

State of Karnataka Vs. Nagappa

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Court : Karnataka

Decided On : Jun-28-1985

Reported in : AIR1986Kant199; ILR1985KAR2374

Judge : N. Venkatachala and ;S.A. Hakeem, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 41, Rules 3A(1), 3A(2), 11 and 13; ;[Limitation Act, 1963](#) - Sections 3 and 5

Appeal No. : C.R.P. No. 3947 of 1984

Appellant : State of Karnataka

Respondent : Nagappa

Advocate for Def. : Shivraj Patil, Adv.

Advocate for Pet/Ap. : M. Prabhudev, Govt. Pleader

Judgement :

Venkatachala, J.

1. In this revision petition, which is before us, being referred for hearing and disposal by a Division Bench, we are concerned and have to deal with the scope and operation of sub-rule 1) of R. 3A of O. 41 .of I he C.P.C. 1908 (for short 'the Act').

2. The material facts, which have given rise to the filing of this revision petition, lie in a narrow compass., The State of Karnataka for short 'the State') presented in the Court of District Judge, Gulbarga for short 'the appellate Court') a time barred appeal. But, that appeal, when presented, was not accompanied by an application for condonation of delay. However, such an application came to be filed subsequently. The appellate Court, which registered the said time barred appeal as R.A. No. 55/83, numbered the said application as I.A.I in that appeal. Later, when the appellate Court took up the time barred appeal together with the application for condonation of delay for hearing, a preliminary objection, to wit, that time barred appeal having been presented without being accompanied by an application for condonation of delay as required under sub-rule (1) of R. 3A of O. 41 of the Code was liable to be dismissed in limine, appears to have been raised relying upon a decision of a learned single Judge of this Court, in *Madhukar Daso Deshpande Anant Nilkandha Deshpande*, : AIR1984 Kant40 . That preliminary objection having been upheld by the appellate Court, by its order dt. 24th July 1984, the appeal itself has come to be dismissed. The validity of that order has been assailed by the State in the present revision petition. This is how, we are concerned and have to deal with the scope and operation of sub-rule (1) of R. 3A of O. 41 of the Code, in the light of the arguments addressed from the Bar.

3. Sub-rule (1) of R. 3A of O. 41 of the Code reads :

'3A. Application for condonation of delay : - (1) When an appeal is presented after the expiry of the period of limitation prescribed therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.'

4. For a proper understanding of the exact scope and real operation of the sub-rule, it would be advantageous to refer at the outset as to why the need for filing an application for condonation of delay arises when a time barred appeal is preferred (presented) in a Court.

5. An appeal preferred after the prescribed period shall be dismissed because of the bar of limitation imposed by S. 3 of the [Limitation Act, 1963](#) (for short 'the

Limitation Act'). As the operation of that Section, as seen therefrom, is made subject to S. 5 of the Limitation Act, an appeal may be admitted by a Court after the prescribed period, if the appellant satisfies the Court that he had sufficient cause for not preferring the appeal within such period. The fact that the appellant was misled by an order, practice or judgment of the High Court in ascertaining or computing the prescribed period, may be sufficient cause within the meaning of that S. 5, becomes clear from the explanation found thereto. As to how the benefit of S. 5 of the Limitation Act could be availed of by an appellant preferring a time barred appeal, is not specified in the Limitation Act. Ex en before R. 3A was inserted in the Code, as a matter of practice, applications for condonation of delay were being filed into the Courts whenever time barred appeals were being presented. Filing of such an application was, in fact, regarded as a procedural step required to be complied with before a time barred appeal was decided by a Court.

6. We shall now refer to the Legislative history of R. 3A wherein sub-rule (1) finds a place, as it will give the background as to why sub-rule (1) as also sub-rule (2) thereof, which requires the Court to decide finally the application for condonation of delay made under sub-rule (1), before it can proceed to deal with the appeal under either R. 11 or R. 13 of O. 41 of the Code, came to be inserted.

7. In *Krishnaswami v. Ramaswami*, ILR 41 Mad 412 at p. 417 : (AIR 1917 PC 179 at p. 180), their Lordships of the Judicial Committee of the Privy Council, while holding that an ex parte order admitting a time barred appeal would be open to reconsideration at the respondent's instance at the hearing of such appeal, observed that the question of limitation should not, however, be left open till such a late stage as the hearing of the appeal, although that had been till then the usage in India. Again, in *Sundara Bai v. Collector*, ILR 43 Bom 376 (383) : (AIR 1918 PC 135 at p. 136), the Privy Council expressed the view that the Indian Courts should adopt a procedure which will secure, at the stage of admission, the final determination, after due notice to all parties, of any question of limitation affecting the competency of an appeal.

8. The Law Commission of India, in its Twenty-seventh Report, at page 2.37, invited reference to its Fourteenth Report, wherein the above observations of the

Privy Council had been noticed and stress was laid on the expediency of adopting a procedure for securing at the stage of admission, the final determination, after due notice of the, question of limitation affecting the competence of the appeal and suggesting insertion of proposed R. 3A in the Code for- the purpose.

9. When Bill No. 27 of 1974 to amend the C.P.C., 1908, and the [Limitation Act, 1963](#), containing the amendment proposed by the Law Commission, was presented before the Parliament along with the statement of objects and Notes on Clauses were also presented. Sub cl. (iii) of Cl. 90 therein read :

'Where an appeal is filed after the expiry of the period of limitation, it is the practice to admit the appeal subject to the provisions as to limitation being raised at the time of the hearing. This practice has been disapproved by the Privy Council which has stressed the expediency of adopting a procedure for securing the final determination of the question as to limitation even at the stage of admission of the appeal. New R. 3A is hereby inserted to give effect to the said recommendation.-

10. That new R. 3A comprised of sub-rules (1) and (2) to which we have adverted earlier. These sub-rules

(1) and (2) came to be enacted as sub-rules (1) and (2) of R. 3A which was inserted into the Code, by Cl. (ii) of S. 87 of the C.P.C, (Amendment) Act. 1976.

11. We shall now proceed to ascertain the scope of sub-rule (1) of R. 3A, from its language and in the context of its Legislative history.

12. An application for condonation of delay shall accompany a time barred appeal, when it is presented, is the requirement of sub-rule (1) of R. 3A, becomes apparent as seen therefrom. The affirmative language employed in the sub-rule, mandates the appellant presenting a time barred appeal to file along with it, an application for condonation of delay as well. This shows the mandatory nature of the sub-rule. The subrule, therefore, may be characterised as a mandatory one. When sub-rule (2), which follows sub-rule (1), enjoins the Court to finally decide the application for condonation of delay filed under sub-rule (1) before it proceeds to deal with the appeal under either R. 11 or R. 13 of O. 41 of the Code, it clearly

indicates that an application for condonation of delay should have accompanied a time barred appeal when presented, so that it may be finally decided before the Court can proceed to deal with the appeal under either R. 11 or R. 13 of O. 41 of the Code. A combined reading of sub-rules (1) and (2) of R. 3A makes it manifest that the purpose of requiring the filing of an application for condonation of delay under sub-rule (1) along with a time barred appeal, is mandatory, in the sense that the appellant cannot, without such application being decided, insist upon the Court to hear his time barred appeal. That was the very purpose sought to be achieved by insertion of sub rules (1) and (2) of R. 3A, becomes clear from the legislative history of new R. 3A to which we have already adverted. The scope of subrule (1) being what we have, thus, stated, we shall now turn to the manner of its operation.

13. Sub-rule (1), in its very nature, is a procedural one. It is designed, as seen from its content, to achieve two purposes: (i) to inform an appellant filing a time barred appeal that it would not be entertained if presented, without being accompanied by an application for condonation of delay; and (ii) to inform the respondent in the time barred appeal that it would not be necessary for him to get ready to meet the grounds of objection taken against the judgment and decree appealed against, in that, the appeal itself cannot be heard under R. 11 or R. 13 of O. 41 of the Code, unless the application for condonation of delay is finally decided in favour of the appellant. No penalty of rejection or dismissal of a time barred appeal for non-compliance with the requirement of the sub-rule is envisaged therein, as has been done under sub-rule (1) of R. 3 of the same O. 41 of the Code, which empowers the Court to reject a memorandum of appeal not drawn up in the prescribed manner. When the explanation to S. 5 of the Limitation Act enables the appellant, who was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period, to seek condonation of delay in presenting the appeal by pleading such order, practice or judgment as sufficient cause therefor, outright dismissal of a time barred appeal presented without being accompanied by an application for condonation of delay, could not have been envisaged at all by the sub-rule, in that, the appellant would be realising the occurrence of such delay in presenting the appeal only when it is pointed out to him either by the Office of the Court or by his opponent. Even the Legislative history of sub-rule (1), to which we have adverted does not indicate

that sub-rules (1) and (2) of R. 3A inserted in the Code, were intended to award the penalty of dismissal of an appeal in the event of non-compliance with the requirement of sub-rule (1) by an appellant presenting a time barred appeal. Thus, when the sub-rule neither expressly nor contextually indicates that its non-compliance by an appellant presenting a time barred appeal, should, as a penalty, entail dismissal of his appeal, we find it rather difficult to regard its operation, as bringing about impliedly such drastic result. It is not also open to us to construe a procedural rule of the kind, intended to aid in the administration of justice as one implying the award of a severe penalty for its non-compliance, if we have regard to what has been said by the Supreme Court as to the manner of approach required of a Court in properly construing a procedural rule.

14. In *Sangram Singh v. Election Tribunal, Kotah*, : [1955]2SCR1 , it is said thus :

'Now a code of procedure must be regarded as such. It is 'procedure', something designed to facilitate justice and further its ends : not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of Sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to 'both' sides) lest the very means designed for the furtherance of justice be used to frustrate it.'

15. Again, in *Jai Jai Rani Manoharlal v. National Building Material Supply, Gurgaon*, : [1999]1SCR1197 it is said thus:

'Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure.'

16. Then, as late as in 1983, in *Kalipada Das v. Bimal Krishna*, : AIR 1983 SC876 , while dealing with a penalty awardable to an appellant who does not comply with a Court's order requiring him to comply with a procedural rule relating to furnishing of Paper Books within the prescribed time, it is said thus :

'A procedural step which facilitates hearing of the appeal, cannot impede access to justice.'

17. A Court, before which a time barred appeal comes up for hearing with no application made along with it under S. 5 of the Limitation Act, seeking condonation of delay, has to necessarily dismiss it not because of non-compliance with sub-rule (1) of R. 3A of O. 41 of the Code, but because of the operation of S. 3 of that Act. Therefore, what a Court can do when a time barred appeal is presented before it without being accompanied by an application for condonation of delay, is to regard such presentation as defective for non-compliance with sub-rule (1) of R. 3A and taking into account the procedural nature of defect in such presentation, to afford to the appellant concerned a reasonable opportunity of remedying the defect, instead of proceeding to dismiss the appeal itself outright or in limine.

Court has to make such approach inevitably and necessarily as the purpose of sub-rule (1) is only to secure at the stage of admission, the final determination of the question of limitation affecting the competence of the appeal. Such should be the approach to be made by a Court in giving effect to a sub-rule of the kind intended to ensure a final decision on the question of limitation before the appeal is taken up for hearing, receives support from what is said by the Supreme Court in *Jagatdish Bhargava v. Jawaharlal Bhargava*, : [1961]2SCR918 , when it was dealing with an appeal presented without complying with the mandatory requirement of sub-rule (1) of R. 1 of O. 41, a mandatory sub-rule. It runs thus :

'It would thus be clear that no hard and fast rule of general applicability can be laid down for dealing with appeals defectively filled under O. 41, R. 1. Appropriate orders will have to be passed having regard to the circumstances of each case, but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinised at, the initial stage soon after they are filed and the appellant required to remedy the defects.'

18. Hence, in our view, mandatory subrule .(I) of R. 3A, the operation of which is being dealt with, has to be regarded by a Court before which a time barred appeal is presented, as requiring that Court to make the appellant presenting such

appeal, comply with its requirement by affording him a reasonable opportunity in that regard and to have recourse to dismissal of such appeal as not properly presented, only when the appellant disregards the opportunity so afforded. It is also our view that a time barred appeal, which was originally presented defectively, but which defect is remedied (cured) within the time allowed by the Court, should be regarded as one properly presented as on the date of its original presentation, in that, the remedying of such a procedural defect necessarily relates back to the date of original presentation of the appeal.

19. We shall now deal with the decision in Madhukar's case : AIR1984 Kant40 (supra) rendered by a learned single Judge of this Court, relying upon which the appellate Court has dismissed the appeal by Its order now under revision.

20. It is a decision rendered in a Regular Second Appeal. There, the validity -of a judgment and decree of a first appellate Court dismissing a time barred appeal, on the ground that no application for condonation of delay was filed therein had been assailed. In dismissing that Regular Second Appeal and affirming the judgment and decree of the appellate Court appealed against, the learned single Judge held thus:

'In view of the mandatory provision of O. 41, R. 3A of C.P.C., the application for condonation of delay shall be accompanied with the appeal memo, if the appeal is presented beyond time. There is no occasion for the Court to say that the application for condonation of delay might be entertained later and there is no occasion for the appellant to request that such an application should be received even at this stage in the interest of justice. Since application for condonation of delay was not admittedly accompanied with the appeal memo, though it was presented beyond time, the first appellate Court was justified in rejecting the appeal (as) barred by time.'

Thereafter the learned single Judge has referred to a decision of a learned single Judge of the Kerala High Court in Padmavathi v. Kalu, : AIR1980 Ker173 , in which it was observed thus :

'It is mandatory for a person presenting an appeal after expiry of the period of limitation specified therefor to file application supported by an affidavit to satisfy the Court that he had sufficient cause for not preferring the appeal within such period. It is mandatory for the condonation petition to accompany -the appeal.'

The learned single Judge appears to have sustained support for his view from the above observations without noticing a Division Bench decision of the same Court in *Mayadevi v. M. K. Krishna Bhattathiri*, : AIR1981 Ker240 by which the decision in *Padmavathi's case* (supra) was overruled. It is obvious that the said Division Bench decision had not been brought to the notice of the learned single judge and we consider this lapse as rather unfortunate.

21-22. Our view that sub-rule (1) of R. 3A of O. 41 of the Code, is mandatory, since well accords with the view expressed by learned single Judge on this aspect in *Madhukar's case* : AIR1984 Kant40 (supra), we approve of the same. But, our view of sub-rule (1), to wit, that it does not enable a Court before which a time barred appeal is presented without being accompanied by an application for condonation of delay, to dismiss it outright or in limine and instead, requires the Court to afford to the appellant concerned, a reasonable opportunity of remedying such defect, since goes contrary to the view expressed in this regard by the learned single Judge in *Madhukar's case* (supra), with due respect to him. we overrule the same.

23. The view we have taken as to how an appellate Court can make operative subrule (1) of R. 3A, it has to be said, receives support from the decisions of High Courts of Kerala, Patna and Bombay (*Mayadevi v. M. K. Krishna Bhattathiri*, : AIR1981 Ker240 ; *State of Bihar v. Rav Chandi Nath Sahay*, : AIR1983 Pat189 ; and *M. Das Gupta v. Prakash K. Shah*, : [1985]153ITR76(Bom) though the reasons given therefor, are not exactly the same as ours.

24. Reverting to the facts of the present revision petition, the order assailed here, is unsustainable and calls to be interfered with because of the views we have taken of the true scope and real operation of sub-rule (1) of R. 3A of O. 41 of the Code.

25. In the result, we allow this revision petition, set aside the order under revision, and remit the case to the appellate Court with a direction that it shall finally decide the application for condonation of delay at the first instance and if that is decided in favour of the appellant, to hear the appeal on merits and decide it.

26. Petition allowed.

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