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**Auto and Hardware Stores and anr. Vs. the State of Bihar and ors.**

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**SooperKanoon Citation : [sooperkanoon.com/138035](http://sooperkanoon.com/138035)**

**Court : Patna**

**Decided On : Nov-07-2003**

**Judge : P.K. Sinha, J.**

**Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 11; [Limitation Act, 1963](#) - Sections 5**

**Appeal No. : S.A. No. 234 of 1997**

**Appellant : Auto and Hardware Stores and anr.**

**Respondent : The State of Bihar and ors.**

**Advocate for Def. : Mahesh Prasad, G.P. III and Kumar Manish, S.C. to G.P. III**

**Advocate for Pet/Ap. : Lala Sachindra Kumar, Adv.**

**Disposition : Second appeal allowed**

**Judgement :**

**P.K. Sinha, J.**

1. Learned Counsel for the appellant was heard under Order XLI, Rule 11 of the Code of Civil Procedure on 11-3-1998. In the judgment of partial reversal of the decree of the learned trial Court, the first appellate Court while holding that the appeal was hopelessly time barred, went on to examine the correctness or

otherwise of the decree of the learned Munsif and recorded a judgment, followed by a decree. Following substantial question of law was framed.

'Whether the decree of the Addl. District Judge is legal on the face on the face of the finding that the appeal preferred by the respondents was hopelessly time barred.'

2. While formulating the aforesaid substantial question of law this Court also ordered, by the same order, for issuance of notices to the respondents to show-cause as to why this appeal be not admitted or disposed of at the admission stage itself. This is how this appeal has come up for final disposal.

3. Since the substantial question of law has been formulated under Section 100 of the Civil Procedure Code, this appeal is also admitted.

4. Auto and Hardware Stores through plaintiff No. 2 brought Money Suit No. 1 of 1983 which was heard and decided by sub-Judge I, Saharsa against the State of Bihar and others, claiming a sum of Rs. 53,258.80 paise with interest @ 18% per annum. This related to non-payment of the price of certain articles supplied by the plaintiffs after their tender was accepted by the concerned officials. The learned trial Court decreed by the suit with interest @18% from the date of filing of the plaint to the date of the decree and 6% per annum till the realisation of the amount. The State of Bihar and others preferred Money Appeal No. 2 of 1993 against that Judgment which was heard and decided by the 3rd Additional District Judge at Saharsa. The learned first appellate Court in para 9 of the judgment also discussed the argument made on behalf of the respondents of that appeal that the appeal was time barred. The learned appellate Court noted that though the appeal ought to have been filed on or before 25-5-1993, it was filed on 26-8-1993. A petition for condonation of delay was also pending which was also discussed in the judgment but that did not find favour with the learned appellate Court which held that the appeal was hopelessly time barred. While upholding the findings of the learned trial Court in dismissing the appeal on merits after discussing the materials on record, the learned appellate Court did not agree with allowing the interest till the date of decree @ 18% and modified the decree of the trial Court to the extent.

5. Learned Counsel for the plaintiffs/respondents/appellate (to be referred to as the appellants) has argued that after holding that the appeal was time barred and, by implication disallowing the petitioner under Section 5 of the Limitation Act, the only course open to the first appellate Court was to dismiss the appeal under the provisions of Section 3 of the Limitation Act. In support of this contention learned Counsel for the appellant has relied, upon a decision of this Court in the case of. Debnath Mishra v. The State of Bihar and Ors., 1985 BLJ 286. A judgment of the . Division Bench of this Court in the case of Abdullan Mian v. Jodha Raut, 1977 PLJR 371 was also relied upon in which it was held that under Section 3 of the Limitation Act a duty was cast upon the Court to dismiss any proceeding instituted after the prescribed period of limitation although limitation had not been set up as a defence.

6. As soon a Court decides that a particular suit or appeal or application is barred by limitation then the only course left to the Court is to dismiss that suit or appeal or application. This is for the simple reason that being barred if such, suit, appeal or application is not maintainable the Court cannot proceed to decide the issues involved therein on merits. Having held that and at the same time not allowing the application filed for condonation of delay, what the learned first appellate Court has done is to proceed to critically examine the judgment and the decree of the lower Court and grant partial relief to the appellants. If the appeal itself was not maintainable then the decree that followed could not be legal and cannot be given effect to. This being so the judgment and decree of the first appellate Court to that extent cannot be sustained. Notices also may be taken of the fact that had the first appellate Court, finding the appeal to be time barred had acted under Section 3 of the Limitation Act, and stopped its hands at that, there would have been no decree under law and no second appeal would have been maintainable. But at the same time having decided the appeal on merits, decree had followed.

7. Learned Counsel for the respondents argued that the first appellate Court should have allowed the application under Section 5 of the Limitation Act and should have condoned the delay, for that a decision in the case of Municipal Corporation, Gwalior v. Ram Charan (D) by Lrs., 2002 (3) PLJR 61, has been relied upon. That decision is not applicable to the facts and circumstances of this

case. In that case there was delay of 39 days in filing the second appeal and the application under Section 5 of the Limitation Act was dismissed by the High Court. It was under the particular circumstances of that case that the apex Court had held that the Court should take a liberal, and not a rigid and too technical a view of the issue before it and should have condoned the delay in filing the appeal, particularly when the explanation for the delay appeared to be plausible.

8. The learned first appellate Court had decided the application for condonation of delay filed earlier and had given grounds for holding that the first appeal was 'hopelessly time barred'. The only question under consideration here is that as to whether, after holding that the learned first appellate Court should have proceeded to decide the appeal on merits. It may also be noted here that file application for condonation of delay was not decided separately but at the time of delivery of the judgment. The decision on that application does not appear to be improper, but what is improper and not legal is then to proceed to decide the appeal on merits.

9. Learned Counsel for the respondents also argued that the first appellate Court could have reduced the interest even if the appeal was not maintainable. Obviously this argument is unacceptable. In view the aforesaid, discussion this second appeal is allowed and the judgment and decree of the first appellate Court, so far it relates to the findings on merits about the judgment and decree of the trial Court, is hereby set aside.

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