public Trust Act and to no other proceedings. The submission has no force. Section 75 merely says that Section

4, 5, 12 and 14 of the Limitation Act shall apply to appeals. Section 75 of the Bombay Public Trust Act does not prohibit application of provisions

of Limitation Act to other proceedings. The Limitation Act is a general Law. Therefore, unless special law specifically excludes the application of

the Limitation Act or its provisions, it must apply to all proceedings under any Law. Change report basically is an application u/s 22 of the Bombay

Public Trust Act. Since it is an application, Section 5 of the Limitation Act, must apply. What Section 5 of the Limitation Act excludes is suits and

applications under Order 21 of Code of Civil Procedure. Thus, necessarily it applies to all applications under any Law for which limitation is

prescribed. It must, therefore be held, that an application u/s 22 of the Bombay Public Trust Act is an application, for submission of which, aid of

Section 5 of the Limitation Act can be taken, if it is filed beyond period of 90 days.

8. Shri Khapre, learned Counsel for the appellants, then contended that when an application u/s 5 of the Act is decided, no appeal can lie against

such order, since appeal is provided u/s 70 of the Bombay Public Trust Act against any finding in application u/s 22 of the Bombay Public Trust

Act. Section 70 of the Bombay Public Trust Act reads as follows

70. Appeals from findings of Deputy or Assistant Charity Commissioner

(1) An appeal [against the finding or order] of the Deputy or Assistant Charity Commissioner may be filed to the Charity Commissioner in the

following cases:

(a) the finding [and order, if any,] u/s 20;

(b) the finding u/s 22;

[(b-1) the findings u/s 22A;]

(c) the findings u/s 28;

(d) the order under Sub-section (3) of Section 54;

[(e) an order confirming or amending the record u/s 79A.]

(2) No appeal shall be maintainable after the expiration of sixty days from the recording of the findings or the passing of the order, as the case may

be.

(3) The Charity Commissioner may, after hearing the appellant or any person appearing on his behalf for reasons to be recorded in writing either

annul, reverse, modify or confirm the finding or the order appealed against or he may direct the Deputy or Assistant Charity Commissioner to

make further inquiry or to take such additional evidence as he may think necessary or he may himself take such additional evidence.

9. Shri Khapre, learned Counsel for the appellants, submits that decision on application u/s 5 of the Limitation Act would not be a finding on an

application u/s 22 of the Bombay Public Trust Act and therefore, no appeal could lie u/s 70 of the Bombay Public Trust Act. True it is, that the

question as to whether change has occurred or not is not decided while deciding an application u/s 5 of the Limitation Act. The question cannot be

decided so easily as is contended. Here, it has to be borne in mind that the party does not present a proceedings as such u/s 5 of the Limitation

Act. It essentially either presents an application or an appeal under the substantive law and that is the main proceeding. Application u/s 5 of the

Limitation Act is merely a subsidiary proceeding or in aid of the party, who could not come to court within time prescribed. The Limitation Act

prohibits taking cognizance of main proceeding until the delay is condoned. All the same, it is clear that application u/s 5 of the Limitation Act alone

cannot be presented or entertained unless a substantive proceeding such as appeal or application is also presented along with it. It, therefore,

becomes a miscellaneous application in the main proceeding. An application u/s 5 of the Limitation Act, therefore, cannot be treated as a separate

or independent proceeding.

10. Bearing in mind the above proposition, the further argument needs to be appreciated. Shri Khapre, learned Counsel for the appellants, then

contended that the appeal could not be entertained u/s 70 of the Bombay Public Trust Act on applying the analogy as laid down in the decision of

this Court in Chandu Ambekar and Another Vs. Digambar Kulkarni and Others, . This Court has held as follows

13. Now coming to the second issue argued before us by Shri Patni, it is to be noted that by rejection of the application for condonation of delay,

the application filed belated for restoration of the suit dismissed ex- parte, came to an end without being registered and decided on merits. When

an application for condonation of delay in filing an appeal is rejected, the proposed appeal does not even get registered and the appellant, thus,

goes out of the Court. It was, therefore, contended that an application for condonation of delay is required to be treated as an independent

proceeding and not an application in a proposed appeal or a suit or any other proceeding. By referring to Rule 3A of Order XLI of the Code and

the decision of this Court in the case of Bhagwan Godsay Vs. Kachrulal Samdariya, it was contended that until the application for condonation of

delay is decided the appeal does not get registered and it remains only a proposed appeal and, therefore, it cannot be treated to be a part of the

appeal proceedings. This issue is no more res-integra as has been held by this Court in Chandrakant''s case (supra) Rani Choudhury Vs. Lt.-Col.

Suraj Jit Choudhury, by relying upon the law laid down in the case of. It is a well settled position in law that an appeal presented out of time is an

appeal and an order of dismissing it as time-barred is one passed in the appeal. Even the language of Rule 3A in Order XLI clearly shows that an

application of condonation of delay is an accompaniment in an appeal which is presented after the expiry of the period of limitation specified

therefore. As per Rule 11A of Order XLI of the Code every appeal shall be heard under Rule 11 as expeditiously as possible and endeavour shall

be made to conclude such hearing within sixty days from the date on which the memorandum of appeal is filed. Sub-rule (1) of Rule 11 of Order

XLI has been amended by Act No. 46 of 1999 and with effect from 1st July, 2002. The status of an application for condonation of delay that was

filed in the instant case, was not an independent proceeding. The revision petitioner had submitted a restoration application in his dismissed suit

and, therefore, it cannot be treated to be an independent proceeding. The application for condonation of delay was an accompaniment to the

restoration application and unless the later was presented there was no occasion to file the application for condonation of delay. We are in

agreement with the view recorded in Chandrakant''s case (supra) on this issue as well.

11. In fact, in this decision also, it is held by this Court that an appeal presented out of time is an appeal and an order dismissing it as time-barred is

one passed in the appeal. If this analogy is to be applied then order passed on delay condonation application rejecting it and thereby rejecting the

application for change is a finding recorded u/s 22 of the Bombay Public Trust Act. The Supreme Court in a recent decision reported in Shyam

Sundar Sarma Vs. Pannalal Jaiswal and Others, has observed as follows

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 decision 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 after 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 along with 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. Thus, if the above proposition of law is borne in mind, the decision on delay condonation application is a decision u/s 22 of the Bombay Public

Trust Act and an appeal would certainly lie against such order. The learned Jt.Charity Commissioner has, therefore, rightly entertained the appeal.

13. Shri Khapre, learned Counsel for the appellants, submitted that this interpretation would not be proper. He submitted that if a District Judge

rejects the application for condonation of delay in preferring the appeal before him u/s 96 of the Code of Civil Procedure, every such litigant would

have to necessarily prefer second appeal if it is an order dismissing of an appeal. That appears to be the ratio of the decision in Shyam Sunder

Sarma''s case (supra) and that is the Law now.

14. The learned Jt. Charity Commissioner in the instant case had condoned the delay without there being any evidence on record. The applicants

had even presented an application for tendering the evidence before the Assistant Charity Commissioner. He too did not allow the parties to tender

the evidence and rejected the application. The learned Jt. Charity Commissioner condoned the delay of 20 years without there being any evidence.

In fact, therefore, he should have sent the matter back to the Assistant Charity Commissioner to allow the parties to explain the delay and then

pass the order. In the circumstances, the orders passed by the Additional District Judge as well as the Joint Charity Commissioner and the

Assistant Charity Commissioner are set aside. The enquiry is remitted back to the Assistant Charity Commissioner with a direction that he shall

allow the applicants in application u/s 22 of the Bombay Public Trust Act to tender evidence/affidavit on delay condonation application and then

decide the application u/s 22 of the Bombay Public Trust Act as well as application for condonation of delay according to Law. The substantial

question of law is answered accordingly.

The appeal is, therefore, allowed and the matter stands remitted to Assistant Charity Commissioner in the above terms. Costs shall be as incurred.