Navinchandra N. Majithia vs State Of Maharashtra & Ors on 4 September, 2000

Equivalent citations: AIR 2000 SUPREME COURT 2966, 2000 AIR SCW 3157, (2001) 1 SCJ 74, 2000 CRILR(SC MAH GUJ) 661, (2000) 6 SUPREME 114, (2000) 4 ALL WC 3040, (2000) 3 CHANDCRIC 70, (2000) 2 ORISSA LR 469, (2000) 4 PAT LJR 200, (2000) 3 CURCRIR 164, 2000 (7) SCC 640, (2000) 29 ALLCRIR 2317, 2000 ALLMR(CRI) 1905, (2001) 2 BLJ 87, 2001 CALCRILR 12, (2000) 4 ALLCRILR 392, (2000) 4 COMLJ 193, (2000) 3 CRIMES 222, (2000) 3 EASTCRIC 1071, (2001) 1 MADLW(CRI) 265, (2001) SC CR R 35, (2000) 6 SCALE 262, (2000) 5 ANDH LT 50, 2000 CRILR(SC&MP) 661, (2000) 2 ANDHLT(CRI) 325, (2000) 10 JT 61 (SC), 2001 SCC (CRI) 215, (2000) 5 BOM CR 906

Author: K.T. Thomas

Bench: K.T. Thomas

PETITIONER:
NAVINCHANDRA N. MAJITHIA

Vs.

RESPONDENT:
STATE OF MAHARASHTRA & ORS.

DATE OF JUDGMENT: 04/00/2000

BENCH:
K.T. THOMAS

JUDGMENT:

THOMAS, J.

Leave granted.

L...I...T.....T.....T.....T.....T.....T.....T..J A learned Single Judge of the High Court of Madhya Pradesh held that an appeal filed out of time unaccompanied by an application to condone the delay is liable to be axed down at the threshold and hence the situation cannot be rectified by filing an application at any later stage. Learned Single Judge rejected a second appeal on the sole ground that the delayed appeal was presented without accompanying an application to condone the delay. An

order so passed by the High Court is now being assailed before us by special leave. A suit was filed by the respondents against the State of Madhya Pradesh and one of its Sales Tax Officers for a decree of declaration of their title and consequential injunction in respect of a residential building. The suit was dismissed on the ground of want of jurisdiction to entertain the suit. The plaintiffs filed an appeal before the District Court against the dismissal and the District Judge reversed the decision of the trial court regarding jurisdiction and remanded the case to the trial court for disposal of the suit on merits.

On 10.12.1996 the appellants filed a second appeal before the High Court challenging the judgment and decree passed by the District Judge in the first appeal. There was some delay in filing the said second appeal, but when it was presented no application for condoning the delay was filed by the appellants along with the appeal. However, appellants filed such an application under Section 5 of the Limitation Act on 6.1.1997.

On 31.1.1997 the High Court issued notice to the respondents on the appeal, without deciding the delay application. Long thereafter the respondents moved the High Court for disposal of the appeal on the ground that it is barred by limitation.

Learned Single Judge of the High Court allowed the said motion of the respondents and dismissed the second appeal filed by the appellants by observing thus:

> A perusal of provision of order 41 rule 3A shows that 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.
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> The appellants cited before the learned Single Judge a decision of the Karnataka High Court in State of Karnataka vs. Nagappa (AIR 1986 Karnataka 199) but he declined to follow the dictum therein on the premise that another Single Judge of the M.P. High Court had taken a different view earlier regarding the legal consequences of not filing an application for condoning the delay along with the filing of the appeal. Learned Single Judge has stated the following for the purpose of meeting the aforesaid contention advanced by the appellants.
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> Similar question had arisen before this Court in First Appeal No.107/95 decided on 3.8.95 and this Court took the view that as the appeal was not accompanied with application for condonation of delay and affidavit, stating the fact, the appeal was not competent. In view of this specific finding of the learned Single Judge, the decision of the Karnataka High Court cannot help the learned counsel for the appellants.
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> Learned counsel for the appellants contended that the High Court has placed a very narrow construction on Rule 3A of Order 41 of the Code of Civil Procedure (for short the Code) which resulted in pre-empting the right of appeal conferred by the statute,

because the court had the power to condone the delay on showing reasonable explanation for it.

In order to decide the said question we have to make a short survey of the relevant Rules in the Code.

Order 42 Rule 1 of the Code says that the rules in Order 41 shall apply, so far as may be, to appeals from appellate decrees. Order 41 Rule 1 says that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the court or to such officer as it appoints in that behalf. It is further required that the memorandum shall be accompanied by a copy of the decree appealed against. A copy of the Judgment must also be filed along with the said memorandum unless the appellate court dispenses with it. Rule 2 is not of much importance on the question involved in this appeal and hence we may skip it and proceed to Rule 3 which says that where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there. It is Rule 3-A of Order 41 of the Code (which rule was inserted in the Code by CPC Amendment Act, 1976) which is now sought to be applied and hence that Rule is extracted below: 3-A 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, decide to hear the appeal.

What is the consequence if such an appeal is not accompanied by an application mentioned in sub-rule (1) of Rule 3-A? It must be noted that the Code indicates in the immediately preceding rule that the consequence of not complying with the requirements in Rule 1 would include rejection of the memorandum of appeal. Even so, another option is given to the court by the said rule and that is to return the memorandum of appeal to the appellant for amending it within a specified time or then and there. It is to be noted that there is no such rule prescribing for rejection of memorandum of appeal in a case where the appeal is not accompanied by an application for condoning the delay. If the memorandum of appeal is filed in such appeal without accompanying the application to condone delay the consequence cannot be fatal. The court can regard in such a case that there was no valid presentation of the appeal. In turn, it means that if the appellant subsequently files an application to condone the delay before the appeal is rejected the same should be taken up along with the already filed memorandum of appeal. Only then the court can treat the appeal as lawfully presented. There is nothing wrong if the court returns the memorandum of appeal (which was not accompanied by an application explaining the delay) as defective. Such defect can be cured by the party concerned and present the appeal without further delay.

No doubt sub-rule (1) of Rule 3-A has used the word shall. It was contended that employment of the word shall would clearly indicate that the requirement is peremptory in tone. But such peremptoriness does not foreclose a chance for the appellant to rectify the mistake, either on his own or being pointed out by the court. The word shall in the context need be interpreted as an obligation cast on the appellant. Why should a more restrictive interpretation be placed on the sub-rule? The rule cannot be interpreted very harshly and make the non- compliance punitive to appellant. It can happen that due to some mistake or lapse an appellant may omit to file the application (explaining the delay) along with the appeal.

It is true that the pristine maxim Vigilantibus Non Dormientibus Jura Subveniunt (Law assists those who are vigilant and not those who sleep over their rights). But even a vigilant litigant is prone to commit mistakes. As the aphorism to err is human is more a practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of a litigant should not normally cause the doors of the judicature permanently closed before him. The effort of the court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by him, but to see whether it is possible to entertain his grievance if it is genuine.

Crawford on Statutory Construction has stated thus at Page 516, Art. 261 in the 1940 Edn. :

> The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also while considering its nature, its design, and the consequences which would follow from construing it the one way or the other.
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> It is apposite to point out that the said passage has been quoted with approval by this Court in Govind Lal Chaggan Lal Patel vs. The Agriculture Produce Market Committee and ors. (AIR 1976 SC 263) In Jagat Dhish Bhargava vs. Jawahar Lal Bhargava and ors. (AIR 1961 SC 832) this Court while considering the procedure to be followed by the Court on receipt of defectively filed appeals made the following observations:
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> It would thus be clear that no hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under O.41, R.1. Appropriate orders will have to be passed having regard to the circumstances of each case, but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinised at the initial stage soon after they are filed and the appellant required to remedy the defects. (para 14) Rule 3-A was inserted in the Code thereafter and hence the question had to be considered afresh. During the early period, following the insertion of Rule 3-A in Order 41 of the Code, some High Courts have taken a very rigid interpretation and non-compliance of it even at the initial stage was held fatal. A learned Single Judge of the Kerala High Court (Khalid, J. as he then was)

held the view in Padmavathi vs. Kalu (AIR 1980 Kerala 173) that where the petition for condonation of delay in filing of appeal has been filed subsequent to the filing of the appeal the petition is liable to be dismissed. A Single Judge of the Karnataka High Court followed the said decision in Madhukar Daso Deshpande vs. Anant Nilkantha Deshpande & ors. (AIR 1984 Karnataka 40) and held that in view of the mandatory provision of Order 41 R.3-A CPC the application for condonation of delay shall be accompanied with the appeal memo, if the appeal is presented beyond time. There is no occasion for the Court to say that the application for condonation of delay might be entertained later and there is no occasion for the appellant to request that such an application should be received even at this stage in the interest of justice.

A Division Bench of the Kerala High Court has subsequently overruled the dictum laid down by the Single Judge in the above case, (vide Maya Devi vs. M.K. Krishna Bhattathiri and anr., AIR 1981 Kerala 240). The same fate had fallen on the view adopted by the Single Judge of the Karnataka High Court in Madhukars case when a Division Bench has subsequently overruled it, (State of Karnataka vs. Nagappa, AIR 1986 Karnataka 199). N. Venkatachala and S.A. Hakeem, JJ (as they then were) dealt with the background of introducing Rule 3-A in Order 41 of the Code and after discussion held that sub-rule (1) of Rule 3-A is mandatory. However, learned Judges pointed out that sub- rules (2) and (3) have been employed by the legislature for highlighting the purpose of introducing such a new rule. The following passage from the judgement of the Division Bench of the Karnataka High Court can usefully be quoted in this context:

A combined reading of sub-rules (1) and (2) of R.3A makes it manifest that the purpose of requiring the filing of an application for condonation of delay under sub-rule (1) along with a time barred appeal, is mandatory, in the sense that the appellant cannot, without such application being decided, insist upon the Court to hear his time barred appeal. That was the very purpose sought to be achieved by insertion of sub-rules (1) and (2) of R.3A becomes clear from the legislative history of new R.3A to which we have already adverted.

We may also point out that a Division Bench of the Patna High Court has adopted the same view even earlier in State of Bihar & ors. vs. Ray Chandi Nath Sahay and ors. (AIR 1983 Patna 189).

The object of enacting Rule 3-A in Order 41 of the Code seems to be two-fold. First is, to inform the appellant himself who filed a time barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the court has to deal with application for condonation of delay as a condition precedent. Barring the above objects, we cannot find out from the rule that it is intended to operate as unremediably or irredeemably fatal against the appellant if the

memorandum is not accompanied by any such application at the first instance. In our view, the deficiency is a curable defect, and if the required application is filed subsequently the appeal can be treated as presented in accordance with the requirement contained in Rule 3-A of Order 41 of the Code.

In the result we allow this appeal and set aside the impugned judgment. The matter shall now go back to the High Court for disposal of the application to condone the delay in filing the second appeal. If the explanation was found satisfactory to the High Court the second appeal will have to be disposed of in accordance with law. This appeal is disposed of accordingly.