The Commissioner Vs. Shrishail and ors.

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Court : Karnataka

Decided On : Jul-22-2003

Reported in : AIR2004Kant75; ILR2003KAR3329; 2003(6)KarLJ279

Judge : N.K. Jain, C.J., ;V.G. Sabhahit and ;H.G. Ramesh, JJ.

Acts : Limitation Act, 1963 - Sections 5; Code of Civil Procedure (CPC) , 1908 - Sections 2(2), 100 and 115 - Order 41, Rules 3A and 35

Appeal No. : R.S.A. No. 379/1999

Appellant : The Commissioner

Respondent : Shrishail and ors.

Advocate for Pet/Ap. : S.S. Haveri, Adv.

Judgement :

Jain, CJ

1. A learned Single Judge of this Court while considering this Appeal arising out of the judgment and decree dated 11.9.1998, passed in R.A.No. 13/1998, has opined that the decision of this Court in KANJI MOORARJI v. S.V. HEGDE, 1979(1) Kar.L.J. 249 is contrary to the decision of the Supreme Court in RANI CHOUDHURY v. SURAJJIT CHOUDHURY,referred the matter to the Division Bench, and in

turn a Division Bench of this Court vide Order dated 7.4.2003 has referred the matter to the larger Bench and ordered to place the matter before the Chief Justice for constituting the larger Bench. As per direction of the Chief Justice issued on 7.7.2003, this reference has come up before us.

2. The question for consideration is whether an order dismissing the Appeal following the rejection of application under Section 5 of the Limitation Act for condoning the delay in filing the appeal, is a decree passed in appeal within the meaning of Section 100 of the Code of Civil Procedure.

3. The necessary facts in the instant case to be stated before dealing with the above question, are:

Respondents 1 to 13 herein filed O.S.No. 264/1989 on the file of the I Addl. Munsiff, Dharwad, against the appellant herein and respondent No. 14, seeking for a declaration that the rateable value fixed by Appellant - Corporation in respect of shops in the occupation of the Plaintiffs is illegal, void, ultra vires and unenforceable, and for the consequential relief of injunction to restrain the appellant from recovering tax based on the said proceedings against the Plaintiffs directly or through Respondent No. 14 herein. The defendants resisted the suit. After trial, the Trial Court answered the issues in favour of the plaintiffs and decreed the suit as prayed for. Being aggrieved by the said judgment and decree, the first defendant, appellant herein, filed R.A. No. 13/1993 on the file of the III Addl. Civil Judge (Sr.Dn), Dharward, and since there was delay of 70 days in preferring the appeal, I.A. No. I was filed under Section 5 of the Limitation Act seeking for condonation of the said delay in preferring the first appeal. The first Appellate Court by its order dated 11.9.1998 rejected I.A.No. 1 with costs and as a consequence, the Appeal was dismissed as barred by time. Accordingly, decree was drawn in Form No. 9 (Civil) under Order 41 Rule 35, C.P.C.

4. As stated, the learned Single Judge as well the Division Bench, considering the contentions of the parties regarding maintainability of the Appeal and with a view that a decision on this point will settle a number of cases pending have referred the matter. In other words, the question is whether an Appeal or Revision lies against an order dismissing the application for condonation of delay.

5. S.S. Haveri, learned Counsel for the Appellant, submitted that delay was not condoned, the first Appeal was rejected, but a decree has been drawn under Order 41 Rule 35 CPC and a second Appeal was filed on the ground that the judgment and decree passed by the Trial Court stands confirmed and merged in the decree of the first Appellate Court and therefore second Appeal is maintainable. In support of his contention, he has relied upon the decisions of the Supreme Court in SHEODAN SINGH v. SMT. DARYAO KUNWAR, , RAJA KULKARNI v. THE STATE OF BOMBAY, AIR 1954 SC 73, RANI CHOWDHARY v. SURAJ JIT CHOWDHARY, V.M. SALGUACAR AND BROTHERS PVT. LTD. v. COMMISSIONER OF INCOME TAX, AIR 2000 SC 1623, KUNHAYAMMED AND ORS. v. STATE OF KERALA AND ORS., and the Full Bench decision of the Kerala High Court in THAMBI v. MATHEW,

6. On the other hand, Ashok R.Kalyan Shetty, learned Counsel for Respondents 1 to 3 and 5 to 13 submitted that the first Appellate Court has not adjudicated the appeal on merits but has dismissed it consequent upon the dismissal of the application for condonation of delay, so decree could not be passed and therefore second appeal is not maintainable under Section 100 CPC and if no Appeal is maintainable a revision would lie under Section 115 CPC. He submits that mere drawing up of a decree would not entitle the aggrieved party to file a second Appeal. In support of his contention, he has relied upon the decisions of the Supreme Court is Smt. KALAVATI v. DURGA PRASAD, , RATAN SINGH v. VIJAY SINGH, AIR 2001 SC 279 and the Division Bench decision of this Court in KANJI MOORARJI AND ORS. v. SRIPATI VENKATARAMANA HEGDE (Supra) and the Full Bench decision of the Calcutta High Court in MAMUDA KHATEEN v. BENIYAN BIBI, .

7. We have heard the learned Counsel appearing for the Appellant and the Respondents and perused the materials on record and the case laws.

8. Before appreciating the rival contentions, it will be appropriate to refer to Sections 100 and 2(2) CPC and Order 41 Rule 3A CPC.

Section 100 CPC, says that an appeal shall lie to the High Court from any decree passed in Appeal by any Court subordinate to the High Court and Section 2(2) of

the Civil Procedure Code defines "decree" as formal expression of an adjudication, which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. Order 41 Rule 3A of the Code of Civil Procedure deals with the application for condonation of delay in filing the appeal and requires the said application shall be finally decided by the Court before it proceeds to deal with the Appeal under Rule 11 or 13.

9. A perusal of the definition of the word 'decree' reveals that a decree is a formal expression of adjudiciation of rights of the parties. So after determining the rights conclusively between the parties, a decree is drawn. As per Order 41 Rule 3A CPC unless an application for condonation of delay is finally decided, merits of the case cannot be heard. In other words, if the delay is not condoned, such order will not be a decree within the meaning of Section 2(2) of C.P.C.

10. Now the simple point is that unless the delay in filing the Appeal is condoned, the merits of the case cannot be heard and once the merits of the case have not been decided, meaning thereby, rights of the parties are not determined, formal decree will not come into existence, and once decree is not drawn, the question of filing of an Appeal in absence of a decree will not arise. In other words, unless the judgment on which the decree is passed or the decree itself does not determine the substantive rights of the parties, such order or judgment cannot be held to be a decree.

11. Considering the arguments and the case law referred, we find that in SHEODHAN SINGH's case, the Supreme Court held that dismissal of Appeal by High Court on the ground that it was barred by time and steps and had not been taken for printing the records, would amount to a decision on merits for considering as to whether it would operate as res judicata under Section 11 CPC. In RANI CHOWDHARY's case, the Supreme Court held that for the purpose of explanation to Order 9 Rule 13, dismissal of appeal on any ground including dismissal on the ground of limitation, except withdrawal of Appeal would debar filing of application to set aside ex parte decree and specifically observed that dismissal of appeal as barred by time may not be decision on merits and may or

may not amount to merger of Trial Court decree. In RAJ KULKARNI's case also, the Supreme Court has not considering the question referred in this case. The other two decisions of the Supreme Court deal with the question as to whether decree of High Court would merge with the order of the Supreme Court with reference to petition for Special Leave to appeal and consideration of Special Leave Petition, and has observed that Doctrine of Merger is not a Doctrine of universal or unlimited application, and it will depend upon the nature of the jurisdiction exercised by the Superior Forum and the content or subject matter of challenge laid or capable of being laid shall be determined of the applicability or merger.

The Supreme Court in Kalavati's case has observed with approval decision in KARASONDOS DHARAMSEY's case (1907) ILR 32 Bom 108 holding that an order of the High Court refusing to admit an Appeal after the period of limitation had expired would not be a decree passed on appeal by the High Court and held that it is only where the appeal is heard and judgment delivered thereafter, the judgment can be said to be a judgment of affirmance and if appeal is not entertained on the preliminary ground that it was not maintainable or for any other reason, the decision cannot be said to be decision in appeal. This judgment of three Judges of the Supreme Court was followed by a division Bench of this Court in KANJI MOORARJI's case by holding that dismissal of appeal on the ground that it had abated against respondent, would not be a decision in appeal affirming the decree of the Trial Court and would not be decree passed in appeal and hence no second appeal would lie and revision was maintainable. Full Bench of the Calcutta High Court in MAMUDA KHATEEN v. BENIYA BIBI (Supra) held that order rejecting time barred memorandum of Appeal consequent upon refusal to condone delay is not a decree nor a appealable order, however, such order is revisable. Same view has been taken by Madhya Pradesh High Court in AJIT SINGH v. V. BHAGWAN AND ANOTHER, , Rajasthan High Court in CHHELARAM v. MANAK, Orissa High Court in AINTHU v. SITARAM,. However, Full Bench of the Kerala High Court took a contrary view in THAMBI v. MATHEW.

12. The question as to whether dismissal of Appeal consequent upon dismissal of application for condonation of delay would amount to decree has been specifically

considered and decided by the Supreme Court in RANTANSINGH v. VIJAY SINGH, (Supra) wherein after referring to 'decree' as defined in 2(2) Civil Procedure Code in para 10, the Supreme Court has observed as follows in para 11 and it would answer the question to be determined in this reference:-

"11. In order that decision of Court should become a decree there must be an adjudication in a suit and such adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be of a conclusive nature. If those parameters are to be applied then rejection of application for condonation of delay will not amount to decree. Consequently, dismissal of an appeal as time barred is also not a decree. We are aware that some decisions of the High Courts have taken the view that even rejecting an appeal on the ground that it was presented out of time is a decree within the meaning of the said definition. We are also aware of the contrary decisions rendered by High Courts on the same point. Dealing with some of those decisions a Full Bench of the Calcutta High Court (S.P. Mitra, CJ, Sabyasachi Mukherjee, J (as he then was) and S.K. Datta. J) has held in MAMUDA KHATEEN v. BENIYAN BIBI, (Supra) that " if the application under Section 5 of the Limitation Act was rejected the resultant order cannot be decree and the order rejecting the memorandum of appeal is merely an incidental order." The reasoning of the Full Bench was that when an appeal is barred by Limitation, the appeal cannot be admitted at all until the application under Section 5 of the Limitation Act is allowed and until then the appeal petition even if filed, will remain in limbo. If the application is dismissed the appeal petition become otiose. The order rejecting the memorandum of appeal in such circumstances is merely an incidental order. We have no doubt that the decisions rendered by the High Courts holding the contrary view do not lay down the correct Principle of law."

In view of the above decision of the Supreme Court, the question for reference is answered by holding that an order rejecting the Memorandum of Appeal following rejection of application for condonation of delay in filing the appeal under Section 5 of the Limitation Act, would not be a decree passed in Appeal and hence, Second Appeal would not lie under Section 100 CPC and order would be revisable under Section 115 CPC. When once it is held that order dismissing appeal as barred by

time, is not a decree, the question of drawing a decree under Order 41 Rule 35 would not arise and mere drawing of decree in the prescribed form would not make such an order a decree and any decree drawn pursuant to such an order is immaterial and would not debar the aggrieved party to file Revision.

13. In view of the decision of the Supreme Court in RATANSINGH'S case, as stated above, rejection of an application for condonation of delay will not amount to a decree and consequently, dismissal of an Appeal as time barred is also not a decree. The answer to the question is that no second Appeal lies and the order would be revisable. In view of this, as stated, the decision of this Court in KANJI MOORARJI's case would not require any reconsideration of the present controversy.

Accordingly, we answer that when an appeal is dismissed as barred by limitation, no appeal lies against such an order even if a formal decree is drawn. No decree need be drawn in such cases. However, Revision lies against such an order. The reference is answered accordingly. The appeal shall now be placed before the appropriate bench for disposal.