

Smt. Bimala Devi and ors. Vs. Patitapaban Dev and ors.

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Court : Orissa

Decided On : Feb-08-1973

Reported in : AIR1973Ori169

Judge : G.K. Misra, C.J., ;B.K. Patra and ;R.N. Misra, JJ.

Acts : [Limitation Act, 1963](#) - Sections 5 - Schedule - Articles 122 and 137; Code of Civil Procedure (CPC) - Sections 151

Appeal No. : M.J.C. No. 95 of 1972

Appellant : Smt. Bimala Devi and ors.

Respondent : Patitapaban Dev and ors.

Advocate for Def. : S.N. Sinha, Adv.

Advocate for Pet/Ap. : B. Patnaik, Adv.

Judgement :

G.K. Misra, C.J.

1. Facts may be stated in brief. First Appeal No. 127 of 1971 was filed with 4 defects. Defects 1 to 3 were removed before the Registrar on 10-1-1972 by order No. 2. For removal of defect No. 4 the Registrar granted three days time on that day with an order that failing compliance the appeal would be placed before the Bench for dismissal. As the defect was not removed the appeal was listed before

R.N. Misra, J. on 18-1-1972 who passed the following order:

'There is no compliance of order No. 2. There is no appearance. Mr. Das is granted two days' time to comply with order No. 2 subject to an application failing which the appeal shall stand dismissed without further reference to Court.' The appellants filed the requisites in time but did not file an application for acceptance of the requisites. Thus, the peremptory order passed on 18-1-1972 was not complied with partially. Accordingly the Deputy Registrar passed an order on 25-1-72 to the effect 'the appeal stands dismissed in pursuance of Court's Order No. 3 dated 18-1-1972.'

On 13-7-1972 this M. J. C was filed, long after the expiry of thirty days. The Stamp Reporter did not take any objection that the M. J. C was barred by limitation. The Deputy Registrar referred to a judgment of Ahmed C. J. in M. J. C No 55 of 1965 disposed of on 14-1-1966 (Orissa) taking the view that the application is not barred by time. The learned Chief Justice's view is extracted here-under:

'.....According to the provision made in Article 122 of the Limitation Act, this application should have been filed latest by the 29th of August, 1965. Mr. Chatterji appearing for the petitioner has challenged the report given by the Stamp Reporter. The submission made by Mr. Chatterji is that in a case like this which has been filed under Section 151 C. P. C. the limitation as provided in Article 122 of the Limitation Act does not apply. In fact according to the learned counsel there is no limitation provided at all for a case like this in the Limitation Act. In support of this contention reliance has been placed by the learned counsel on a Bench Decision of the Patna High Court reported in Mrs. Minne Lal v. Mahadeo Lall, AIR 1949 Pat 112. There the phrase 'for want of prosecution' as used therein has been interpreted to mean 'dismissed for want of prosecution as provided or contemplated in the Code of Civil Procedure and not dismissed for want of non-compliance of any peremptory order passed by the Court'. In my opinion the view taken in the Division Bench is fully supported by the terms as used in Article 122 of the Limitation Act. Accordingly it is held that an application made in the circumstances stated above is not governed or controlled by Article 122 of the Limitation Act.....'

The matter was placed before R.N. Misra, J. who by his order dated 22-8-73 referred it to a larger Bench due to conflict of judicial opinion. The case was placed before a Division Bench consisting of Acharya and R.N. Misra JJ. and they referred the matter to a Full Bench OB 7-9-1972. This is how the case has come before us.

2. The short question for consideration is whether Article 122 or Article 131 of the Indian [Limitation Act, 1963](#) (Act 36 of 1963) applies to an application for restoration of the appeal dismissed for non-compliance of the provisions of the High Court Rules. Articles 122 and 137 run thus:

Description of suit
Period of Limitation
Time from which period begins to run.

122. To restore a suit or appeal or application for review Or revision dismissed for default of appearance or for want of prosecution or for failure to pay costs of service of process or to furnish security for costs.

Thirty days
The date of dismissal.
137. Any other application for which no period of limitation is provided elsewhere in this Division.
Three years
When the right to apply accrues.

3. Article 122 so far as it relates to readmission of an appeal dismissed for want of prosecution corresponds to Article 168 of the Indian Limitation Act, 1908 (Act IX of 1908). Similarly Article 137 of the 1963 Act corresponds to Article 181 of the 1908 Act.

4. Articles 168 and 181 of the 1908 Act run thus:

Description of application
Period of Limitation
Time from which period begins to run.

168. For the re-admission of an appeal dismissed for want of prosecution.

Thirty days
The date of the dismissal.
181. Application for which no period of limitation is provided elsewhere in this schedule or by section 48 Of the Code of Civil Procedure, 1908 (V of 1908).
Three years
When the right to apply accrues.

Law is well settled that a residuary Article of the Limitation Act is applicable if any specific Article is not applicable to the facts and circumstances of a case. Article 137 is the residuary Article. It will have no application if Article 122 in terms would be applicable to the facts of this case.

We would, therefore, examine whether article 122 is applicable to this case. The relevant portion of the Article is that the period of limitation to restore an appeal dismissed 'for want of prosecution' is thirty days from the date of dismissal.

One view is that the expression 'for want of prosecution' is not limited in its application and is not confined to an appeal dismissed for default under specific provisions of 'Order 41', C.P.C. but is wide enough to cover any class of appeal dismissed for want of prosecution. The alternative view reflected in the judgment of Ahmed C.J. is that Article 122 is to be confined to dismissal of appeals for want of prosecution as provided in specific provisions of the Civil Procedure Code.

5. Before examining which of the views is correct, it would be appropriate to refer to the various provisions in Order 41 of the Civil Procedure Code under which an appeal is dismissed and is restored.

6. Under Order 41, Rule 10 (I) C.P.C. the appellate Court may require the appellant to furnish security for costs. If the security is not furnished within such time as the Court orders, the Court shall reject the appeal under Sub-rule (2).

Under Order 41, Rule 11 (1) the appellate Court may dismiss the appeal after fixing a day for hearing the appellant without sending notice to the respondent. It may under Rule 11 (2) dismiss the appeal on an adjourned day of hearing if the appellant does not appear when the appeal is called on for hearing.

Similarly, the appeal can be dismissed under Order 41, RULE 17 (1) for appellant's default.

Order 41, Rule 18 relates to dismissal of appeal where the notice is not served in nonsequence of the appellant's failure to deposit the sum required to defray the cost of serving the notice.

Rule 19 is the only provision in Order 41 for re-admission of appeal dismissed for default. This rule with Orissa amendment runs thus:

'19. (1) Where an appeal is dismissed under Rule 11, Sub-rule (2) or Rule 17 or Rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

(2) The provisions of Section 5 of the Indian Limitation Act, 1908 shall apply to applications under Sub-rule (1).'

7. It would thus be seen that the First Appeal was not dismissed for non-compliance with the provisions of Order 41. Rules 11, 17 and 18. Consequently, the application for restoration is not one under Order 41, Rule 19, C. P. C.

8. It would be appropriate at this stage to extract the relevant Rules of the High Court of Orissa Volume I under which the First Appeal was dismissed. Those rules are 6 and 7 of Chapter VII. Part II, and Rule 13, second proviso, of Chapter III. Part I.

'6.In case of appeals from original decrees, the memorandum of appeal shall be accompanied by the requisite process fee and the process forms, duly filled in, the date of appearance and the date of the notice being left blank.'

'7. When an appeal or application is not accompanied by the necessary copies of judgments, the Registrar may allow time for production of the same. If copies are not produced within the time allowed, the appeal or application shall be laid before the Court for orders.

Note:-- The provisions of this rule shall apply mutatis mutandis to an appeal from original decree where the memorandum of appeal is not accompanied by the requisite process fee and the process forms.'

'13. In addition to the powers conferred upon him by other rules, the Registrar shall have the following duties and powers:--

X X X Provided, secondly that whenever, compliance of any matter is not made or defect not removed within the time allowed by Registrar or within the time limited therefore in the rules hereinafter contained, the appeal or application shall without being listed in that matter before the Lawazima, Court be placed before the Bench for dismissal of the appeal or application as the case may be and the same shall be liable to be dismissed unless a petition supported by an affidavit showing to the satisfaction of the Bench that there is good and sufficient cause for condoning the delay is filed and the Bench grants further time for compliance. This proviso shall not apply to matters which the Registrar is empowered to finally dispose of without reference to the Bench under the rules.'

In First Appeal No. 127 of 1971 the memorandum of appeal had been filed in violation of Rule 6. It was accordingly listed before the Registrar for orders under Rule 7. The order of the Registrar not being complied with, the matter was placed before the Bench under Rule 13 second proviso. The Bench granted two days' time with a direction to file the requisites along with an application. The application was not filed within time and the appeal was dismissed for partial non-compliance of the peremptory order.

9. Thus, the First Appeal was dismissed not under Order 41, Rule 11 (2), Rule 17 or Rule 18 but under specific rules of the Rules of the High Court of Orissa Volume I.

10. In the High Court Rules there is no provision for restoration of an appeal. Consequently, the power of restoration must be exercised under Section 151 C. P. C. which lays down that nothing in this Code shall be deemed to limit or otherwise affect the inherent Power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In AIR 1939 Pat 678 (Ramkhelawan Singh v. Monilal Sahu) the appeal was dismissed for non-filing of the appellant's list within time. The Full Bench held that the application for restoration was maintainable under Section 151. C.P.C. We are in respectful agreement with that view.

11. The various articles in the Schedule attached to the [Limitation Act, 1963](#) are divided into three Divisions. The First Division from Articles 1 to 113 relates to suits. The Second Division from Articles 114 to 117 relates to appeals. The Third Division from Articles 118 to 137 deals with applications. There are some Articles in the Third Division which do not at all relate to applications under the Civil Procedure Code. For instance. Article 119 relates to applications under the Arbitration Act, 1940. Similarly, Articles 132 and 133 relate to applications under Articles 132, 133 and 134 of the Constitution of India, 1950. Article 1'33 prescribes the limitation for special leave to appeal to the Supreme Court. None of these Articles relates to applications under the Civil Procedure Code.

On the other hand there are certain Articles which specifically refer to applications under the Civil Procedure Code Articles 120 and 121 may be referred to by way of illustration. Articles 120 and 121 run thus:

Description of suit Period of limitation. Time from which period begins to run.

120. Under the Code of Civil Procedure, 1908 (5 of 1908), to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent, made a party.

Ninety days The date of death of the plaintiff, appellant, defendant or respondent as the case may be.

121. Under the same Code for an order to set aside an abatement. Sixty days. The date of abatement

12. When the legislature did not use the words 'Civil procedure Code' in Article 122 as used in Articles 120 and 121 and did not purport to confine Article 122 to appeals dismissed for want of prosecution under the Civil Procedure Code, there is no justification to give the expression 'for want of prosecution' a restrictive meaning. The plain language of the Article justifies the conclusion that it would have wide application to all appeals dismissed for want of prosecution. An appeal dismissed for non-compliance with the High Court Rules is nonetheless an appeal dismissed for want of prosecution. The application for restoration under Section

151 C. P. C. is an application to restore such an appeal and falls within the ambit of Article 122. We are in agreement, with the views expressed in AIR 1930 Rang 228 (FB) (Shakoor) Abdul Ganny v. Mrs. I.M. Russel, AIR 1932 Mad 170. G. Sirur v. R. Mythili; AIR 1937 Oudh 426 Firm Anant Ram Mangat Ram v. Firm Ram Sarup & Sukhdeo Prasad and ILR (1951) 1 Rai 827, Ram Niwas v. Suleman.

On the aforesaid analysis, we are of the opinion that the contrary views expressed in AIR 1949 Pat 112 (Mrs. Minne Lal v. Mahadeo Lall): AIR 1962 Cal 110: (Biswanath Banerjee v. Amar Nath Mukherjee) and AIR 1968 Mys 329, (Baswantarava v. Gurappa) do not lay down good law. The view expressed by Ahmed C.J. in MJC No. 65 of 1965 (Orissa) is overruled.

13. It need hardly be stated that Section 5 of the [Limitation Act, 1963](#) is applicable to an application under Article 122. If sufficient cause is shown, limitation can be condoned. The learned Single Judge passed the following order on 10-8-72:

'The M. J. C. shall be taken as pending notwithstanding the order for restoration of the first appeal.'

In view of this order we do not consider it necessary to give any further direction.

14. We appreciate the assistance given by Mr. B. Patnaik and Mr. S.N. Sinha who argued the case amicus curiae.

Patra, J.

15. I agree.

B.N. Misra, J.

16. I agree.