

Shivkumar Vs. Padum

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Court : Madhya Pradesh

Decided On : Aug-03-2000

Reported in : 2001(1)MPHT186

Judge : Mr. S.C. Pandey, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100 - Order 22, Rule 9 - Order XLI, Rule 3-A; [Limitation Act, 1963](#) - Sections 5; Civil Procedure (Amendment) Code, 1976

Appeal No. : Second Appeal No. 1362/99

Appellant : Shivkumar

Respondent : Padum

Advocate for Pet/Ap. : Shri M.S. Patel, Adv.

Disposition : Second Appeal dismissed

Judgement :

ORDER

S.C. Pandey, J.

1. The Civil Appeal No. 48-A/99 was dismissed by the Lower Appellate Court on the ground that it was barred by time. It is not in dispute that the appellant-plaintiff

did not file any application for condonation of delay. The Court below had no option but to dismiss the civil appeal as the Order 41 Rule 3-A of the Code of Civil Procedure were not complied with. It is clear from the plain language of Order 41 Rule 3-A of the Code of Civil Procedure that a memorandum of appeal 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. Admittedly, this application was not filed. It is also very clear that this provision was added by CPC (Amend.) Act, 1976 with effect from 1-2-1977. It is apparent from the language of Rule 3-A of Order 41 of the Code of Civil Procedure that the question of limitation has to be decided prior to admission of the second appeal, after hearing the parties on merits of the application for condonation of delay. It appears that the civil appeal was admitted without noticing the fact that it was barred by time. It may be that the Court may relax the condition that the application for condonation of delay may be filed subsequent to the filing of an appeal in the interests of justice. But, it cannot altogether nullify the operation of Order 41 Rule 3-A of the Code of Civil Procedure by holding that no application need be filed under Order 41 Rule 3-A of the Code of Civil Procedure. The question of condonation of delay in filing the appeal cannot be said to be merely procedural. The law has prescribed limitation for filing an appeal and an appeal should ordinarily be filed within the prescribed period of limitation. The question of limitation is also a question on merits and it cannot be held to be procedural. The opposite party can always say that there is no ground for condonation of delay under Section 5 of the Limitation Act. Therefore, it is necessary that the appellant-plaintiff should have filed an application under Order 41 Rule 3- A of the Code of Civil Procedure as the question of sufficient cause in condoning the delay in filing the appeal cannot be decided on the mere oral request of the counsel for the appellant. This Court does not agree with the authority cited by learnedcounsel for the appellant in the case of Miss Nirmala Chaudhary v. Bisheshar Lal, reported in AIR 1979 Delhi 26. If the view taken by the Delhi High Court is accepted, then Order 41 Rule 3-A of the Code of Civil Procedure shall become redundant. Such a view cannot be taken especially when the legislature had stated the Objects and Reasons for enacting Order 41 Rule 3-A of the Code of Civil Procedure that the question of limitation should be decided at

the outset prior to the admission of the appeal. In case, judgment of the Delhi High Court in that case is accepted, as correct, then the question of limitation could not be decided satisfactorily because the oral prayer of a party cannot be effectively opposed by the opposite party. The delay may or may not be condoned without recording any evidence without deciding essential questions of facts constituting 'sufficient cause' for not filing an appeal within time. It is inherent in the nature of Section 5 of the Limitation Act that the sufficient cause must be pleaded in writing so that the opposite party may have a right to rebut it in writing and by leading evidence. An application for condonation of delay cannot be opposed on vague oral pleas made by the person who had filed the appeal. In the opinion of this Court, so far as Section 5 of the Limitation Act is concerned, the application in writing is must so that the opposite party may rebut it. In view of this matter too, this Court holds that an application under Section 5 of the Limitation Act is essential even though it is not so prescribed in so many words in it. There is stronger reason to take this view in cases covered by Order 41 Rule 3-A of the Code of Civil Procedure because the rule requires that the memo of appeal shall be accompanied by an application for condonation of delay. This Court also does not accept the view of the Gujarat High Court in the case of *M/s. Markland Pvt. Ltd. and others v. State of Gujarat*, reported in AIR 1989 Gujarat 44, for the reason, that the satisfaction of the Court is dependent upon a finding that there was sufficient cause for condoning the delay. The opposite party has also a right to oppose the prayer for condonation of delay. This can be done only by way of proper pleadings and evidence of sufficient cause and not on the basis of an oral prayer. So also, for the reasons aforesaid, this Court does not accept the view of the Allahabad High Court in the case of *Smt. Shakuntala Devi v. Banwari Lal and others*, reported in AIR 1977 Allahabad 551, that delay in filing the appeal could be condoned by an oral prayer. However, that case is slightly different. In that case, an application under Order 22 Rule 9 of the Code of Civil Procedure was filed stating the sufficient cause for not filing the application for bringing the legal representatives on record and also for not filing an application for setting aside abatement even after the expiry of sixty days. The Court said that the application under Order 22 Rule 9 of the Code of Civil Procedure can be treated as an application under Section 5 of the Limitation Act and delay can be condoned on

the basis of the application under Order 22 Rule 9 of the Code of Civil Procedure. This is altogether different. Perhaps only in those cases where it is not disputed by the opposite party, that there was sufficient cause under Section 5 of the Limitation Act, the oral prayer may be accepted. In cases covered by Order 41 Rule 3-A of the Code of Civil Procedure even this course cannot be adopted unless the opposite party appears and concedes that there was sufficient cause for condonation of delay or it is waiving the plea of limitation. But, in such a case, the Courts decide the case as estoppel on concession or waiver but not on the ground that an oral prayer is enough for condoning the delay under Order 41 Rule 3-A of the Code of Civil Procedure.

2. For all these reasons, there appears to be no merit in this appeal. The appeal fails and is hereby dismissed in limine and so also the M. (C.) P. No. 93/2000 for temporary injunction.

3. Second Appeal dismissed.

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