

**THE HIGH COURT OF MADHYA PRADESH**  
**SA 2043/2018**  
**Man Khan vs. Dr. Keshav Kishore & Ors.**

**Gwalior, dtd. 05/02/2019**

Shri N. K. Gupta, Senior Counsel with Shri SD Singh, counsel for the appellant.

Shri Prashant Sharma with Shri Nirmal Sharma, counsel for the respondent No.1.

Heard on the question of admission.

This appeal is admitted on the following substantial questions of law:-

- "(i) Whether the Court below has erred in law by not giving an opportunity to the appellant to file an application for condonation of delay ?
- (ii) Whether the Court below after having come to a conclusion that the appeal is barred by limitation and no application for condonation of delay has been filed, was right in also deciding the appeal on merits or not ?"

Since the controversy involved in the present appeal lies in a narrow compass, therefore, with the consent of the parties, the appeal is heard finally.

This Second Appeal under Section 100 of CPC has been filed against the judgment and decree dated 24<sup>th</sup> July, 2018 passed by First Additional Judge to the Court of First Additional District Judge, Bhind in Regular Civil Appeal No.44/2017, thereby dismissing the appeal filed by the appellant against the judgment and decree dated 18/05/2017 passed by First Civil Judge, Class-II, Bhind in Civil Suit No.63A/2016.

The necessary facts for the disposal of the present appeal in short are that the respondents have filed a suit for eviction against the appellant under Sections 12(1)(a),(1)(b), 12(1)(f) of MP Accommodation Control Act. The suit filed by the respondents under Sections 12(1)(a) and 12(1)(f) of MP Accommodation Control Act was decreed by judgment and decree

dated 18/05/2017 passed by the First Civil Judge, Class-II, Bhind in Civil Suit No.63-A/2016.

It appears that the appellant filed an appeal on 03/07/2017. On the same day, the appellant was heard on the question of admission and the appeal was admitted for final hearing and the execution of the impugned judgment and decree was also stayed by the First Appellate Court. The notices were issued. An application was filed by the respondent No.1 under Section 151 of CPC, which was rejected by the Appellate Court by order dated 13/03/2018 and thereafter, the case was fixed for final arguments. On 07/04/2018, an application was filed by the appellant under Order 41 Rule 27 r/w Section 151 of CPC. Another application under Order 26 Rule 9 of CPC r/w Section 151 of CPC was filed by the appellant on 05/05/2018. On 14/05/2018, it was directed that the application filed under Order 41 Rule 27 r/w Section 151 of CPC and the application filed under Order 26 Rule 9 r/w Section 151 of CPC shall be heard at the time of final hearing. On 09/07/2018, the final arguments were heard and accordingly, on 24<sup>th</sup> July, 2018 the impugned judgment and decree was passed. The appellate Court, after considering the merits of the case, held that the respondents have succeeded in establishing their claim under Section 12(1)(a) of MP Accommodation Control Act, but held that the suit accommodation is not *bona fide* required by the respondents and thus, the decree passed under Section 12(1)(f) of MP Accommodation Control Act was set aside. However, at the same time, the appellate Court held that the appeal was filed beyond the period of limitation and thus, the appeal is liable to be dismissed on the ground of delay.

Paragraph 62 of the judgment reads as under:-

“62-यह सही है कि निर्णय पारित होने की दिनांक 18.05.2017 को ही अपील प्रस्तुत करने की अवधि तीस दिन प्रारंभ हो गई थी तथा नकल प्राप्त करने में लगा समय पांच दिन माफ किये जाने पर अपील दिनांक 22.06.2017 को प्रस्तुत की जानी चाहिए थी। दिनांक 22.06.2017 के बाद प्रतिवादी ग्रीष्मकालीन अवकाश अवधि को अपील प्रस्तुत करने की अवधि

में सम्मिलित नहीं कर सकता था, उसे 22.06.2017 को ही अपील प्रस्तुत करनी चाहिए थी परंतु अपील दस दिन विलंब से 3.7.17 को प्रस्तुत की गई है, इसलिये विलंब के आधार पर भी अपील अपास्त किये जाने योग्य है।”

Challenging the judgment and decree passed by the Appellate Court, it is submitted by the learned Senior Counsel for the appellant that where an appeal against the judgment and decree has been filed belatedly, then until and unless the delay in filing the appeal is condoned, it cannot be said that there is any appeal in the eyes of law. It is further submitted that when the appeal was presented before the Appellate Court, no objection was raised either by the Office or the Court and on the day one, the appeal was admitted for final hearing. Even during the pendency of appeal, no objection with regard to delay in filing the appeal was ever raised either by the Court or the respondents in the appeal. Even otherwise, if the Court was of the view that the appeal was filed belatedly, then the same is curable defect and an application for condonation of delay can be filed subsequently and under these circumstances, the appellate Court should have given an opportunity to the appellant to file an application for condonation of delay. It is submitted that when an appeal is filed belatedly and if it is not accompanied by an application for condonation of delay, then the Appellate Court can either return the memorandum of appeal to the appellant to file it afresh along with the application under Section 5 of Limitation Act or to provide a chance to file an application for condonation of delay. In the present case, the Appellate Court without giving any opportunity to the appellant and to the surprise of the appellant, came to the conclusion in the impugned judgment and decree itself that the appeal filed by the appellant was barred by limitation.

*Per contra*, it is submitted by the counsel for the respondent No.1 that even if the appeal has been dismissed as barred by limitation but the finding recorded by the Appellate Court for granting decree under Section 12(1)(f) of MP Accommodation Control Act still holds the field and thus,

no prejudice would be caused to the appellant. It is further submitted that the appellant has not argued to show that the finding recorded by the Appellate Court for granting a decree under Section 12(1)(a) of the MP Accommodation Control Act is erroneous.

Heard the learned counsel for the parties.

Section 3 of the Limitation Act reads as under:-

**"3. Bar of limitation.**—(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act—

(a) a suit is instituted—

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted—

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii) in the case of a counter claim, on the date on which the counter claim is made in court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court."

Thus, the question of limitation is to be considered by the Court and it can be said that it is the duty of the Court to find out whether the appeal filed by the litigant /appellant is within the jurisdiction or not ? This exercise has to be done on the very first day when the appeal is filed.

I have gone through the orders sheets of the Appellate Court.

The appeal was filed on 03/07/2017 and the order dated 03/07/2017 passed by Appellate Court reads as under:-

**"03-07-2017**

अपीलार्थी द्वारा श्री अतुल कुमार सक्सैना अधिवक्ता उपस्थित।

अपीलार्थी द्वारा यह अपील सी0पी0सी0 की धारा 96 के तहत न्यायालय प्रथम व्यवहार न्यायाधीश वर्ग 2 के न्यायालय के द्वितीय अतिरिक्त व्यवहार न्यायाधीश वर्ग-2 भिण्ड (श्री ज्ञानेन्द्र कुमार शुक्ला) के प्रकरण क्रमांक 63ए/16 में पारित निर्णय एवं डिक्री दिनांक 18.05.2017 को व्यथित होकर प्रस्तुत की है। साथ में निर्णय की प्रति पेश की गयी है। साथ में स्वयं का शपथपत्र भी पेश किया।

पंजीयन पर सुना।

प्रथम दृष्टया अपील सुनवाई योग्य प्रतीत होती है जिससे मूल अपील पंजी में प्रकरण दर्ज हो।

अपीलार्थी की ओर से एक आवेदन आदेश 41 नियम 5 सहपठित धारा 151 जा0दी0 का पेश किया गया। जिस पर आई0ए0 नम्बर 1/17 से चिन्हित किया गया। अपीलार्थी अधिवक्ता को सुना।

प्रत्यर्थी क01 ने अपीलार्थी तथा प्रत्यर्थी क02 लगायत 06 के विरुद्ध म0प्र0 स्थाननियंत्रण अधिनियम के तहत विवादित स्थान खाली कराकर रिक्त अधिपत्य दिलाये जाने बावत् दावा पेश किया था। विद्ववान अधीनस्थ न्यायालय द्वारा प्रत्यर्थी क0 1 का दावा डिक्री किया गया है। जिससे व्यथित होकर यह अपील पेश की गयी है। अपीलार्थी ने यह आवेदन इस आशय का पेश किया है कि यह उक्त निर्णय एवं डिक्री का निष्पादन स्थगित नहीं किया गया तो अपीलार्थी को अपील पेश करने का उद्देश्य विफल हो जायेगा, जिससे उक्त निर्णय एवं डिक्री का निष्पादन स्थगित रखा जाये।

अधीनस्थ न्यायालय के निर्णय एवं डिक्री के निष्पादन को स्थगित नहीं किया गया तो अपीलार्थी की अपील पेश करने का उद्देश्य विफल होगा और उसे सारवान क्षति होगी, जिससे अपीलार्थी का आवेदन इस शर्त पर स्वीकार किया जाता है कि अपीलार्थी विद्ववान अधीनस्थ न्यायालय के समक्ष आज से पन्द्रह दिवस के अन्दर पचास हजार रुपये की जमानत एवं इतनी ही राशि का बंधपत्र इस आशय का पेश करे कि यदि अपीलार्थी की अपील निरस्त की गयी तो अपीलार्थी अपील निरस्त करने की दिनांक से दो माह के भीतर प्रत्यर्थी क0 1/वादी को विवादित दुकान का रिक्त अधिपत्य सौपेंगा तथा अपील लंबित रहने तक प्रत्येक माह की पांच तारीख तक आवश्यक रूप से किराया अदा करता रहेगा तब उक्त निर्णय एवं डिक्री की निष्पादन की कार्यवाही स्थगित रखी जाये।

आदेश की एक प्रति संबंधित न्यायालय को भेजी जावे।

अपीलार्थी द्वारा तीन दिवस के अन्दर तलवाना एवं अपील की प्रति पेश की जाये तो प्रति अपीलार्थीगण को जर्ज समन आहूत किया जाये।

मूल अभिलेख तलब हो।

प्रकरण प्रतिअपीलार्थीगण की उपस्थिति एवं अंतिम तर्क हेतु दिनांक 26.07.2017 पेश हो।"

Thus, it is clear that on 03/07/2017 the appellate Court did not take any objection with regard to delay in filing the appeal but on the contrary not only admitted the appeal but also granted stay of execution of decree.

I have gone through the entire order sheets of the Appellate Court and it appears that no objection was ever taken by the Appellate Court with regard to delay in filing the appeal. It appears that while deciding the appeal filed by the appellant, the Appellate Court must have noticed that the appeal filed by the appellant was barred by limitation. Under these circumstances, where the Court itself had not taken any objection with regard to delay in filing the appeal at the earliest and considering the fact that non-filing of application for condonation of delay is a curable defect and the appellant can be permitted to file an application for condonation of delay at a later stage as well as the fact that until and unless the delay in filing the appeal is condoned, it cannot be said that there was any appeal in the eyes of law, this Court is of the view that the Appellate Court after having noticed that the appeal is barred by limitation, should have granted an opportunity to the appellant to file an application under Section 5 of the Limitation Act.

My view is fortified by the judgment passed by this Court in the case of **Premchand Soni since deceased LRs Janki Bai and Others vs. Harish Chand** reported in **2012(1)MPLJ 65** which read as under:-

"6. On bare perusal of the impugned judgment passed by learned First Appellate Court this Court finds that on the basis of a decision of this Court *Pradeep Kumar* (supra) since the appeal of the tenant-defendant was barred by time and memorandum of appeal was not accompanied by any application to condone the delay under section 5 of the Limitation Act, the appeal was dismissed as not maintainable. Indeed, said decision of this Court has been reversed by the Supreme Court in *State of M.P. And another vs. Pradeep Kumar and another*, (2000) 7 SCC 372 wherein the Supreme Court has held that if an appeal is barred by time, the Court should either return the memorandum of appeal to the appellant to submit it along with the application under section 5 of the Limitation Act or should provide a chance to file application to condone the delay. Since neither the learned First Appellate Court returned the appeal to the appellant nor gave any chance to the appellant to file necessary application to condone the delay in filing the

appeal, I am of the view that on the basis of decision of Supreme Court *State of M.P. vs. Pradeep Kumar* (supra), the impugned judgment cannot be said to be in accordance with law."

This Court in the case **Dinesh Chandra Raghuvar Dayal Sharma vs. Yashveer Singh Ghuraiya and Others**, reported in **2000(3) MPLJ 243** has held as under:-

"4. In this connection, it may be noticed that when there is a specific provision authorizing and empowering an authority to condone the delay on making out a sufficient cause, from the mere fact that the authority concerned has proceeded to decide the case on merits, it cannot be assumed that there is an implied condonation of delay. Sufficient cause for the delay has to be made out for its condonation and only then the concerned authority can assume jurisdiction to go into merits. Further, in the absence of the order of the concerned authority, it cannot be said that the delay, either expressly or by necessary implication had been condoned. "

The Supreme Court in the case of **State of MP and Ors vs. Pradeep Kumar and Ors**, reported in **2000 (7) SCC 372** has held as under:-

'10. 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. "

Accordingly, this Court is of the considered opinion that the appellate Court has committed a material illegality by not granting an opportunity of hearing to the appellant to file an application for condonation of delay. Furthermore, once the Appellate Court was of the view that the appeal is barred by limitation, then it should not have decided the appeal on merits also.

Accordingly, the substantial questions of law are answered in affirmative. The judgment and decree dated 24<sup>th</sup> July, 2018 passed by First Additional Judge to the Court of First Additional District Judge, Bhind in Regular Civil Appeal No.44/2017 is hereby set aside.

The appeal is remanded back to the appellate Court. The appellant is directed to file an application for condonation of delay before the Appellate Court **by 11<sup>th</sup> March, 2019**. The Appellate Court is directed to decide the said application on its own merits and if the delay in filing the appeal is condoned, then the Appellate Court shall decide the appeal on merits afresh without getting influenced by any of the observations already made on merits.

With the aforesaid observation, the appeal succeeds and is hereby **allowed**.

**(G. S. Ahluwalia)**  
**Judge**