

Durga Devi and ors. Vs. Lalmani Kuer

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Court : Patna

Decided On : Aug-26-1997

Judge : P.K. Deb, J.

Appeal No. : Second Appeal No. 13 of 1996 (R)

Appellant : Durga Devi and ors.

Respondent : Lalmani Kuer

Judgement :

P.K. Deb, J.

1. This appeal has been preferred by the abovenamed defendants appellants against the judgment and decree dated 25.9.1995 passed in Title Appeal No. 15 of 1989 dismissing the appeal as being time barred and thereby confirming the judgment dated 22.12.1987 passed in Partition Suit No. 111 of 1981 by the sub-Judge, I, Palamau at Daltonganj.

2. The predecessors of some of the respondents had filed the abovementioned Partition Suit which was decreed by the original Court and

then appeal was preferred. While the appeal was filed, Seristedar put a note to the effect that the appeal is barred by limitation for about 13 days. The appellant did not file any condonation petition and contended that there is wrong calculation

made by the Seristedar and the appeal is within time. Notice was issued on the limitation matter to the respondents and some of the respondents appeared and it appears that on 25.9.1995, the matter was heard by the learned District Judge, Palamau and by a scrappy order it has been held that the appeal is barred by limitation and by the impugned order/judgment the appeal was dismissed and hence this second Appeal.

3. Mr. P.K. Prasad, appearing on behalf of the appellants submits that such sort of dismissal of the appeal on ground limitation is bad in the eye of law. The appellants were contending that there was wrong in the calculation regarding the limitation period in filing of the appeal by the office of the 'District Judge and in that view they had filed a petition also. According to the appellants, if on scrutiny, the learned District Judge could find that the notes given by the Seristedar was correct and the appeal is really time barred then opportunity ought to have been given to the appellants to file a condonation petition as required under Section 5 of the Limitation Act but without giving that opportunity the appeal has been dismissed, which is bad in the eye of law.

4. In this appeal when the 1st appellate Court dismissed the First Appeal on ground of limitation alone without going into the merits and also without giving opportunity to the appellants to file a petition for condonation of delay, this Court found that the matter could be disposed of at the admission stage itself and as such issued notice to the respondent. The respondent appeared accordingly and contested the appeal.

5. Mr. N.N. Tiwary, the learned Counsel appearing on behalf of the respondent has submitted that this second Appeal is not maintainable as the appeal was dismissed under Order 41, Rule 3-A of the Code of Civil Procedure and against such an order only Revision lies and not an appeal. His second contention is that even if the Second appeal lies, when there is no substantial question of law involved as required under Section 100 of the Code of Civil Procedure. Then this Court should reject the same under order 41, Rule 11 of the C.P.C.

6. Mr. P.K. Prasad has referred to a judgment of the Division Bench of this Court as 1996 PLJR, page 494, Ravneshwar Thakur and Ors. v. Neeraj Kumar and Ors.,

wherein it has been held that a First Appeal rejected on the ground of limitation alone is dismissal of the appeal and a decree being prepared, second appeal is maintainable and not a revision petition.

7. Mr. Tiwary has submitted that in that Division Bench judgment the learned judges had not considered the new provisions as inserted in the Code of Civil Procedure by amendment as contemplated under Order 41, Rule 3A of the C.P.C. When there is dismissal on limitation ground as per Rule 3A of Order 41 then there cannot be any appeal and only a revision is maintainable.

8. Now, first of all we have to see whether this appeal has been rejected under Rule 3A of Order 41 of the Code of Civil Procedure or not.

Here, there is no petition for condonation of delay filed by the appellant, so the question of dismissal of the appeal under Rule 3A does not arise, sub Clause 3 of Rule 3A is applicable only when there is a petition for condonation of delay as required under Section 5 of the Limitation Act, when there is no application for condonation of delay, Rule 3A as a whole is not applicable and hence the present case does not come within the purview of Rule 3A of Order 41 of the CP.C. Hence, this submission of Mr. Tiwary has got no force, when there is a Division Bench judgment of this Court that second appeal shall lie against the dismissal of an appeal on limitation ground alone then the second appeal is maintainable.

9. The second contention of Mr. Tiwary is that no substantial question of law is involved in this appeal. According to him, there is no question of law even not to speak of substantial question of law. That the matter was decided on factual aspect. The appellant contended that the appeal was not time barred and they filed an application to that effect also that the calculation made by the office of the District Judge was wrong and the learned Court below after hearing the parties could find that the appeal was time barred for about 13 days and as such dismissed the appeal in limine.

10. Whether such dismissal is legal or not is a question of law. A Single Bench of this Court as reported in 1996 (2) PLJR 167 Shyama Devi v. Jasomati Devi, while entertaining a Second Appeal held that the condonation of delay need not be

considered in pedantic or technical way to frustrate the cause of justice rather the limitation matter should be construed in relief oriented way. In that case a petition for condonation of delay was filed but here no opportunity had been given to the appellant to file any condonation petition. Whether such dismissal can be made without giving an opportunity of filing the condonation petition or not is a substantial question of law which can be considered under Section 100 of the C.P.C. and I do accordingly hold so. There are catena of decisions on this point. The Calcutta High Court held in : AIR1988 Cal28 Smt. Sipra Dey v. Ajit Kumar Dey, that memorandum of appeal, where the same is barred by Limitation Act Should be accompanied by an application for condonation of delay, and the same view has been expressed by Orissa High Court also as reported in : AIR1986 Ori38 Diabhar and Anr. v. Sulabha and Ors.. The Gujrat High Court had gone a step further, to the effect that when an appeal is presented beyond the period of limitation but without any application for condonation of delay then there is no provision under the Civil Procedure Code to dismiss the appeal straightway without giving an opportunity to the appellant to explain the delay and as such it was held that if the Court finds that the appeal is time barred and there is no application for condonation of delay then at that stage an opportunity should be given to the appellant to file petition for condonation of delay. : AIR1987 Guj205 , Naran Anappa Shethi v. Jayanti Lal Chuni Lal Shah. The same view has been expressed by the Karnataka High Court as reported in : AIR1986 Kant199 State of Karnataka v. Nagappa.

11. The Karnataka High Court further held that the earlier decision to the effect that if no condonation petition have been filed alongwith the memo of appeal then appeal can be dismissed on ground of limitation is bad in law and the

earlier decisions have been over-ruled. It has also been held by Karnataka High Court in the same judgment that as per Rule 3A, requirement of filing of application for condonation of delay alongwith memo of appeal is not a mandatory one and the same can be filed at a later stage also before the same goes for admission on merit.

12. Thus, it is found that if the Court of appeal finds that the memo of appeal is barred by limitation and no application for condonation of delay was filed then an opportunity must be given to the appellant to file a petition for condonation of delay.

13. In that view of the matter, the impugned

JUDGMENT / ORDER

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and the decree thereof is hereby set aside and the matter is sent back to the lower Court but as there are laches on the part of the appellant also as is found from the order sheet than such setting aside shall be on a condition of deposit of Rs. 1000/- within three weeks positively from date before the 1st appellate Court. If no such deposit is made within the time frame the setting aside order shall not be in force. On such deposit being made the amount should be disbursed in favour of the contesting respondent.

14. It appears that the matter is a very old one and at the appellate stage also it took long 4-5 years in deciding the matter on limitation alone, hence it is ordered that the condonation petition, if the other conditions are fulfilled should be filed by the appellants within three weeks from this date alongwith deposit of cost and the same should be disposed of within a month next and if the condonation is allowed the appellants should be heard on merit within one year next positively.

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