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Court : Rajasthan

Decided On : Dec-06-1972

Reported in : 1972WLN1111

Judge : B.P. Beri and; M.L. Joshi, JJ.

Appeal No. : D.B. Civil leave to Appeal Petition Nos. 44, 52 and 66 to 68 of 1971

Appellant : The State of Rajasthan and anr.

Respondent : Ramnath and ors.

Disposition : Petition dismissed

Judgement :

B.P. Beri, J.

1. These five petitions have been moved under Article 133(1)(c) of the Constitution of India seeking leave to appeal to the Supreme Court and can be disposed of by one order as the circumstances in which they arise are common.

2. The Additional District Judge, Dholpur, passed five decrees against the State of Rajasthan arising from various contracts and excepting in leave petition No. 52 of 1971 each of the decrees was above Rs. 20,000/-. The decree in leave petition No. 52 of 1971 was in the sum of Rs 8,000/- only. Appeals against these decrees were presented before the Deputy Registrar, High Court at his residence at 11.45

P.M. on 16-3-1970. The office raised an objection that they were barred by time by two days. Applications were moved under Section 5 of the Indian Limitation Act for the condonation of delay and after bearing the learned Counsel for the parties the Division Bench of this Court by its judgment dated the 8th February, 1971 held that the State of Rajasthan, the appellant, was unable to show sufficient cause which could entitle it to the benefit of the provisions of Section 5 of the Indian Limitation Act and accordingly all the five appeals were dismissed as barred by time.

3. These petitions have been made under Article 133(1)(c) of the Constitution of India seeking leave to appeal to the Supreme Court. But in the body of four petitions it is also submitted that the valuation of the subject matter in the trial court and in appeal before this Court and the proposed one before the Supreme Court is more than Rs. 20,000/-. The learned Additional Advocate General, therefore, urged that he was entitled to leave as of right under Article 133(1)(a) of the Constitution of India.

4. In our opinion the petitioner is not entitled to any leave under Article 133(1)(c) of the Constitution of India because on the well established principles crystallised in numerous decisions the learned Judges of this Court came to the conclusion that the petitioner was unable to show sufficient cause entitling it to condonation under Section 5 of the Indian Limitation Act. No question of public or private importance, which is not settled, arises in these circumstances and we are, therefore, unable to certify this as a fit case for appeal to the Supreme Court of India. This also settles the fate of leave petition No. 52 of 1971, the valuation of which is below Rs. 20,000/-.

5. Learned Additional Advocate General conceded and in our opinion rightly that the remaining four petitions are not covered by Article 133(1)(b) of the Constitution of India.

6. Now remains the consideration of Article 133(1)(a) of the Constitution. Let us read it.

133 (1) An appeal shall lie to the Supreme Court from any Judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High

Court certifies-

(a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law;.

and where the judgment, decree or final order appealed from affirms the decisions of the court immediately below...if the High Court further certifies that the appeal involves some substantial question of law.

7. While the learned Additional Advocate General submits that the judgment of this Court dated the 8th of February, 1971 does not affirm on merits the decision of the court immediately below Mr. S. M Mehta, learned Counsel for the non-petitioner urges that it is a judgment of affirmance. A number of authorities have been cited which we shall presently examine.

8. Article 133 of the Constitution of India and Sections 109 and 110 of the Code of Civil Procedure have some difference but in our opinion the expression 'affirms' employed in Article 133 of the Constitution and in Section 110 C.P.C. connotes the same meaning and, therefore it will be relevant to examine cases touching its interpretation under Section 110 C.P.C. as well. In its plain grammatical meaning the word 'affirmation' means in the realm of law to confirm or maintain (see Shorter Oxford English Dictionary).

9. The crucial question is when an appeal is dismissed by an appellate court as barred by time whether the judgment pronounced by the appellate court is a judgment which affirms the decision of the court immediately below within the language of Article 133(1) of the Constitution. Under Order 41 Rule 32 C.P.C. the judgment in a case like the one we have in hand of the appellate court could be one of confirming, varying or reversing the decree from which the appeal was preferred There is no doubt that the judgment of the learned Additional District Judge, Dholpur was neither varied nor reversed by this Court. In essence it was not interfered with Therefore shall we be right in saying that it is a judgment of affirmance?. There is no Supreme Court authority deciding the question which has been brought to our notice. There is one case of the Rajasthan High Court, which

we shall like to examine first, namely, Smt. Nathi Bai v. Suraj Narain and Ors. AIR 1966 Raj. 159. In this case an appeal to the High Court was dismissed on the ground of abatement and the learned Judges found that it was a judgment of affirmance. In substance an appeal abates when within the stipulated time the legal representatives of a deceased party are not brought on record Thus it was on account of lack of action within time that the appeal abated and failed and not on merits and yet this Court held that it was a judgment of affirmance within the meaning of the term in Article 133(1)(a) of the Constitution. This case followed Mahadeo Sahai v. Secy. of State AIR 1932 All 312; Ganesh Prasad v. Mt. Makhna : AIR1948 All375 ; Mt. Satto v. Amar Singh AIR 1919 Lah 65 and distinguished the Privy Council case in Chandri Abdul Majid v. Jawahir Lal AIR 1914 PC 66

10. In Chandri Abdul Majid's case AIR 1914 PC 66 a decree was sought to be enforced because it had been turned constructively into a decree of His Majesty in Council Their Lordships had dismissed the appeal for want of prosecution and did not deal with the matter in suit judicially and then their Lordships said that it was not an order adopting or confirming the decision appealed from. The Rajasthan High Court has distinguished this case on the ground that it was not a case relating to abatement because the determination of the question relating to abatement requires a judicial determination.

11. The next case, which we should notice is Purnendu Nath Tagore v. Kanailal Ghoshal ILR 1948 (2) Cal 202 This was an appeal which was dismissed because it was barred by time and leave to appeal to the Privy Council was asked for. The learned Judge while holding that they could not certify the case as a fit one for appeal to the Privy Council because the question of limitation did not involve any substantial question of law, expressed the opinion following Abdul Majid's case ILR 1948 (2) Cal 202 that it could not be characterised as a judgment of affirmance within the meaning of Section 110 C.P.C. The learned Judges have, after quoting the passage from the Privy Council Judgment, which we have summarised earlier, proceeded to observe:

We think, however, that these observations apply with equal cogency to the present case, and that whilst the order rejecting the application for filing an appeal

could not be regarded as an order adopting or confirming the decision appealed from, its effect was to put the appellants in the same position as if they had not appealed at all. These observations to some extent support the view we have taken on the interpretation of Clause (a) of Section 109 of the Code. We think it unnecessary, however, to pursue this matter further, since for the reasons already given, we dismiss the application with costs for the respondents.

In the Calcutta case ILR 1948 (2) Cal 202 a memorandum of appeal was presented against the decision of a learned Single Judge before the Deputy Registrar of the Court. He reported that the appeal had been filed out of time and, in accordance with the rules of the Original Side, the memorandum of appeal was returned to the filing solicitors. It was then presented to the Division Bench along with an application for admission of the appeal or, if found necessary, for extending the time for preferring the appeal under Section 5 of the Indian Limitation Act. That application was dismissed. In the case before us the learned Judge of this Court had dismissed, the appeals as barred by time by their judgment of the 8th of February, 71 while in the Calcutta case ILR 1948 (2) Cal 202 according to the rules only an application under Section 5 was dismissed. We must confess that to some extent no doubt the Calcutta case ILR 1948 (2) Cal 202 supports the view which has been urged before us by the learned Additional Advocate General. However, we shall presently s(sic)e that if for any reason an appeal is dismissed by an appellate court it has been consistently held by other High Courts that the judgment of the appellate Court is one of affirmance. In Mahadeo Sahai's case AIR 1932 All 312 the appellant failed to furnish security for the costs of the respondent. The appeal was dismissed and on an application for leave to appeal to the Privy Council under Section 110 C.P.C. the learned Judges observed:

Where an order of this Court dismisses an appeal it has the effect of confirming the decision of the trial court. It should be noticed that the words in Section 110 are 'affirms the decision of the Court' and not 'affirms the decision of the Court on the merits.

In Ganesh Prasad's case AIR 1948 All 375 an appeal was dismissed for default on account of non prosecution and the learned Judges observed that it was a case which affirmed the decision of the court below. Here again there was no decision on merits. In Brij Indar Singh v. Kanshi Ram and Ors. AIR 1917 Lah 448(1) an appeal was rejected as time barred and the learned Judge held that it was an order passed on appeal. The language employed by the learned Judge is significant that 'No doubt, my order precluded decision of the appeal on the merits, but nevertheless it seems to me that order was an order on appeal. In Lal Durga Bux Singh and Ors. v. Lal Ambika Bux Singh and Ors. AIR 1940 Oudh 397 the court required the appellants to pay(sic)d valorem Court fee on the plaint as well as on the memorandum of appeal. The appeal was rejected as the deficiency in the court-fee was not paid. The plaintiff applied for leave to appeal to the Privy Council. The learned Judge held that the order of the High Court sought to be appealed fell under the last clause of Section 110 C.P.C. and was an order of affirmance of the decision of the Court below. In H G Pereira v. East Indian Railway AIR 1926 Pat 102 the learned Judges made the following observations:

We quite agree that if we had refused the application made to us under Section 5 of the Limitation Act, that refusal would have operated as a dismissal of the appeal, and, subject to the other provision of the section, the order would be appealable, not indeed as a final order but as 'a decree passed on appeal.

12. It would thus be seen that where an appeal is dismissed on account of default as in Ganesh Prasad's case AIR 1948 All 375, or for want of payment of court-fee as in Durga Bux Singh's case AIR 1940 Oudh 397, or for failure to furnish security as in Mahadeo Sabai's case AIR 1932 All 312, the judgment have been held to be those of affirmance of the court immediately below although there was no decision on merits. We see no reason to take a different view. In our opinion because the appeals before us were barred by time the judgment of the court below remained unvaried unreversed and the judgment of the High Court, although not on merits were those of affirmance & here we may recall the powers of an appellate court as contained, in Order 41 Rules 32 C.P.C. They are primarily three, viz. of confirmation, variation or reversal. Since the decree of the trial court were not varied or reversed they were clearly confirmed by process of elimination.

Confirmation is equivalent to affirmance.

13. Manhorlal Manilal Shah v. Official Liquidator and Anr. 1969 GLR 218 and Gulabchand Gambhirmal v. Kudilal Govindram and Anr. AIR 1952 MB 149 are distinguishable because in both these case no appeals lay before the courts below and in such situation the judgment could not be called judgment of affirmance.

14. Another line of thought that deserves examination is that leave to appeal in a case of affirmance simpliciter was not permitted irrespective of value of the subject matter because the two Courts had applied their minds and it is only when there is a substantial question of law that the Supreme Court should be approached. This interpretation means that the word 'affirms' in Article 133(1) should be qualified by the words 'on merits'. We see no good reason to narrow the connotation of the word 'affirms'. An opportunity provided by law but which could not utilized by a litigant due to inaction does not mean that another opportunity must be available as of right. Besides, an ingenious litigant could deliberately present an appeal of adequate value late in the High Court to acquire a passport to the Supreme Court. It is far from our minds that the petitioner acted thus in these case but we are merely saying it as a possibility. We are, therefore, of the opinion that the decrees of the Additional District Judge having been varied or reversed were confirmed by the decree of this Court.

15. The petitioner before it succeeds in these petitions has to satisfy that the appeals raise some substantial question of law. Their Lordships of the Supreme Court in Sir Chunilal V. Mehta and sons Ltd. v. Century Spinning and . : AIR 1962 SC1314 have laid down the tests. Does it raise a debatable question of law not settled by the Supreme Court, Privy Council, Federal Court which is of importance generally or affects the rights of the parties? Learned Additional Advocate General for the State urged that it involves huge amounts of money. But that is not the same thing as substantial question of law. The Constitution makers have already provided the measure of money in Article 133(1)(a) but where it is a judgement of affirmance something more is necessary, namely, that there must be a substantial question of law and that there are some alternative views possible to be taken which require to be authoritatively settled. We have examined the judgment of the

learned Additional District Judge, Dholpur, also of the High Court and we are not satisfied that these cases raise a question of law which is not already well settled.

16. The result is that these petitions fail and are dismissed. In the circumstances there will be no order as to costs.

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