

(2012) 01 RAJ CK 0049

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 6092 of 2011 and Civil Miscellaneous Stay Application No. 4181 of 2011

Bal Kishan Sharma and Others

APPELLANT

Vs

Radhey Shyam Godhawat

RESPONDENT

Date of Decision : 05-01-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 43 Rule 1, Order 43 Rule 1(d), Order 9 Rule 13, 96(2)
Limitation Act, 1963 — Section 5

Citation : (2012) 3 RLW 2764

Hon'ble Judges : Mahesh Bhagwati, J

Bench : Single Bench

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

Final Decision : Dismissed

Judgement

Hon"ble Mahesh Bhagwati, J.—By way of the instant appeal preferred under Order 43 Rule 1(d) CPC, the appellants-defendants have beseeched to set-aside the order dated 3rd September, 2011, whereby the learned Additional District Judge (Fast Track) No. 7, Jaipur Metropolitan dismissed the Civil Misc. Application No. 56/2008 filed under Order 9 Rule 13 CPC. Adumbrated in brief, the facts of the case are that the respondent-plaintiff filed a suit against the appellants-defendants in the Court of Additional District Judge (Fast Track) No. 7, Jaipur city, Jaipur (here-in-after referred to as the "trial court") on 17th January, 1995 seeking specific performance of an agreement alleged to have been executed by the appellants in favour of the respondent on 29th November, 2006 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 the order on 13th August, 1998 to proceed ex-parte against the appellants. After completion of trial, the trial court finally passed an ex-parte

decree in favour of the plaintiff respondent and against the appellants-defendants vide judgment and decree dated 18th August, 2007. When the appellants came to know about the said ex-parte decree on 12th October, 2008, they immediately filed an application under Order IX Rule 13 of CPC on 20th October, 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 3rd September, 2011. The appellants thereafter filed a regular appeal u/s 96(2) read with Order 41 Rule 1 of CPC challenging the judgment and decree dated 18th August, 2007 passed by the trial court in Civil Suit No. 4/2007. Since there was a delay of about 1421 days in filing the appeal and the appellants utterly failed to make out any sufficient cause for the condonation of delay as contemplated. u/s 5 of the Limitation Act, the application filed u/s 5 of the Limitation Act with regard to condonation of delay was dismissed vide order dated 23rd December, 2011 by the Coordinate Bench. In view of the dismissal of the Misc. Application No. 288/2011 filed u/s 5 of Limitation Act, the Coordinate Bench also dismissed the Civil First Appeal No. 691/2011. After dismissal of the first appeal preferred against the ex-parte decree, the appellants now have preferred an appeal under Order 43 Rule 1 (d) CPC against the order dated 3rd September, 2011, whereby the trial court dismissed the application of Order IX Rule 13 CPC.

2. At the very out-set, Mr. A.K. Sharma, learned counsel for the respondent-plaintiff vehemently opposed the appeal on the ground of its maintainability. Learned counsel took me through the Explanation part of Rule 13 of Order IX CPC and canvassed that where there had been an appeal against the ex-parte decree under Rule 13 and the appeal had been disposed of on any ground other than the ground that the appellant had withdrawn the appeal, no application would lie under this Rule for setting aside the ex-parte decree. In order to buttress the submission, he cited three following judgments of Hon'ble Apex Court rendered in the case of Rani Choudhury vs. Lt. Col. Suraj Jit Choudhury reported in (1982) 2 SCC 596; Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others, ; and Bhanu Kumar Jain Vs. Archana Kumar and Another,

3. Learned counsel for the respondent further canvassed that the appellants-defendants first filed an application under Order IX Rule 13 of CPC on 20th October, 2008 for setting aside the said ex-parte decree and when that application was dismissed by the trial court on 3rd September, 2011, the appellants-defendants instead of preferring an appeal against the order dated 3rd September, 2011, preferred first appeal u/s 96(2) of CPC against the ex-parte judgment and decree passed by the trial court on 18th August, 2007. Since the appellants-defendants filed the appeal after inordinate delay of 1421 days and they utterly failed to make out a sufficient cause for the condonation of delay, the first appellate court dismissed the application filed u/s 5 of Limitation Act and also dismissed the appeal accordingly vide order dated 23rd December, 2011. Since the first appeal preferred against the ex-parte judgment and decree has already been disposed of on any ground other than the ground of withdrawal of appeal, the instant appeal against the order whereby the application of setting

aside the ex-parte decree filed under Order IX Rule 13 CPC was dismissed, is not maintainable.

4. E Converso, Mr. Ajeet Bhandari, the learned counsel appearing for the appellants-defendants contended that after the ex-parte decree having been passed by the trial court against them, there were only two options open before them, either to file an application under Order IX Rule 13 CPC for setting aside the ex-parte decree or to file a regular first appeal u/s 96(2) of CPC challenging the legality and validity of the said ex-parte decree. He further contended that as per the judgments of the Hon''ble Apex Court, both, the application under Order IX Rule 13 CPC for setting aside the ex-parte decree and a regular appeal u/s 96(2) of CPC could also be filed simultaneously, but their Legal Adviser asked the appellants to file an application under Order IX Rule 13 CPC for setting aside the ex-parte decree and therefore, they first filed an application under Order IX Rule 13 CPC accordingly, which was dismissed by the learned trial court. Since, thereafter, they filed a regular first appeal questioning the legality and the validity of the said ex-parte decree u/s 96(2) of CPC after inordinate delay of 1421 days, the learned appellate court did not condone the delay, hence first appeal was dismissed on the ground of limitation. Since the appeal was not decided on merits, hence the appellants have a right to prefer an appeal against the order rendered by the trial court passed on application filed under Order 9 Rule 13 CPC. If their appeal is not allowed to be heard, then the appellants shall be made to suffer a great loss merely on account of a wrong advise of their lawyer. Mr. Bhandari further argued that it was wrong to say on the part of Mr. A.K. Sharma, Advocate that the instant appeal was not maintainable under the provisions of law. Mr. Bhandari submitted that since first appeal has not been decided on merits, they have every right to file a Misc. Appeal against the order passed by the trial court on an application filed under Order IX Rule 13 CPC.

5. A bird''s eye view of some of the decisions of Hon''ble Apex Court throwing light on this issue needs to be taken into consideration.

6. In the case of Rani Choudhury (supra), Hon''ble Apex court held thus:

The disposal of an appeal on the ground of limitation may or may not be adjudication on the merits of the appeal, depending on the particular facts and circumstances of the case and may or may not result in the merger of the decree of the trial court with the decree, if any, of the appellate court; but there cannot be any manner of doubt that when an appeal from the ex parte decree is dismissed on the ground of limitation, the appeal is disposed of on any ground other than the ground that the appellant has withdrawn the appeal. As the dismissal of the appeal on the ground of limitation results in the disposal of the appeal on any ground other than the ground of the withdrawal of the appeal by the appellant, the Explanation is attracted, and the application for setting aside the ex parte decree becomes incompetent after the disposal of the appeal and cannot be entertained.

7. In the case of Shyam Sundar Sarma (supra), the Hon''ble Apex Court held that the question as to whether an appeal accompanied by an application for condonation of delay in filing the appeal is an appeal in the eye of law, when the application for condonation of delay in filing the appeal is dismissed and consequently the appeal is dismissed as being time barred by limitation, was considered in extenso by a Full Bench of the Kerala High Court in the case of Thambi vs. Mathew reported in (1987) 2 KLT 848 (FB). In that case, after referring to the relevant decisions on the question, the Court held that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order of dismissing the appeal was a decree, that could be the subject of a second appeal. The Apex Court, having considered numerous judgments as mentioned in the judgment finally held that:

Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.

8. In view of the afore-stated observation of the Apex Court, the argument put forth by the learned counsel for the appellants-defendants that the first appeal filed by the appellants u/s 96(2) of CPC was not decided on merits and it was dismissed on the ground of limitation, as such, the instant appeal could be filed, is not tenable. Rather, the argument advanced by Mr. Bhandari which turns into so-called a question stands properly answered by the Apex Court by the afore-stated observation.

9. In the said judgment of Shyam Sundar Sarma (supra), the Hon''ble Apex Court further held that:

Where there has been an appeal against an ex-parte decree and the appeal has not been withdrawn by the appellant and has been disposed of on any ground, the application under Order IX Rule 13 of CPC would not lie and should not be entertained. Hence, even though the appeal against the ex-parte decree was disposed of on the ground of limitation and not on merits, the Explanation to Order 9 Rule 13 of CPC was attracted and hence, no petition under Order IX Rule 13 of the Code would lie. On the scope of Explanation, it was stated that the disposal of the appeal, as contemplated in the Explanation was not intended to mean or imply a disposal of merits resulting in the merger of the decree of the trial court with a decree, if any, of the appellate court on the disposal of the appeal.

10. We find the answer of this argument in the case of Bhanu Kumar Jain (supra) also, wherein the Hon''ble Apex court has held as under:-

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 Order 9, Rule 13 of the Code. He can take

recourse to both the proceedings simultaneously but, in the even 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 Order 9 Rule, 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.

11. In the same judgment, the Hon"ble Apex Court further held that where an application under Order IX Rule 13 got dismissed, first the doctrine of "issue estoppel" as also "cause of action estoppel" would arise. As such when an application under Order IX Rule 13 of the Code was dismissed, the defendant could 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 could not raise the same contention in the first appeal. If it be held that such a contention could be raised both in the first appeal as also in the proceedings arising from an application under Order IX Rule 13, it would lead to conflict of decisions, which was not contemplated in law.

12. Adverting to the facts of the instant case, it is found that the appellant first filed an application under Order IX Rule 13 of CPC on 20.10.2008 for setting aside the ex-parte decree dated 18th August, 2007 and his application came to be dismissed by the trial court vide order dated 3rd September, 2011. Thereafter the appellants preferred a regular first appeal u/s 96(2) read with Order 41 Rule 1 of CPC challenging the judgment and decree dated 18th August, 2007 and as already stated above, the Single Bench of High Court dismissed the first appeal no. 691/2011 on the ground of limitation vide order dated 23rd December, 2011. As the dismissal of the appeal on the ground of limitation results in the dismissal of the appeal on any ground other than the ground of withdrawal of appeal by the appellant, the Explanation appended to Rule 13 of Order IX CPC is attracted and the application for setting aside the ex-parte decree becomes incompetent, but in the instant case even the application for setting aside the ex-parte decree under Order IX Rule 13 CPC has also been dismissed and appellants thereafter first preferred a regular first appeal u/s 96(2) CPC challenging the legality and validity of the impugned ex-parte decree and judgment after dismissal of the application filed under Order IX Rule 13 CPC, in such a situation the appeal under Order 43 Rule 1 CPC against the order passed on an application under Order IX Rule 13 CPC is not at all maintainable as Mr. A.K. Sharma, learned counsel for the defendant has rightly pointed out at the very outset of his arguments. If the argument advanced by learned counsel for the appellants is accepted, then I am of the view that it shall defeat the legislative scheme as noticed by the Hon"ble Apex Court in the case of Rani Choudhury (supra).

13. For the reasons stated above, the Civil Misc. Appeal is not found to be maintainable and the same stands dismissed accordingly. Consequent upon the dismissal of Civil Misc. Appeal, the stay application, filed therewith, does not survive and that also stands dismissed.