

Asi Bai Vs. Gomathi and ors.

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Court : Chennai

Decided On : Mar-13-1978

Reported in : AIR1979Mad115

Judge : Suryamurthy, J.

Acts : Partition Act; Limitation Act - Sections 5

Appeal No. : Civil Revn. Petn. No. 2839 of 1975

Appellant : Asi Bai

Respondent : Gomathi and ors.

Judgement :

ORDER

1. This is a civil revision petition against the Order of the learned District Judge of Coimbatore (West), refusing to condone the delay of one year 7 months and 20 days in filing the appeal against the final decree passed by the learned Subordinate Judge of Ootacamund. Prior to the presentation of the appeal and after the final decree was passed, an application to review the order in I. A. No. 815 of 1969 passing a final decree was filed by the plaintiff and was pending disposal till about the time the appeal was sought to be presented. If the period during which such an application for review was pending is excluded, the appeal will be in time. However, if the said period is not excluded, there would be a delay of one year 7 months and 20 days in the presentation of the appeal. Therefore, the

decree-holder-plaintiff in O. S. No. 193 of 1952 on the file of the Sub-Court, Ootacamund, who sought to prefer the appeal against the final decree passed by the learned Subordinate Judge, Ootacamund, in the aforesaid I. A., filed a petition to condone the delay. In support of his application for condoning the delay he relied on the fact that during the entire period, he was prosecuting the review application in the Sub-Court, Ootacamund. The learned District Judge Coimbatore (West), having dismissed the application for condoning the delay, the decree-holder has filed this revision petition.

2. The final decree was passed declaring that the decree-holder is entitled to possession of the house bearing new door No. 280 on payment of Rs. 12,000 being 2/5th share due to the respondent and that the respondent will be entitled to execute the decree if the amount is not paid within three months. A charge over the suit property was created in favour of the defendant for the aforesaid amount. The decree-holder wanted the matter to be dealt with under the Partition Act as the Commissioner found that the property was indivisible. Therefore, he files the petition, and rightly too, for review of the order, dated 31st January, 1970 and praying for the final decree being passed in terms of the provisions of the Partition Act. There can be no doubt about the fact that the application was bona fide, and the learned Subordinate Judge, Ootacamund, had jurisdiction to deal with the same, and in my view, ought to have dealt with the same, in accordance with law. As the learned Subordinate Judge, Ootacamund, did not do so, the decree-holder sought to file an appeal against the order, dated 31st January, 1970 out of time with a petition for condoning the delay referred to above.

3. In *Brij Indar Singh v. Kanshi Ram*, ILR (1917) Cal 94 : AIR 1917 PC 156 the Privy Council has laid down a general rule for the exercise of the judicial discretion under S. 5 of the Limitation Act to admit, for 'sufficient cause' an appeal which would otherwise be barred by limitation. It has referred to *Kattu Bakheh v. Daulat Ram* (1888) Pun Re 183 and observed that the true guide is whether the appellant has acted with reasonable diligence in the prosecution of his appeal. It has further observed that the appellant ought to be deemed to have so acted where, after deducting the time spent in prosecuting with due diligence a proper application for review of judgment, the period between the date of the decree appealed from and

the date of presenting the appeal does not exceed the period prescribed for preferring an appeal. The learned District Judge ought to have followed this rule and exercised his judicial discretion. He had failed to do so. Therefore, the order of the learned District Judge is set aside and the matter is remanded to him for fresh consideration. The civil revision petition is accordingly allowed. There will be no order as to costs.

4. Revision allowed.

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