

Hafiz Mohammad Ismail vs Shafaat Husain And Ors. on 7 February, 1951

Equivalent citations: AIR1951ALL614, AIR 1951 ALLAHABAD 614

ORDER

Mootham, J.

1. This is an appln. for revn. of an order rejecting an appln. under S. 5, Limitation Act.
2. The appct. filed a suit for the ejectment of the opposite parties from certain property & for damages. The suit was in part decreed & in part dismissed, & against that decree the appct. appealed. The last day for the filing of the appeal was 4-1-1950, but the appeal was in fact filed two days later, namely on 6th January. It was then accompanied by an appln. under Section 5, Indian Limitation Act, supported by an affidavit, praying that the appeal be admitted on the ground of the appct.'s illness. That appln. was on the following day, the 7th January, summarily dismissed by the learned Dist. J. in chambers without hearing the appct. or his counsel. No order was, however, made dismissing the appeal.
3. Mr. H. P. Gupta, who appears for the opposite parties, raises the preliminary objection that no revn. lies as there is no "case decided" within the meaning of Section 115, C. P. C. The question of what constitutes a "case decided" has been considered on a number of occasions by this Ct., but as was pointed out in *Ramzan Ali v. Satul Bibi*, 1948 A. L. J. 43: (A. I. R. (35) 1948 ALL. 244 F.B.) no conclusive test to determine that question has or probably can be laid down. Each case must be considered as it arises but it is material to consider, although it may not be conclusive, whether the order which is in question is one which is made in proceedings which are distinct & separate from the main suit & whether it is an order which may, under Section 105, Sub-section (1). C. P. C., be challenged in an appeal from the decree which is passed in the main suit: see *Gupta, & Co. v. Kirpa Ram Bros.*, 57 ALL. 17 : (A. I. R. (21) 1934 ALL. 620 F.B.); *Ramzan Ali's case*, 1948 A. L. J. 43 : (A.I.R. (35) 1948 ALL. 244 F.B.).
4. There is no doubt that an appln. under Section 5, Limitation Act, which accompanies an appeal filed beyond time is a matter which is separate & distinct from the latter. That was so held by an F. B. of this Ct. in *Shahzadi Begum v. Alakh Nath*, 57 ALL. 983 : (A. I. R. (22) 1935 ALL. 620 F.B.) in which it was pointed out that an order dismissing the appln. under Section 5 does not involve an automatic dismissal of the appeal. And it appears to me to be no less clear, on the authority of *Radha Mohan v. Abbas Ali*, 53 ALL. 612 : (A. I. R. (18) 1931 ALL. 294 F.B.) that an order dismissing an appln. under Section 5, Limitation Act, cannot subsequently be challenged in a second appeal from the decree dismissing the appeal on the ground that it was filed beyond time. An order under Section 105(1) of the Code can only be questioned in appeal if it is an order "affecting the decision of

the case," & in Radha Mohan Dutt's case, (53 ALL. 612 : A. I. R. (18) 1931 ALL. 294 F.B.), it was held that the words 'affecting the decision of the case' are to be construed in the sense of affecting the decision of the case on the merits. In that case an order setting aside an ex parte decree was held not to affect the decision on the merits as it did not determine the merits, but merely ensured or was a condition precedent to the rehearing or determination of the suit on the merits. Similarly, it appears to me that an order under Section 5, Limitation Act, determining as to whether the appct. had sufficient cause for not preferring his appeal within the statutory period has no relation to the merits of the appeal itself. Mr. Gupta has drawn my attention to the case of Gajadhar Bhagat v. Moti Chand Bhatat, A. I. R. (28) 1941 Pat. 108 : (190 I. C. 671), a decision of the Patna H. C., in which the Ct. in an appeal from a decree dismissing an appeal on the ground that it was filed after the expiry of the period of limitation, held that there was sufficient cause for the appeal not having been filed in time. The question whether the order which had been made by the lower appellate Ct. rejecting an appln. by the applt. under Section 5, Limitation Act, was an order which affected the decision of the case within the meaning of Section 105(1) of the Code was not raised or discussed, & in any event I am bound to follow the decisions of this Ct.

5. In the circumstances, therefore, I am of opinion that an order rejecting an appln. under Section 5, Limitation Act, is a "case decided." The question which then arises is whether, as is contended in this case, the learned Dist. J. in rejecting the appln. acted in the exercise of his jurisdiction either illegally or with material irregularity, that is to say, whether he acted in breach of some provision of law or committed some error of procedure which is material in that it may have affected the ultimate decision. It is an elementary principle of law that no order shall be passed against a person without giving him an opportunity of being heard, & where that right has been refused the Ct. has held itself entitled to interfere in revn.: see Sato Kuer v. Gopal Sahu, 34 Cal. 929 : (12 C. W. N 65); Bachu Bhai v. Ibrahim, 47 Bom. 11 : (A. I. R. (9) 1922 Bom. 207). In my opinion, the order of the learned Dist. J. disposing of this appln. in chambers without notice to the appct. constituted both a material irregularity & a breach of a well established provision of law.

6. I, therefore, allow this appln. in revn. & set aside the order of the learned Dist. J. The case will go back to the lower appellate Ct. for determination of the appln. under Section 5, Limitation Act, & in order that this question may be finally disposed of notice will issue not only to the appct. but also to the opposite parties.