

(2011) 12 RAJ CK 0081

In the Rajasthan High Court

Case No : Civil Miscellaneous Application No. 288 of 2011 in Civil First Appeal
No. 691 of 2011

Bal Kishan Sharma and Others

APPELLANT

Vs

Radhey Shyam Godhawat

RESPONDENT

Date of Decision : 23-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 43 Rule 1, Order 9 Rule 13, 105, 95(2)
Limitation Act, 1963 — Section 5

Citation : (2012) 4 RLW 3100

Hon'ble Judges : Bela M. Trivedi, J

Bench : Single Bench

Advocate : Ajeet Bhandari, for the Appellant; A.K. Sharma with V.K. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Bela M. Trivedi, J.—The precise question that falls for consideration before this court is as to whether delay occurred in filing the present appeal filed u/s 96 of CPC, challenging the exparte decree passed by the trial court should be condoned on the ground that the applicants-appellants (original-defendants) had filed an application under order 9, Rule 13 of CPC before the trial court for setting aside the same exparte decree, which application ultimately came to be dismissed by the trial court? A few facts, giving rise to the present application filed u/s 5 of the Limitation Act seeking condonation of delay occurred in filing the appeal, are that the present respondent (original plaintiff) had filed a suit being No. 4/2007 (13/95) (42/1995) against the present applicants-appellants (original defendants) in the court of Addl. District Judge (Fast Track) No. 7, Jaipur City, Jaipur (hereinafter referred to as the "trial court"), on 17.1.95, seeking specific performance of an agreement alleged to have been executed by the appellants in favour of the respondent on 29.11.1986 with regard to the sale of the suit property described in para No. 1 of the plaint. In the said suit, the

summons were sought to be served on the appellants-defendants, however, the same were allegedly refused by the appellants and therefore the trial court passed an order on 13.8.1998 to proceed ex parte against the appellants. The trial court ultimately considering the evidence on record adduced by the respondent-plaintiff decreed the said suit, vide the judgment and decree dated 18.8.2007. According to the appellants, they came to know about the said ex parte decree on 12.10.2008 and therefore they filed an application under Order 9, Rule 13 of CPC on 20.10.2008 for setting aside the said ex parte decree. The said application of the appellants came to be dismissed by the trial court vide order dated 3.9.2011. The appellants thereafter have filed the present appeal u/s 96 read with Order 41, Rule 1 of CPC challenging the judgment and decree dated 18.8.2007 passed by the trial court in the Civil Suit No. 4/2007. Since there was a delay of about 1421 days in filing the appeal, the appellants have filed the present application u/s 5 of the Limitation Act seeking condonation of the said delay.

2. The application seeking condonation of delay has been resisted by the respondent-plaintiff by filing the reply and the appellants have also filed the rejoinder to the reply filed by the respondent.

3. It has been submitted by the learned counsel Mr. Ajeet Bhandari for the appellants that the appellants were pursuing the remedy under Order 9, Rule 13 of CPC by filing the application for setting aside the ex parte decree dated 18.8.2007 passed by the trial court and that the said application came to be dismissed only on 3.9.2011, which had caused delay in filing the present appeal u/s 96 of CPC. Mr. Bhandari also submitted that the expression "sufficient cause" contained in section 5 of the Limitation Act should receive a liberal construction so as to advance the substantial justice, as propounded by the Apex court in the case of *The State of West Bengal Vs. The Administrator, Howrah Municipality and Others*, . According to Mr. Bhandari, after the passing of the ex parte decree by the trial court, there were two courses open to the appellants, one, by filing an application under Order 9 Rule 13 of CPC for setting aside the ex parte decree and the other, by filing a regular appeal u/s 96 of the CPC challenging the legality and validity of the said ex parte decree. He further submitted that there is no bar in any of the statutes against filing regular appeal u/s 96 of CPC after the dismissal of application made under Order 9, Rule 13 of CPC and that the explanation contained in Rule 13 of Order 9 would come into play only when the appeal against a decree passed ex parte has been disposed of on any ground other than the ground that the appellants had withdrawn the appeal. In order to buttress his submission, the learned counsel Mr. Bhandari has relied upon the decision of the Apex Court in the case of *Bhanu Kumar Jain Vs. Archana Kumar and Another*, . He has alternatively submitted, relying upon the rejoinder filed by the appellants to the reply filed by the respondent that the appellants had relied upon the legal advice given by the concerned advocate of the trial court, who had advised them that it was not possible to proceed simultaneously i.e. one by filing an appeal u/s 96 and the other by filing application under Order 9, Rule

13 of CPC for setting aside the exparte decree, and therefore the appellants had first filed an application under order 9 Rule 13 of CPC and on its dismissal have filed the present appeal. He further submitted that the appellants had acted bonafide on the advice given by their advocate and that the appellants should not be made to suffer on account of a wrong advice of their lawyer.

4. The learned senior counsel Mr. A.K. Sharma for the respondent, however, challenging the very maintainability of the appeal, vehemently submitted that the appellants-defendants having already exhausted the remedy of filing an application under Order 9, Rule 13 of CPC for setting aside the exparte decree, and the said application having already been dismissed by the trial court, the present appeal filed u/s 96 (2) of CPC would not be maintainable in the eye of law. Placing heavy reliance on the decision of Apex Court in the case of Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury, , Mr. Sharma has submitted that it was obligatory on the part of the appellants to decide whether to file an application under Order 9, Rule 13 for setting aside the exparte decree or to file an appeal u/s 96 (2) of CPC against the said exparte decree, but the appellants could not be permitted to file an appeal u/s 96 (2) after the dismissal of the application under Order 9 Rule 13 by the trial court, Mr. Sharma has also relied upon the judgment of Madhya Pradesh High Court in the case of Sumera Vs. Madanlal and Others, , in this regard, Mr. Sharma further submitted that any mistaken advice given by the counsel would not be a sufficient cause to condone the delay. Placing reliance on the judgment of Punjab and Haryana High Court in the case of Gajjan Singh Vs. Ram Lok, and Andhra Pradesh High Court in the case of Jokam Reddy and others vs. Kokar Mallah (AIR 1976 Andhra Pradesh 399), the learned counsel Mr. Sharma submitted that the time spent in prosecuting the application under Order 9, Rule 13 cannot be treated as sufficient cause u/s 5 of the Limitation Act and cannot be deducted from the time allowed for filing the appeal, and that any wrong advice given by the counsel to file an application under Order 9 Rule 13 also could not be said to be the sufficient cause for condoning the delay occurred in filing the appeal. He further submitted that the exparte decree was passed in the year 2007 after about 9 years of the order passed in 1998 to proceed exparte against the appellants-defendants as they had refused to accept summons of the court, and that there was no malafide intention on the part of the respondent to get the decree in absence of the appellants. According to him, the respondent could not be forced to face the appeal when the alternative remedy of filing of application under Order 9, Rule 13 was already availed of by the appellants and when the said application is also dismissed by the trial court.

5. Though in the instant application, the court is required to consider as to whether the delay occurred in filing the appeal should be condoned or not, the question as to whether the appeal itself is maintainable or not assumes significance in view of the submissions made by learned counsel for the parties in the light of various pronouncement of judgments/decisions by the Apex Court. The Apex Court had an occasion to deal with the explanation contained in Order

9, Rule 13 in the case of Rani Chaudhary (supra) and the Apex Court (Per Hon''ble Mr. R.S. Pathak, J) observed as under:

The CPC (Amendment) Act, 1976 was enacted with the avowed purpose of abridging and simplifying the procedural law. By enacting the Explanation, Parliament left it open to the defendant to apply under R. 13 of O. 9 for setting aside an ex parte decree only if the defendant had opted not to appeal against the ex parte decree or, in the case where he had preferred an appeal, the appeal had been withdrawn by him. The withdrawal of the appeal was tantamount to effacing it. It obliged the defendant to decide whether he would prefer an adjudication by the appellate court on the merits of the decree or have the decree set aside by the trial court under R. 13 of O. 9. The legislative attempt incorporated in the Explanation was to discourage a two-pronged attack on the decree and to confine the defendant to a single course of action. If he did not withdraw the appeal filed by him, but allowed the appeal to be disposed of on any other ground, he was denied the right to apply under R. 13 of O. 9. The disposal of the appeal on any ground whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation.

The other Hon''ble Mr. Amrendra Nath Sen, J. Also took the same view but recorded his separate reasons.

6. The Apex Court in the case of P. Kiran Kumar Vs. A.S. Khadar and Others, , followed the above referred ratio laid down in the case of Rani Chaudhary, Again the Apex Court while considering the issue of remedies available to a defendant when an exparte decree is passed against him, observed as under in the case of Bhanu Kumar (supra);

23. The question which now arises for consideration is as to whether the First Appeal was maintainable despite the fact that an application under Order 9, Rule 13 of the Code was dismissed.

24. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

(i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and

(ii) The suit could not have been posted for ex-parte hearing.

25. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

26. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for

setting aside the order in terms of O. 9, R. 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to O. 9, R. 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

27. In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an Appellant to raise a contention as regard correctness or otherwise of an interlocutory order passed in the suit subject to the conditions laid down therein.

28. It is true that although there may not be a statutory bar to avail two remedies simultaneously and an appeal as also an application for setting aside the ex-parte decree can be filed; one after the other; on the ground of public policy the right of appeal conferred upon a suitor under a provision of statute cannot be taken away if the same is not in derogation or contrary to any other statutory provisions.

29. There is a distinction between "issue estoppel" and "res judicata" (See Thoday vs. Thoday 1964 (1) All. ER 341)

30. Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res-judicata creates a different kind of estoppel viz. Estopper By Accord.

It has been further observed:

37. We have, however, no doubt in our mind that when an application under Order 9, Rule 13 of the Code is dismissed, the defendant can only avail a remedy available there against, viz. to prefer an appeal in terms of Order 43, Rule 1 of the Code, Once such an appeal is dismissed, the Appellant cannot raise the same contention in the First Appeal. If it be held that such a contention can be raised both in the First Appeal as also in the proceedings arising from an application under Order 9, Rule 13, it may lead to conflict of decisions which is not contemplated in law.

38. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex-parte hearing by the Trial Court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the First Appeal filed by him against Section 95(2) of the Code on the merit of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not

maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr. Choudhari that the "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this court in Rani Choudhury (supra), P. Kiran Kumar (supra) and Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others, .

39. We, therefore, are of the opinion that although the judgment of the High Court cannot be sustained on the premise on which the same is based, the Respondents herein are entitled to raise their contentions as regards merit of the plaintiffs case in the said appeal confining their contentions to the materials which are on records of the case.

7. Having considered the above referred decisions of Hon"ble Supreme Court, it clearly transpires that the explanation in Order 9, Rule 13 was enacted in order to discourage a two-pronged attack on the decree and to confine the defendant to single course of action, i.e. either to file an application for setting aside the exparte decree under Order 9, Rule 13 or to file an appeal u/s 96(2) of CPC. Though the learned counsel Mr. Bhandari for the appellants has placed reliance on the decision of Apex Court in the case of Bhanu Kumar (supra), it is pertinent to note that it has been categorically observed in para 37 of the said decision that when an application under Order 9, Rule 13 is dismissed, the defendants can only avail of the remedy available to them viz., to prefer an appeal in terms of Order 43 Rule 1 of the Code and once such an appeal is dismissed, the appellants cannot raise the same contention in the first appeal. It has also been observed that if such a contention is permitted to be raised both in the first appeal and as also in the proceeding arising from an application under Order 9, Rule 13 of CPC, it may lead to conflict of decisions which is not contemplated in law. In view of the said decision of Apex Court, this court finds much force in the submission of learned senior counsel Mr. A.K. Sharma for the respondent that the appellants were required to decide either to file an application under Order 9, Rule 13 for setting aside the exparte decree or to file an appeal u/s 96(2) of CPC, and that even if they wanted to avail of both the remedies, they were required to file an application under Order 9 Rule 13 and an appeal u/s 96(2) of CPC simultaneously. In that view of the matter, it is required to be held that though there is no statutory bar, the appellants-defendants cannot be permitted to file an appeal u/s 96(2) challenging the exparte decree, after the dismissal of the application filed by them under Order 9, Rule 13 for setting aside the said exparte decree, and that on the dismissal of the application under Order 9, Rule 13, the defendants could only avail of the remedy available to them under Order 43 Rule 1 of CPC, as held by the Apex Court in the case of Bhanu Kumar (supra).

8. Having said that let us examine whether this is a fit case to condone the delay of 1421 days occurred in filing the appeal. In this regard the only submission made by learned counsel Mr. Bhandari was that the appellants were advised by their counsel Miss Priyambada Sharma to file an application under Order 9, Rule 13 only and not to file an appeal u/s 96(2), and therefore the appellants have

filed the present appeal challenging the *ex parte* decree after the dismissal of the application filed by them under Order 9, Rule 13. According to Mr. Bhandari, the time taken for the disposal of the said application by the trial court was required to be deducted from the total number of delay occurred in filing the appeal and that for the wrong advice given by the counsel, the appellants could not be made to suffer. In the opinion of this court, there is hardly any substance in the said submission made by learned counsel Mr. Bhandari. Though it is true that the expression "sufficient cause" contained in section 5 of Limitation Act should receive a liberal construction so as to advance substantial justice, when no negligence or inaction or want of bonafide is imputable to a party, as held by the Apex Court in the case of *The State of West Bengal Vs. The Administrator, Howrah Municipality and Others*, , it is pertinent to note that in the instant case, the appellants had chosen to follow advice of their counsel in filing the application under Order 9 Rule 13 and not to file an appeal u/s 96(2). It is needless to say that only bonafide mistake committed in good faith could be regarded as the sufficient cause u/s 5 of the Limitation Act and not every mistake as it would depend upon the facts of each case. Mere staling in the application that a wrong advice was given by the counsel may not be sufficient to condone the delay u/s 5. The court is also required to see whether the allegedly wrong advice given by their counsel was bonafide or not. In the instant case, the *ex parte* decree was passed against the appellants in the year 2007. Instead of filing simultaneous proceedings under O. 9 R. 13 and under S. 96 of CPC, or filing either of them for challenging the *ex parte* decree, the appellants preferred to file the application under O. 9 R. 13 first, and only on its dismissal, have filed the appeal u/s 96(2) of CPC, which course could not only be not permitted, but such course also does not appear to be bonafide. The contention raised by the appellants in the rejoinder regarding mistaken advice does not inspire confidence and such a lame excuse appears to have been taken to cover up the gross delay of 1421 days, as rightly submitted by learned counsel Mr. Sharma for the respondent. As such an advocate is expected to know the law as propounded by the Apex Court from time to time and is also expected to give correct advice to his or her client. From the affidavit in the rejoinder filed by the appellants, it does not transpire whether the said Miss Privambada was a junior advocate or a senior advocate. However, any ignorance of law on the part of the counsel for the appellants could not be considered as sufficient cause to condone the delay. The learned counsel Mr. Sharma has rightly relied on the decision of Delhi High Court in the case of *Banwarilal and Sons Pvt. Ltd. Vs. Union of India and Others*, , wherein the Delhi High Court relying on the decision of Supreme Court reported in *Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd.*, , held that after the expiry of limitation, the appellant is required to explain the delay occurred in filing the appeal day by day and that the mistake of counsel or ignorance of law on the part of counsel could not be treated as sufficient cause for condoning the delay.

9. It is also settled legal position that the period of preferring an appeal cannot

be extended simply because the appellants' case is harsh calling for the sympathy nor the courts should extend the period of limitation out of benevolence to the party seeking relief. In any case, if any liberal view of condoning the delay of 1421 days is taken, in the instant case, it would be harsh to the respondent and not to the appellants inasmuch as after having faced and succeeded in the proceedings filed by the appellants under Order 9, Rule 13 of CPC for setting aside the ex parte decree, the respondent would again be forced to fight in the appeal seeking setting aside of the same ex parte decree. In that view of the matter, it is held that the appellants have failed to make out any sufficient cause for the condonation of delay as contemplated u/s 5 of Limitation Act and therefore the application deserves to be dismissed. The application accordingly is dismissed.