

Pushpa Devi Vs. Nanak Singh

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Court : Jammu and Kashmir

Decided On : Feb-27-1982

Reported in : AIR1983J& K1

Judge : A.S. Anand and; I.K. Kotwal, JJ.

Acts : Jammu and Kashmir Limitation Act, 1995 Smvt. - Sections 5, 29 and 29(2) - Schedule - Article 156; ;Jammu and Kashmir Hindu Marriage Act, 1980 - Section 34; ;Code of Civil Procedure (CPC) - Section 23

Appeal No. : Civil Misc. Petn. No. 76 of 1981 and Civil First Misc. Appeal No. 23 of 1981

Appellant : Pushpa Devi

Respondent : Nanak Singh

Advocate for Def. : J.P. Singh, Adv.

Advocate for Pet/Ap. : Rachhpal Singh, Adv.

Disposition : Appeal dismissed

Judgement :

Kotwal, J.

1. The short question that falls for determination in this appeal is whether Section 5 of the Jammu & Kashmir Limitation Act, 1995 applies to appeals under Section 34 of the Jammu & Kashmir Hindu Marriage Act, 1980, herein-, after to be referred to as the Act,

2. The appellant Pushpa Devi lost her petition under Section 12 of the Act in the court of District Judge, Jammu on 24-2-1981 and preferred an appeal against the aforesaid judgment in the High Court on 2-5-1981. Since it was beyond thirty days, the period of limitation provided for it by Section 34 of the Act, she also moved an application under Section 5 of the Limitation Act, seeking condonation of the delay on various grounds. When this application came up for consideration before Hon'ble the Acting Chief Justice, an objection was taken on behalf of the respondent that Section 5 of the Limitation Act was not applicable to appeals under Section 34 of the Act, which itself prescribed period of limitation for appeals, as its application to such appeals was clearly excluded by Section 29 of the Limitation Act. Reliance was also placed upon a single Bench decision of this court in Sarishta Devi v. Omkar Lal, 1981 Kash LJ 427. The learned Acting Chief Justice being of the view that Section 5 being an independent provision which had nothing to do with computation of period of limitation, its application could not be deemed to have been excluded by Section 29 and referred the case to a larger Bench for reconsideration of the view taken in 1981 Kash LJ 427 (supra).

3. Section 29 of the Jammu & Kashmir Limitation Act, which is a facsimile of Section 29 of the Indian Limitation Act, 1908, barring Sub-sections (3) and (4) of the Central Act, which do not occur in the State Act, and are also relevant for the present discussion, reads as under:--

'29. Savings.-- (1) Nothing in this Act shall affect Section 25 of the Contract Act (IX of 1977).

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first Schedule the provisions of Section 3 shall apply, as if such period were prescribed therefor in that Schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law-

(a) the provisions contained in Section 4, Sections 9 to 18 and Section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply.'

4. On the plain language of Sub-section (2) once it is shown that the special or local law under which the suit, application, or appeal is brought, provides for it a period of limitation different from the one provided therefor by the first Schedule, all provisions of the Limitation Act, except those contained in Sections 3, 4, 9 to 18 and Section 22 shall have no application to such suit, application or appeal proprio vigore. Even the provisions contained in Sections 4 and 9 to 18 and 22 shall have no application in so far and to the extent to which they are expressly excluded by the special or local law under which the suit application or appeal is brought With due respect to the learned Acting Chief Justice, there is no warrant for the proposition that Section 5 is independent of Section 29 and has nothing to do with reckoning of the period of limitation. Period of limitation is prescribed by the first schedule. How that period is to be reckoned in different cases under different circumstances, has been provided by various sections of the Limitation Act, including Section 5. which too has the effect of extending the same in certain given cases on proof of sufficient cause. It is therefore, idle to contend that this section has no bearing on the computation of period of limitation prescribed under the first Sch. Unless, therefore. Section 5 is specifically made applicable to any suit, appeal or application by the special or local law prescribing limitation for the same, it cannot apply to it by its own force. This view has been taken by almost all the courts in India and no court is shown to have taken a contrary view. (See Chheda Lal Jain v. Officer Commanding Station Meerut Cantonment, AIR 1941 All 207, M.K. Abu Bucker v, B. Moidu, AIR 1957 Andh Pra 473, Canara Bank Ltd., v. Warden Insurance Co. Ltd., AIR 1953 Bom 35, Rai Harendranath Chaudhari v. Sm. Daulatmani Chaudhuri, AIR 1958 Cal 539, Harbans Singh v. Karam Chand, AIR 1949 East Puni 299, A, C. Arumugham v. Manager, Jawahar Mills Ltd., AIR 1956 Mad 79, Ram Sagar v. Ram Nath, AIR 1941 Oudh 276, and Surya Mohan Thakur v. State of Bihar, AIR 1951 Pat 462.) In all these cases the court declined to condone delay on the ground that the period of limitation having been

prescribed by the special law, Section 29 (2) excluded the application of Section 5, under which the delay was sought to be condoned.

5. While not disputing the correctness of this view Mr. Rachpal Singh has still argued that Section 29 (2) has no application to the present appeal, for no period of limitation has at all been provided for it by the first Schedule, which is *sine qua non* for excluding the application of Section 5 in terms of Section 29. His contention is that Article 156 of the Limitation Act will not apply to the present appeal for the obvious reason that the right to bring the present appeal is traceable not to the Code of Civil Procedure but to Section 34 of the Act itself. Article 156, according to him, will apply to those appeals only, the right to file whereof is conferred by the Code of Civil Procedure.

6. He has not, however, disputed the fact that the Act is a special law within the meaning of Section 29 (2), which makes a provision for the period of limitation for appeals. This argument immediately raises two questions for our determination. These are :

(i) what is the true connotation of the expression 'under the Civil P. C.' occurring in Article 156? and

(ii) will Section 29 (2) apply even if no period of limitation is provided by the first Sch. for a suit, application or appeal, though the same is provided by the special or the local law under which it is brought?

7. The expression 'under the Civil P. C.' which also occurred in Article 156 of the Indian Limitation Act, 1377 came in for interpretation in *Aga Mahomed Hamadani v. Cohen* (1886) ILR 13 Cal 221 and was interpreted by the learned Judges with these observations:--

'.....The Limitation Act, Sch. II, Article 156, when it speaks of the Civil Procedure Code is, on the face of it speaking of a Code which relates to procedure, and does not ordinarily deal with substantive rights: and the natural meaning of an appeal under the Civil Procedure Code appears to us to be an appeal governed by the Civil P. C. so far as procedure is concerned.'

Following the aforesaid decision, a similar view was taken by the Madras High Court in *A. Ramaswami pillai v. Tehsil-dar of Madura*, AIR 1920 Mad 407 wherein it was held:--

'It seems to us that this is the correct interpretation of Article 156. There seems to be no good reason for saying that an appeal under the Civil P. C, means only an appeal the right to prefer which is conferred by the Code itself. On the other hand, it would not be straining the language of the article too much to hold that an appeal the procedure with respect to which from its inception to its disposal is governed by the Civil P. C. may rightly be spoken of as an appeal under the Code this interpretation seems to us to be strengthened by the reference in Article 156 itself to Article 151 of the same Schedule,.....'

8. Dissenting from the view taken by Mudholkar J. that where the right of appeal is given by some other law, appeal within the meaning of Article 156 must be regarded as one under that law and not under the Civil P. C. the majority in *Vidyacharan Shukla v. Khubhchand Baghel*, AIR 1964 SC 1099 approved the view taken in the aforesaid two decisions of the Calcutta and Madras High Courts, with these observations (at p. 1103):--

'.....We consider that these decisions correctly interpret Article 156 and, in any event, we are not prepared to disturb the decisions which have stood for so long and on the basis of the correctness of which Indian legislation has proceeded,'

The law thus seems to be well settled that the expression 'under the Civil P. C.' occurring in Article 156 merely con-notes that an appeal shall lie to the High Court the procedure to be followed wherein is governed by the Civil P. C. It does not connote that the right to file the appeal itself must be conferred by the Civil p. C. The procedure to be followed in appeals under the Act, there can be no manner of doubt, is one prescribed by the Civil P. C. Section 23 of the Act specifically makes the Code applicable to all proceedings under the Act. The conclusion that Article 156 would have applied to appeals under Section 34 of the Act had this section not prescribed the period of ninety days for filing appeals under it is, therefore, inescapable. The first contention raised by Mr. Rachpal Singh is, therefore, overruled.

9. His second contention is equally untenable. The controversy, if any, appears to have been finally set at rest by their Lordships of the Supreme Court in V.C. Shukla's case (AIR 1964 SC 1099) (supra). In that case the Supreme Court approved the view taken by the Bombay High Court in Canara Bank case (AIR 1953 Bom 35) (supra) that even if the first schedule omitted to lay down any period of limitation for a particular appeal, the provisions of Section 29 (2) would still apply provided the special or local law prescribed the period for filing the appeal. This is borne out from the following observations made therein (at p. 1102):--

'.....There have been several decisions on this point but it is sufficient to refer to the decision of the Bombay High Court in Canara Bank Ltd. Bombay v Warden Insurance Co. Ltd. Bombay, ILR (1952) Bom 1083: (AIR 1953 Bom 35) where Chagla, C. J., repelled this construction and held that even where there was no provision in the 1st Schedule for an appeal in a situation identical with that for which the Special Law provides the test or 'a prescription of a period of limitation different from the period prescribed by the first Schedule is satisfied. This court in Kaushalya Rani v. Gopal Singh, Cri. Appeal No. 126 of 1962, D/- 20-9-1963 (AIR 19(54 SC 260) upheld this construction and approved the judgment of Chagla, C. J., in the Canara Bank case, ILR (1952) Bom 1083: (AIR 1953 Bom 35). Apart from the decision of this Court, we consider the reasoning of Chagla, C. J., to be unexceptionable and we agree with Subba Rao, J. in holding that the requirement of a prescription by the Special Law 'of a period different' from that prescribed by the first Schedule is satisfied in the present case.'

10. Looked from any angle, therefore, Section 5 has no application to the present appeal and no exception can be taken to the view taken by one of us (Anand J.,) in 1981 Kash LJ 427 (supra).

11. In the result, the appeal is dismissed as barred by time, but in the circumstances of the case without any order as to costs.

12. Before parting with the file, I may impress upon the State Legislature the need to amend Section 34 of the Act so as to make the provisions of Section 5 of the Limitation Act applicable to appeals under the Act, This is necessary to obviate grave hardship to which an appellant may sometime be subjected for no fault of

his.

A.S. Anand, J.

13. I agree.

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