MANU/BH/0341/1968

**Equivalent Citation:** 1969PLJR432

**IN THE HIGH COURT OF PATNA**
**FULL BENCH**

M.A. No. 46 of 1962

Decided On: 07.02.1968

Appellants: **Firm Bhudarmal Chandi Prasad**
**Vs.**
Respondent: **State of Bihar**

**Hon'ble Judges/Coram:**
*R.L. Narasimham, C.J., Udai Sinha and Tarkeshwar Nath, JJ.*

**Counsels:**
*For Appellant/Petitioner/Plaintiff: J.C. Sinha and S. Mustafi*

*For Respondents/Defendant: Lal Narain Sinha, Advocate General, S. Sarwar Ali, Addl. Govt. Pleader and Lakshman Saran Sinha*

**JUDGMENT**

**R.L. Narasimham, C.J.**

**1.** The following two questions of law have been referred to the Full Bench by a Division Bench of this Court (Choudhary and Anwar Ahmad, JJ.) under Rule 3 of Chapter V of Part II of the High Court Rules:

> **1.** Where a plea of limitation was taken in defence, but was not pressed at the trial, and the plaintiff obtained only a partial decree against the defendant and preferred an appeal to the Appellate Court for the further claim, could the defendant respondent, who did not prefer any appeal from the decree passed against him, raise in appeal, under Order 41, Rule 22, C.P.C. the question that the suit was barred by limitation?
>
> **2.** Does the expression 'support the decree' on any of the grounds decided against him used in Order 41, Rule 22, C.P.C. include a ground which had the effect of challenging the correctness of the decree?

The appellant is a firm of contractors which, on the 12th February, 1952, entered into a contract with the defendant (State of Bihar) agreeing to supply 32,00,000 of bricks for a total price amounting to Rs. 1,42,600/-. It was alleged that the defendant agreed to supply permits for coal at controlled rates, but after supplying permits for 94 tons of coal in May, 1952, and 119 tons in June, 1962, the defendant failed to fulfil its part of the term of the contract with the result that plaintiff could supply only 5,69,912 bricks. Further manufacture of bricks was stopped on the instructions contained in a letter dated the 27th August, 1952, from the defendant. There was subsequent correspondence between the parties, and, ultimately, the plaintiff brought the suit under appeal on the 2nd August, 1958, chiming Rs. 26,969/2/9 as damages for breach of contract besides interest Rs. 7,821/8/-.

**2.** One of the important issues was issue no. 2, which was as follows:

> Is the claim of the plaintiff barred by limitation?

The trial of the suit in the lower court, viz., the court of the 1st Additional Subordinate Judge, Bhagalpur, was completed on the 4th September, 1961, and arguments on behalf of the defendant were heard on the 5th September. Arguments on behalf of the plaintiff were heard in part on the 6th September. On the next day, viz., the 7th September, the learned Government Pleader, who appeared for the defendant, gave up several points, including the objection to the suit on the ground of limitation. The learned Subordinate Judge made the following note in the order sheet on that day:

> The learned lawyer for the defendant has also not pressed his defence that the claim is barred by limitation.

Arguments were then resumed, and judgment was delivered on the 21st September, 1961, and the plaintiff was given a decree for Rs. 3300/2/2 only with interest. As regards issue no. 2 the learned Subordinate Judge noted in the judgment that it was not pressed.

**3.** The plaintiff filed an appeal in the High Court against that portion of the decree which was against it but reduced the claim to Rs. 13,159/12/7. The State of Bihar, however, did not file an appeal or cross-appeal or cross-objection against that portion of the decree of the trial court allowing the plaintiff's claim to the extent of Rs. 3,900/2/2 with interest. But, when the appeal came up for hearing before the Division Bench, counsel for the State of Bihar wanted to raise the question of limitation, relying on Order XLI Rule 22(1), Civil Procedure Code. Counsel for the appellant, however, objected on the ground that, if the bar of limitation is permitted to be taken up at that appellate stage, it might be fatal to the whole suit, and that Order XLI Rule 22(1) will not be available for that purpose. Counsel for the State of Bihar relied on (1) Gaddem Chinna Venkata Rao V. Koralla Satyanarayanamurthy (MANU/TN/0137/1943 : A.I.R. 1943 Mad 698), but the learned Division Bench was not satisfied with the correctness of the view taken therein, and hence referred the two questions of law to the Full Bench.

**4.** Order XLI Rule 22(1) may now be quoted:

> Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

The crucial words in the said sub-rule for the purpose of this reference are (1) "grounds decided against him" and (2) "support the decree". It was urged that, inasmuch as the issue of limitation was not pressed, there was no decision by the trial court on that issue, and that, consequently, Sub-rule (1) of Rule 22 has no application. Secondly, it was contended that the expression "decree" in the words "support the decree" means the entire decree passed by the trial court, and that, by raising the plea of limitation, the defendant could not be held to be supporting that portion of the decree which was against it. It was urged that this plea of limitation, if

accepted, would destroy the decree in its entirety, and result in the dismissal of the suit. As the defendant did not file an appeal or a cross objection it cannot be permitted to take up such a plea as a respondent, relying on Order XLI Rule 22(1), Civil Procedure Code.

**5.** The first point does not require much discussion. The issue of limitation was one of the important issues raised in the trial court, and both parties adduced all their available evidence in respect of this issue and other issues. It was only at the stage of the arguments after the defendant's counsel had finished his arguments and the plaintiff's counsel was replying to the same that the defendant's counsel stated that he would not press this issue of limitation. Under Order XX Rule 5, Civil Procedure Code, the Court was bound to give its decision on every issue, and hence, when the defendant's counsel stated that he would not press this issue, the Court should have written in express terms that issue no. 2 was decided in favour of the plaintiff as it was not pressed by the defendant. The Court, however, merely wrote in the judgment 'not pressed' but in the context, bearing in mind the provisions of Order XX Rule 5 and the belated stage at which this issue was given up by the defendant, the order of the Court should be construed as a decision in favour of the plaintiff. As pointed out in (2) Dundbahadur Singh V. Durga Prasad Singh (MANU/BH/0124/1953 : A.I.R. 1953 Patna 346 at 348):

> The concession made by the lawyer in the course of the argument represents his opinion as to the effect of the evidence. He felt that the evidence on his side did not establish his case and it would be better for his clients that he should concede the point as my review of the evidence will show his opinion was not unjustified. This concession was not intended to bind his clients in a later stage of the case and to prevent another lawyer, who might take a different view of the evidence, from re-opening the point in appeal.

Because of this concession, the trial court was perhaps justified in not discussing the evidence on the question of limitation, but it was bound to decide the issue in favour of one party or the other, in accordance with its own view of law and facts. Some reliance was placed on (3) Pran Krishna Das V. Pratap Chandra Dalai (MANU/WB/0411/1917 : A.I.R. 1918 Cal 227), where it was held that a point newly taken up at the appellate stage, which was not in issue in the lower court, could not be held to be a point "decided" for the purpose of Order XLI Rule 22(1), Civil Procedure Code. That case is, however, clearly distinguishable because there no issue was raised on the point; and it was not the subject of adjudication. Here, however, the facts are otherwise. I would, therefore, hold that the issue of limitation must be held to have been decided against the defendant by the lower court.

**6.** Turning to the second point, I may quote those portions of Rule 22(1) where the word "decree" occurs along with other words: (1) "though he may not have appealed from any part of the decree" (2) "support the decree on any of the grounds decided against him in the Court below", and (3) "take any cross-objection to the decree which he could have taken by way of appeal". A decree would, ordinarily, mean the entire decree passed by the trial court, but where the decree is of a composite nature, being partly in favour of the plaintiff and partly in favour of the defendant, difficulties sometimes arise in construing the word "decree". The context, specially the accompanying words, afford the best guide, and the said word will have to be construed as meaning that portion of the composite decree which is either in favour of the appellant or the respondent according to the context. Thus, the words "though he may not have appealed from any part of the decree", occurring in Rule 22(1),

should be so construed as applicable to that part of the decree which is against the respondent. Similarly, in the words "take any cross-objection to the decree which he could have taken by way of appeal", the decree referred to must be that portion of the decree which is against the respondent because the qualifying words "which he could have taken by way of appeal" show that it could not possibly be the entire decree, a portion of which is in his favour. On the same reasoning, the words "support the decree on any of the grounds decided against him in the court below" should be so construed as to refer to that portion of the decree of the trial court which is in favour of the respondent, otherwise full meaning cannot be given to the word "support" because a respondent cannot possibly support that portion of the decree which has been passed against him. It will be repugnant to the context to construe the word "decree" occurring in the said portion, as meaning the entire decision of the lower court, as has been done by some of the High Courts. I am, therefore with respect, inclined to accept that view taken in the Fall Bench decision of the Madras High Court reported in (1) A.I.R. 1913 Mad 698, overruling the contrary view taken in (4) Sri Ranga Thathachariar V. Srinivasa Thathachariar (MANU/TN/0074/1927 : A.I.R. 1927 Mad 801). In the earlier Madras decision (4) (MANU/TN/0074/1927 : A.I.R. 1927 Mad 801), it was held that the respondent cannot, by virtue of the sub-rule, take up those grounds which were decided against him in the court below and in respect of which he has filed no appeal or memorandum of objection. This view was followed in (5) Gengama Naik V. N.L.V.R. Veerappa Chatti (MANU/TN/0233/1930 : A.I.R. 1931 Mad 513), where it was observed at page 516 that any ground taken by the respondent at the appellate stage, which, according to him, should have been decided in his favour by the trial court, would not be a ground "in support of the decree" but a ground "attacking the decree". This view has also been taken by several other High Courts. Thus, in (6) Shailesh Chandra Guha V. Bochai Gope (MANU/WB/0123/1924 : A.I.R. 1925 Cal 94), it was pointed out that, if such a ground be permitted to be taken up at the appellate stage, it would, if sustained, render the entire decree invalid. In (7) Kishan Kishore V. Din Muhammad (MANU/LA/0134/1928 : A.I.R. 1929 Lah 68) also, a similar view was held on the assumption that such a ground would be attacking the decree and not supporting the decree. In (8) Mst. Mewa V. Amar Singh (MANU/PH/0158/1959 : A.I.R. 1959 Pun 515), a similar view was taken, and it was held that an objection, which goes to the root of the case and which, if upheld, would necessarily result in the suit failing, cannot be taken up by the respondent at the appellate stage by virtue of Order XLI Rule 22(1), Civil Procedure Code.

**7.** In all these decisions, it seems to have been assumed that word "decree" in the words "support the decree", occurring in Order XLI Rule 22(1), Civil Procedure Code, means the decree in its entirety as passed by the trial court. If however, this word is construed as meaning the decree under appeal (as discussed already), the argument based on the assumption that the respondent was not supporting the decree but attacking the decree by raising such a submission at the appellate stage will no longer be available.

**8.** The correctness of the decision in (4) Sri Ranga Thathachariar V. Srinivasa Thathachariar (MANU/TN/0074/1927 : A.I.R. 1927 Mad 801) was doubted in (9) Gokul Krishna Banerji V. Secretary of State (MANU/BH/0072/1931 : A.I.R. 1932 Pat 134). Counsel for the appellant relied on (10) Hardi Ram Pandey V. Kali Prasad Singh (MANU/BH/0218/1948 : A.I.R. 1949 Pat 79), but in that judgment, the earlier Division Bench judgment of the Patna High Court in (9) Gokul Krishna Banerji V. Secretary of State (MANU/BH/0072/1931 : A.I.R. 1932 Pat 134) and the Full Bench judgment of the Madras High Court in (1) Gaddem Chinna Venkata Rao V. Koralla

Satyanarayanamurthy (MANU/TN/0137/1943 : A.I.R. 1943 Mad 698) have not been noticed.

**9.** This sharp conflict in the judicial opinion about the interpretation of Order XLI Rule 22 (1), Civil Procedure Code, has been noticed by their Lordships of the Supreme Court in (11) The Management of Itakhooli Tea Estate V. Its workmen (MANU/SC/0330/1960 : A.I.R. 1960 SC 1349), but their Lordships did not decided this question, though they disposed of that case on the assumption that the later Full Bench of the Madras High Court in (1) Gaddem Chinna Venkata Rao V. Koralla Satyanarayanamurthy (MANU/TN/0137/1943 : A.I.R. 1943 Mad 698) laid down the correct law.

**10.** The contrary view taken in some of the decisions cited above seems to be based on the obsession that, if the respondent is permitted to support that portion of the decree under appeal on the basis of a ground decided against him by the trial court, he will be rendering the entire decree invalid and bringing about the dismissal of the suit. This basic assumption is, with great respect, erroneous. It will be somewhat hypothetical to consider at the appellate stage what would have been the result if the aforesaid ground taken up by the respondent had been accepted by the trial court. It may be that the result would have been the dismissal of the suit in its entirety but that does not necessarily mean that by merely raising this point at the appellate stage, the respondent would invariably render the decree passed by the trial court wholly invalid. Under normal circumstances, by his failure to file an appeal against that portion of the decree which is against him and by his omission to file a cross-objection in the plaintiff's appeal, he has rendered that portion of the decree final. This finality is irrespective of the effect of his argument in the appellate stage, and is brought about by a different principle altogether. The learned Advocate General for the respondent urged, relying on Order XLI Rule 33, Civil Procedure Code, that, under that rule, the Court may have power, in the aforesaid circumstances, to set aside the decree in its entirety. Here, we are not concerned with the application of Order XLI Rule 33 as the two questions of law, referred to us by the Division Bench, do not deal with that rule. I will leave open the question as to whether Order XLI Rule 33 can possibly apply on the facts of this case, but so far as Order XLI Rule 22(1) is concerned, the respondent will be precluded from attacking that portion of the decree which was passed against him by the trial court by his own conduct in not filing an appeal or a cross-objection. But, from this conclusion, it does not necessarily follow that he cannot "support" that portion of the decree which was passed in his favour on the basis of a ground decided against him, if that is sufficient for the dismissal of the plaintiff's appeal.

**11.** The aforesaid reasoning apply with greater force where the ground taken up is regarding limitation. Section 3 of the Limitation Act expressly directs the Court to dismiss a suit if it is time barred, even though limitation has not been set up as a defence. This power is required to be exercised not only by the trial court but also by the appellate court, Waiver of a plea of limitation by a party cannot operate as estoppel. In (12) Ramchandra Deo Garu V. Chaitana Sahu (MANU/PR/0085/1920 : A.I.R. 1920 PC 139), their Lordships made it clear that even a concession by a party that the claim was not barred by limitation would not preclude their Lordships from examining the conditions associated with the Limitation Act and from dismissing the suit with costs if the claim was barred by time. They, however, did not exercise this power because the concession in that case had the result of making the trial court's decree a consent decree, against which no appeal lay. Hence, except in those cases where on the basis of a concession on the question of limitation, the decree of the

trial court becomes a consent decree (against which there is no right of appeal), the mere withdrawal of the plea of limitation by a party will not preclude that party from taking up this question at the appellate stage. In (13) Maqbul Ahmad V. Onkar Pratap Narain Singh (MANU/PR/0025/1935 : A.I.R. 1935 PC 85), their Lordships observed a page 88:

> It is to be noted that this view is supported by the fact that Section 3 of the Act is peremptory and that the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings.

In (14) Yeshwant Deorao V. Walchand Ramchand (MANU/SC/0033/1950 : A.I.R. 1951 SC 16) the plea of limitation under Section 18 of the Limitation Act was permitted to be taken up even at the appellate stage, though it was not taken up in the lower courts. I may also refer (15) Kundo Mal V. Daulat Ram Vidya Parkash (MANU/LA/0213/1939 : A.I.R. 1940 Lah 75), where it was emphasised that objections regarding limitation cannot be waived, and if they are waived, they can be taken up again by the parties or by the courts themselves. It is true that, in the present case, the issue of limitation cannot be said to be wholly a question of law but it is a mixed question of law and fact depending mainly on ascertainment of the exact date when the alleged breach of contract took place. If it were a second appeal, the findings on facts would be binding, and the examination of the question of limitation would be restricted to points of law only but as the appeal before the Division Bench is a first appeal, it will be open to the respondent to ask the Court to come to its own finding as to the date on which the alleged breach took place, and then decide whether the suit was brought within time. Even if it succeeds in this plea, the plaintiff's appeal alone will be dismissed, and that portion of the decree which is against the respondent cannot be disturbed, as it has attained finality, unless, of course, the Bench is of opinion that Order XLI Rule 33, Civil Procedure Code, would apply.

**12.** If the plea of limitation had not been taken up and the parties had not got opportunities to lead evidence, the taking up of the question at the appellate stage may cause prejudice to the parties, as pointed out in (16) banarsi Das V. Kanshi Ram (MANU/SC/0302/1962 : A.I.R. 1953 SC 1165--paragraph 15). But here, however, the issue was raised, all available evidence was given, and the plea was given up by the Advocate for the respondent at the stag; of argument. Hence, there can be no question of any prejudice being caused to the plaintiff in respect of leading of available evidence bearing on the issue of limitation, if this issue is permitted to be taken up at the appellate stage under Order XLI Rule 22(1). In (17) Mahindra Land and Building Corporation Ltd. V. Bhutnath Banerjee (MANU/SC/0259/1963 : A.I.R. 1964 SC 1336 paragraph 9), their Lordships pointed out that even a Court of revision can rely on Section 3 of the Limitation Act if it is satisfied that the lower courts have come to an erroneous decision.

**13.** For these reasons, I answer the two questions referred to us by the Division Bench as follows:

> Question No. 1. The defendant respondent can raise the plea of limitation by virtue of Order XLI Rule 22(1), Civil Procedure Code, in the circumstances mentioned in the question but only to support the decree which is in his favour.
>
> Question No. 2. This question must be held to have been somewhat

inaccurately put, in view of my holding that the word "decree" in Order XLI Rule 22(1), Civil Procedure Code, means not the entire decree of the trial court but only that portion of the decree which is under appeal. The defendant could support that decree on any of the grounds decided against him by the lower court, even though the acceptance of that ground by the trial court would have had the effect of the dismissal of the suit. The defendant's (respondent's) right to challenge that portion of the decree of the trial court which is against him may be barred on account of his failure to file an appeal or a cross-objection, and thus the question of his challenging that portion of the decree dots not arise within the terms of Order XLI Rule 22(1). We express no opinion about the applicability of Order XLI Rule 33, Civil Procedure Code under those circumstances.

Let the case be now sent back to the Division Bench for disposal. Costs will abide the result.

**Udai Sinha, J.**

I agree

**Tarkeshwar Nath, J.**

I agree