

Labhmal Vs. Lalchand

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Court : Rajasthan

Decided On : May-06-1971

Reported in : AIR1972Raj123; 1971(4)WLN275

Judge : L.N. Chhangani and; J.P. Jain, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47 - Order 41, Rule 1; Rajasthan High Court Rules, 1952 - Rule 132; Limitation Act, 1908 - Sections 5

Appeal No. : Special Appeal (Execution) No. 26 of 1966

Appellant : Labhmal

Respondent : Lalchand

Advocate for Def. : Inderchand Maloo, Adv.

Advocate for Pet/Ap. : Biradmal Singhvi, Adv.

Disposition : Appeal dismissed

Judgement :

Jain, J.

1. This Is a special appeal under Section 18 (2) of the Rajasthan High Court Ordinance, 1949 by leave of a Single Judge of this Court.

2. Labhmal had a money decree against Lalchand, judgment-debtor for a sum of Rs. 5,862/-. By his application dated 12-7-1962 in the execution court, he prayed for the arrest and detention of the judgment-debtor in civil prison. On notice the respondent judgment-debtor opposed the application under Section 47 of the Code of Civil Procedure. After enquiry, the Civil Judge, Jodhpur ordered the judgment-debtor to be sent to civil prison for six months. In appeal against this order the learned District Judge held that in view of the proviso to Section 51 of the Code of Civil Procedure, the judgment-debtor was not liable to arrest and detention in civil prison. He accordingly set aside the order of the execution court and allowed the appeal by his order dated 7th April, 1965.

3. The decree-holder presented an appeal against this order on 12th July, 1965 on the last day of limitation in the High Court. The memorandum of appeal was accompanied only by a copy of the judgment. Copy of the order-sheet was not submitted. On 21-7-1965 it was pointed out by the office that the copy of the decree or the formal order against which the appeal was directed has not been submitted. The appellant then applied for a copy of the decree-sheet on 24-7-1965 and obtained the same from the court of District Judge, Jodhpur and submitted the same on the same day. The office then raised the objection that the appeal was barred by limitation. The appellant then made an application under Section 5 of the Limitation Act and stated therein that no decree-sheet was required to be prepared under Order XX, Rule 6, Civil P. C. as the question decided was under Section 47, Civil P. C. It was also stated that no decree-sheet was prepared by the execution court and he believed that no decree-sheet was required to be prepared by the first appellate court. It was also submitted that he got the file of the appellate court inspected by his counsel on the next day and he came to know for the first time that the decree-sheet was prepared in that case. He applied for a copy and obtained the same. The learned single Judge held that a copy of the decree-sheet was required to be filed and the reasons given under Section 5 of the Limitation Act were not sufficient for extending the limitation. He dismissed the appeal as time-barred. He, however granted leave to file special appeal.

4. We have heard Shri Biradmal Singhvi for the appellant and Shri In-derchand Maloo on behalf of the respondent.

5. It is admitted that the appellant applied for obtaining a copy of the decree-sheet in the court of District Judge. Jodhpur for the first time on 24-7-1965. This application was not made within time. This is also not in dispute that a decree was drawn in pursuance of the order of the District Judge dated 7th April. 1965 on the same day and it was also signed the same day. It is well borne out from the order sheet dated 7-4-1965 of the Court.

6. General Rules (Civil), 1952 were framed by the High Court for the subordinate courts. Rules 85 and 87 read as follows :--

'85. Every decree and order as defined in Section 2 of the Code shall be drawn up in such a manner that in order to the understanding and execution thereof, it may not be necessary to refer to any other document or paper whatever, which is not made part of the decree or order.

In all cases in which the form of a decree has been prescribed or indicated by statute, the decree shall be prepared, as far as possible in the form so prescribed.

67. (1) The decree or formal order shall be drawn up ordinarily within three days of the date of judgment and shall bear that date. After the decree has been examined it shall be signed by the Judge and the date of such signature entered by him immediately beneath the signature.

(2) The Judge shall see that the decree or formal order drawn up specifies clearly the relief granted or other determination of the case and contains definite particulars of the claim.'

7. It is therefore clear that every decree and order as defined in Section 2 of the Code of Civil Procedure shall be drawn up. Section 2(2) of the Code of Civil Procedure defines 'decree' and it reads as follows:--

'(2) 'decree' means the 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 and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144, but shall not

included

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.'

8. Rule 132 of the Rajasthan High Court Rules, 1952, requires that every Memorandum of appeal shall be accompanied by a copy of the decree or formal order against which the appeal is directed; a copy of the judgment upon which such decree or formal order is founded and a copy of the judgment of the court of first instance where the decree is directed against an appellate decree or order.

9. Another provision that needs mention here is Order 41, Rule 1 of the Code of Civil Procedure. It reads as under:--

'1. (I) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.'

10. Rule 132 of the Rajasthan High Court Rules, 1952 and Order 41, Rule 1, Civil P. C. are absolutely clear. Under the said provision every appeal has to be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the court or to such officer as it appoints in that behalf and has to be accompanied by a copy of the decree appealed from, and of the judgment on which it is founded. A copy of the judgment of the court of first instance has also to be submitted in case it is an appeal against an appellate order. Rule 1 of Order 41 empowers the appellate court to dispense with the filing of the judgment, but there is no jurisdiction in the appellate court to dispense with the filing of the copy of the decree. In law the appeal is not so much against the judgment as against the decree. Therefore there is no doubt that the decree should be filed along with the memorandum of appeal and in the absence of the decree, the filing of the appeal would be incomplete, defective and incompetent. In view of the provisions reproduced above, it is not open to the learned counsel for the appellant to

contend that the decree-sheet or the formal order was not required to be drawn as the question decided was one falling under Section 47, Civil P. C. There is also no be for him to contend that the appellant was under a bona fide belief that no decree or formal order shall be prepared by the first appellate court. As already noticed above. Rule 85 of the General Rules (Civil) is absolutely clear on the point.

11. In *Jagat Dhish v. Jawahar Lal*, AIR 1961 SC 832, their Lordships of the Supreme Court observed-

'The argument is that Order 41 Rule 1, is mandatory, and as soon as it is shown that an appeal has been filed with a memorandum of appeal accompanied only with a certified copy of the judgment of the appeal must be dismissed as being incompetent, the relevant provisions of Order 41 with regard to the filing of the appeal being of a mandatory character. It would be difficult to accede to the proposition thus advanced in a broad and general form. If at the time when the appeal is preferred a decree has already been drawn up by the trial Court and the appellant has not applied for it in time it would be a clear case where the appeal would be incompetent and a penalty of dismissal would be justified. The position would, however, be substantially different if at the time when the appeal is presented before the appellate Court a decree in fact had not been drawn up by the trial Court; in such a case if an application has been made by the appellant for a certified copy of the decree, then all that can be said against the appeal preferred by him is that the appeal is premature since a decree has not been drawn up, and it is the decree against which an appeal lies. In such a case, if the office of the High Court examines the appeal carefully and discovers the defect the appeal may be returned to the appellant for presentation with the certified copy of the decree after it is obtained. In the case like the present, if the appeal has passed through the stage of admission through oversight of the office, then the only fair and rational course to adopt would be to adjourn the hearing of the appeal with a direction that the appellant should produce the certified copy of the decree as soon as it is supplied to him. In such a case it would be open to the High Court and we apprehend it would be its duty to direct the subordinate Court to draw up the decree forthwith without any delay. On the other hand, if a decree has been drawn up and an application for its certified copy has been made by the appellant after

the decree was drawn up, the office of the appellate Court should return the appeal to the appellant as defective, and when the decree is filed by him the question of limitation may be examined on the merits.'

12. In the instant case it has already been indicated above that at the time the appeal was preferred, the decree was already drawn up by the lower appellate court and the appellant had not applied for it in time. Thus according to the observations quoted above, it is a clear case where the appeal was incompetent when it was filed and the copy of the decree-sheet having been submitted out of time, the appeal was rightly held to be time-barred. The learned Single Judge considered the two Calcutta cases; *Khironde Sundari Debi v. Jnanendra Nath Pal Chaudhury*, (1902) 6 Cal WN 283 and *Kamala Dasi v. Tarapada Mukerji*, (1912) 14 Ind Cas 1006 (Cal). There was no rule in the Civil Rules and Orders framed by the Calcutta High Court like that of Rule 85 in the General Rules (Civil) framed by the Rajasthan High Court. *Khironde Sundari Debi's* case has been expressly dissented from by the Division Bench of the Allahabad High Court in *Qasim Ali v. Mt. Bhagwanta Kuar*, AIR 1918 All 394. The view expressed by the Allahabad High Court is in accord with the provisions which exist in Rajasthan and the Calcutta view has no bearing.

13. In *Mangrey v. Sunder*, AIR 1940 Oudh 351 a Division Bench of the Oudh Chief Court has adopted the Allahabad view. It held that an order under Section 47 is by Section 2(2), Civil P. C. included in the definition of a decree and under Order 41, Rule 1 it is imperative that a copy of the decree should accompany the memo of appeal. Where therefore the appeal from an order under Section 47 is not accompanied by a copy of the formal order which is filed beyond limitation, the appeal is incompetent.

14. The next contention of learned counsel for the appellant is that it was a fit case in which the delay should have been condoned. His submission is that the appellant was under a bona fide belief that decree-sheets are not prepared in such cases. We have already given above the substance of the application submitted by the decree-holder. He has not pointed out in his application or the accompanying affidavit that what was the basis for him to have that bona fide

belief. Section 5 of the Indian Limitation Act, 1908 reads as under:--

'5. Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.'

Explanation:-- The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section.'

15. There is no evidence on record to show that he was misled by any bona fide advice rendered to him by any lawyer of standing. It is also not borne out that the decree-sheet and the formal orders are not usually drawn out by the subordinate courts in Jodhpur. The order sheet dated 7-4-1965 of the court of learned District Judge clearly points out that the decree sheet was signed on the same day the order was pronounced. Apart from this it was pointed out by the office of the High Court on 21-7-1965 that the copy of the decree or the formal order has to be submitted along with the memorandum of appeal. He applied for the copy on 24th July, 1965. He is unable to explain the delay of three days in applying for the copy. In his application he has stated that he wanted to ascertain as to whether the decree-sheet was in fact drawn up or not, he got the file inspected by his counsel on the next day. That means the file was inspected on 22nd. We are unable to understand why it was necessary for him to inspect the file. He should have straightway applied for a copy of the decree sheet even if the decree-sheet had not been drawn. The period would have been included in the time requisite for obtaining the copy. But he did not act diligently and it cannot be said that he acted with care and attention. As a matter of fact, his stand was all through this that the decree or the formal orders are not required to be prepared at all when the question decided is one under Section 47, Civil P. C. There appears to be no reason why the appellant should have that impression of his own.

16. Learned counsel for the appellant has placed reliance on Kesharibhai Jesingbhai v. Bai Lilawati, AIR 1963 Gui 119, Bhausahab Jamburao v. Sonabai, AIR 1946 Bom 437 and Mata Din v. A. Narayanan, AIR 1970 SC 1553. In all these cases mistaken advice of a lawyer has been held to be a sufficient ground to condone the delay. It has been held in Mata Din's case that if the error of the counsel was not tainted with any mala fide motive, it can be a sufficient ground for condoning the delay. We are in respectful agreement with the view that the mistake of counsel may in certain circumstances be taken into account in condoning the delay, although there is no general proposition that mistake of counsel by itself is a sufficient ground. In every case it is a question of fact whether the mistake was bona fide or was merely an advice. But in the present case, as indicated above, it has not been alleged in the application or the affidavit that the appellant was labouring under the impression on account of a mistaken advice of a counsel. The authorities referred to above have no application to the circumstances of this case. Sham 'Lal Thakar Dass Aggarwal v. Punjab National Bank, AIR 1961 Punj 81 has also been relied upon in support of the proposition that an erroneous belief that no decree-sheet was required to be submitted along with the memo of appeal is a sufficient cause within the meaning of Section 5 of the Limitation Act. In the Punjab case the facts were distinguishable. The erroneous belief had occurred on account of a decision of G. D. Kho-sla, J. as he then was in F. A. O. No. 125 of 1954 = (1954) 56 Pun LR (SN) 9, Krishan Gopal v. Sant Ram. The learned Judge dealing with the case observed as follows :--

'No doubt it is true that the present appeals are barred by time, but this question wholly depends on the decision of the question whether the appellants are entitled to the benefit of Section 5 of the Indian Limitation Act. It is a matter of common knowledge that during this period the appeals were filed in this Court on the erroneous belief that no decree sheet was required, and I am doubtful if a decree sheet is required particularly when on the appeal no ad valorem court fee is charged.

In any case, it is not necessary to go into this matter because the decision of Dua, J. has become final. The learned Judge has held that the appeals filed in the first instance were not proper appeals as they were not accompanied the decree

sheets. In view of the affidavit of the clerk to Mr. Bhagirath Dass and the erroneous belief prevalent during the relevant period, I am of the view that the appellants are entitled to the benefit of Section 5 of the Limitation Act. I, accordingly, acting under Section 5 of the Limitation Act, condone the delay in filing these appeals.'

Thus in the Punjab case the applicant was misled by the judgment of the High Court and it was in those circumstances and the affidavit of the clerk of Shri Bhagirath Dass that the learned Judge condoned the delay. Such circumstances do not exist in the present case and we have no hesitation to hold that no case of sufficient cause has been made out within the meaning of Section 5 of the Limitation Act. We agree with the view taken by the learned single Judge and hold that the appeal of the decree-holder was time-barred.

17. In the result, the appeal fails and is hereby dismissed. In the circumstances of the case, we pass no order as to costs.

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