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Court : Rajasthan

Decided On : Jan-21-1997

Reported in : AIR1997Raj284; 1997(2)WLC85; 1997(1)WLN138

Judge : Gopal Lal Gupta, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 2(2), 100 and 115 - Order 41, Rules 3A, 3A(1), 9 and 11; Limitation Act, 1963 - Sections 3 and 5

Appeal No. : Civil Second Appeal No. 210 of 1995

Appellant : Chhelaram

Respondent : Manak

Advocate for Def. : I.R. Choudhary, Adv.

Advocate for Pet/Ap. : G.L. Khatri, Adv.

Disposition : Appeal dismissed

Judgement :

Gopal Lal Gupta, J.

1. This second appeal has been directed against the decree/order/judgment dated 10-10-1995 passed by the learned Additional District Judge, Sojat dismissing the appellant's first appeal on the ground that it was barred by time.

2. Respondent Manak had filed a suit for permanent injunction in respect of plot of land situate in village Giri. Defendant-appellant in his reply claimed that the suit land was in his possession. The trial Court framed three issues. After recording evidence and hearing the parties the trial Court decreed the suit on 26-8-1994 holding that the suit land belonged to the plaintiff and it was in his possession. The defendant preferred appeal before Additional District Judge on 19-10-1994. The office reported that the appeal was time-barred. The appeal was, however, admitted subject to objection of limitation. Thereafter, vide impugned order the learned Additional Dist. Judge held that the appeal was time-barred. He, therefore, dismissed the application under Section 5 of the Limitation Act and also the appeal. Hence, this second appeal.

3. A preliminary objection was raised on behalf of the respondent that this appeal is not maintainable. It was contended that the impugned order/decree does not satisfy the requirement of Section 2(2) of the C.P.C. as the order has not conferred any statutory status affecting the rights of the parties and, therefore, it cannot be called a decree. My attention has been invited to Sub-rule (3-A) of Rule 41, C.P.C. which erects a positive bar to pass any order in appeal filed without first deciding the question of limitation.

4. Learned Counsel for the appellant on the other hand contended that since decree has been prepared this appeal is maintainable.

5. In my considered opinion, the preliminary objection must prevail. Section 100 of C.P.C. provides that an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court. The word 'decree' has been defined in Section 2(2), C.P.C. which is reproduced hereunder:-

(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 withini Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

6. It is evident from a bare reading of thedefinition that, 'decree' has the following essentialelements:-

(i) There should be an adjudication.

(ii) The adjudication should determine the rights of parties regarding the matter in controversy.

(iii) The adjudication should be in a suit and the adjudication should be formal and conclusive so far as that Court is concerned.

In the definition, some orders which otherwise do not constitute decree are also included and certain orders which constitute decree have been excluded from it.

7. The question would be whether an order of the Court which does not satisfy the test envisaged by the definition could at all be a decree even if it is so expressed by the Court in passing the order. In my opinion merely because there exists some order captioned as decree, drawn up even in the form of decree, it would not make such an order a 'decree' unless the order satisfies the requirement of Section 2(2), C.P.C. There is ample support for the proposition that when any order decides only the question of limitation such an order will not be a 'decree' within the meaning of Section 2(2), C.P.C. because such an order does not result in conclusive determination of the rights of the parties envisaged by Section 2(2) with regard to all or any matter in controversy in a suit. Because, evidently the question of limitation does not and cannot touch the merits of the case set up by any party to the suit so as to be treated as a matter in controversy in any suit. Bar of limitation is a threshold bar to be invoked even suo motu by a Court under Section 3 of the Limitation Act as a result of which, for determination of I right of parties agitated in the suit, there remains I no scope when the bar operates. Indeed this Court way back in the year 1957 in the case of Amsingh v. Jethma, AIR 1957 Raj 173, held that decision on plea of limitation is not a decree. Speaking for the Court Hon'ble Mr. Justice Dave, as he then was, observed as follows :-

'The determination by the Court of the plea of limitation in a suit does not amount to a decree, for the term 'determination of the rights of the parties' occurring in the definition of the word 'decree' in Section 2(2), Civil P. C, refers to the substantive rights of the parties with regard to the merits of the case and not to other disputes between the parties which are ancillary to the subject-matter of the suit. For instance, question relating to the jurisdiction of the Court or limitation and other preliminary points of the sort, if decided in favour of the plaintiff does not determine the rights of the parties in relation to the suit.'

8. It is thus obvious that the order holding that suit/appeal is barred by time cannot partake the character of a decree. It is not material that a formal decree-sheet has been drawn up. When the judgment on which the decree is passed or the decree itself does not determine the substantive rights of the parties, the order cannot be held to be decree. In my opinion, the impugned order which only decides the point of limitation does not amount to decree and this appeal does not lie.

9. Rule 3A was added to Order 41, C.P.C. by Amendment Act of 1976. This newly added provision is quoted hereunder :-

'3A. Application for condonation of delay :- (1) When an appeal is presented after the expiry of the period of limitation specified 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.

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under Rule 11 or Rule 13, as the case may be.

(3) Where an application has, been made under Sub-rule (1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after, hearing under Rule 11, decided to hear the appeal.'

10. It isclear from Sub-rule (1) of Rule 3 A that at the time of presentation of appeal which is barred by limitation appellant is required to file an application that he has sufficient cause for not filing the appeal within the perid of limitation. It is incumbent upon the Court to decide the application before it proceeds to decide the appeal on merits. In case the Court accepts the application only then it can proceed under Rule 11 or Rule 13. If the application for condoning the delay in filing the appeal is dismissed the question of registration of appeal under Rule 9 and its consideration under Rule 11 does not arise. In such a situation it cannot be held that the order of dismissal amounts to affirmation of the decree of the trial Court and, therefore, is a decree within the meaning of Section 2(2) of the C.P.C.

11. As a matter of fact Rule 3A erects a positive bar disabling a Court to pass any order in any appeal filed before it without taking care to first decide finally the question of limitation, as to whether or not the appeal is time-barred. The legislature has been so particular that it has debarred the Court even from making any order for stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not after hearing under Rule 11, decides about the consideration of appeal. It is thus obvious that the Court will have to decide first as to whether the delay should be condoned or not and if the Court comes to the conclusion that there were not sufficient grounds to condone the delay, the appeal shall not be treated to have been admitted and in that case appeal cannot be preferred to the higher Court.

12. The Madhya Pradesh High Court had occasion to deal with such controversy in the case of Bal Krishan v. Tulsa Bai, AIR 1987 Madh Pra 120. It has been clearly held therein that order dismissing an appeal as time-barred does not amount to decree and second appeal does not lie.

13. Full Bench of the Calcutta High Court had also considered this controversy in the case of Mamuda Khateen v. Beniyan Bibi, AIR 1976 Cal415 and it has been held that an order rejecting the memorandum of appeal following the rejection of an application under Section 5 of the Limitation Act for condonation of the delay in filing the appeal is not a decree but an incidental order against which no appeal can be preferred.

14. In the instant case by the impugned order the learned Additional Dist. Judge dismissed the application of the appellant filed under Section 5 of the Limitation Act and he consequently dismissed the appeal. He also drew up the formal decree. In my opinion the learned Additional Dist. Judge had no jurisdiction to draw up the decree-sheet when he dismissed the application under Section 5 of the Limitation Act. If under wrong impression the Appellate Court has drawn up a decree, it does not confer a right on the-appellant to prefer an appeal. Thus preliminary objection succeeds and this appeal is held to be riot maintainable.

15. Mr. Khatri faced with the situation argued that the appeal may be treated as revision and delay in filing appeal in first Appellate Court be condoned. There is no legal impediment in treating the appeal as revision and, therefore, I treat this appeal as revision.

16. Now the question is whether in revisional jurisdiction this Court should condone the delay in filing the appeal. Section 115 is enacted with a view to enable the High Court to correct the errors of the jurisdiction committed by the subordinate Court. It will not be proper to interfere with the finding of fact arrived at by the subordinate Court and substitute its own opinion after reappraisal of the evidence; vide Hindustan Aeronautics v. Ajit Prasad, AIR 1973 SC 76. Obviously the grounds given by first Appellate Court for not condoning delay are based on appraisal of the evidence. In my opinion it will not be appropriate for me to upset the same after reappraising the evidence in revision petition.

17. Even on facts, it is difficult to accept the application of the appellant. In the application the grounds stated are that the trial Court pronounced the judgment on 26-8-94 on which date the Advocate told him to take the copy after some time and he was supplied the copy of the judgment on 30-8-94 and when he approached his advocate at Jetaran he desired that copy of the decree should also be brought and, therefore, the defendant again went to Bur and contacted his Advocate and obtained copy of the decree on 7-10-94. It was further stated in the application that the Court prepared the decree after he made application in the Court for obtaining decree. At least this fact is patently incorrect in the application of the appellant that the Court had prepared the decree after he moved application for copy of the

decree. The decree-sheet bears the date 26-8-94. When the date has been recorded it has to be presumed that the decree-sheet was prepared on 26-8-94 itself. Besides that at the time of arguments Mr. Choudhary submitted a copy of the decree-sheet obtained by his client from the trial Court. A perusal of the copy indicates that the copy was supplied to the plaintiff on 26-9-94. It is thus obvious that the decree-sheet was already on record before 26-9-94. This fact falsifies the averment made in the application moved by the appellant that the decree-sheet was prepared after he moved application for the copy of the decree on 3-10-1994. Thus a false affidavit has been filed by the appellant.

18. It is true that the Courts should be liberal in allowing the applications for condonation of delay as has been mandated by the Apex Court in the case of Collector, Land Acquisition v. Mst. Katiji (AIR 1987 SC 1353) but at the same time where the party has been negligent and was working under the instructions of the advocate the delay cannot be condoned; moreso, when false allegations have been made against the Court that the decree-sheet was not prepared in time. Thus, in my opinion, even on facts the application could not be allowed and this Court in revisional jurisdiction cannot be justified in allowing this application.

19. Consequently, this second appeal/revision deserves to be dismissed and is hereby dismissed. No order as to costs.

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