
(2005) 07 MP CK 0106
In the Madhya Pradesh High Court
Case No : First Appeal No. 577 of 2004

Narmada Club Registered Society and Another

APPELLANT

Vs

P.K. Tare

RESPONDENT

Date of Decision : 26-07-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 96, 96(2)
Limitation Act, 1963 — Section 14, 5

Citation : (2006) ILR (MP) 737 : (2006) 1 JLJ 384 : (2006) 1 MPLJ 33

Hon'ble Judges : U.C. Maheshwari, J

Bench : Single Bench

Advocate : A.K. Choubey, for the Appellant; Amrit Ruprah, for the Respondent

Final Decision : Dismissed

Judgement

Maheshwari, J.

This IA No. 4242/05 has been filed by the Appellant u/s 5 of Limitation Act for condoning the delay in filing the appeal against the impugned ex parte judgment and decree passed on 22.11.1993 and dated 24.11.1993 respectively by First Additional District Judge, Hoshangabad, in COS No. 3-A/1992.

As per averments of it, on having knowledge about said ex parte decree, they filed an application dated 13.8.1994 under Order 9 Rule 13 of CPC (in brief "CPC") for setting aside it, such proceedings as MJC No. 90/94 were contested by parties and by order of the trial Court, dated 17.12.1998, the same was dismissed on merits, on which MA No. 445/99 preferred by Appellant, was also dismissed vide order dated 19.10.2000 and order of trial Court was upheld. On which SLP was preferred before the apex Court which was also dismissed vide order dated 19.8.2004 as Civil Appeal No. 641/03. Thus, the proceedings under Order 9 Rule 13 of CPC have come to an end and such decree has remained in force.

It is an admitted fact that till disposal of the aforesaid proceedings, Appellant had

not preferred any regular appeal against the impugned decree as provided u/s 96 of the CPC and only after exhausting the aforesaid remedy, filed this appeal along with this application to condone the delay from the date of decree upto filing this appeal, i.e., on 14.9.2004.

As per application, the main ground for condonation of delay is that they were prosecuting the aforesaid proceedings in good faith with due diligence before the other forum, so by excluding period spent in such proceedings, this appeal be treated in time and heard on merits. It is also stated that this cause is sufficient to condone the delay.

However, some other grounds are also taken in it, but all other grounds are related with the merits of the impugned judgment, decree and property in dispute, so they are not required to mention here.

In reply, filed on behalf of Respondent, it has been pleaded that the proceeding filed by Appellants under Order 9 Rule 13 of CPC was not the same proceedings like appeal, so same cannot be treated as that it was filed and prosecuted for long time before the wrong forum which had no jurisdiction to hear it, but such proceedings was initiated before the appropriate forum and inspite the availability of right to file regular appeal such appeal was not filed within limitation even after receiving the knowledge of said decree and reasons as mentioned by Appellant also denied and existence of any sufficient cause for excluding the time in computing the period for limitation is also denied and prayed for dismissal of this application.

Counsel for Appellant during the course of argument fairly conceded that Section 14 of Limitation Act is not applicable to his case and could not be invoked in available circumstances but argued the matter for condoning the delay and submitted that although right to file appeal and to file proceedings for setting aside ex parte decree are concurrent and both were available to the Appellants but due to lack of proper advice appeal could not be filed within time and only after exhausting the remedy under Order 9 Rule 13 of CPC on receiving the advice to file this appeal, then this appeal has been preferred. It was further said that the time exhausted in said other proceedings is a bona fide and sufficient cause for condoning the delay in filing the appeal.

He also advanced his submission on other grounds related with the merits of the judgment decree and property in dispute. He placed his reliance in the matter of Chhotelal Vs. Jamnadas, and Anr. in the matter of M.K. Prasad Vs. P. Arumogam, .

While on other hand counsel for Respondent placed his reliance on decided cases by the apex Court in the matter of Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury, and in the matter of Sumera Vs. Madanlal and Others, and submitted that once the remedy under Order 9 Rule 13 of CPC has been adopted and exhausted by Appellant and right to appeal was abandoned than at this stage specially after dismissal of the application under Order 9 Rule 13 of CPC up to the apex Court, Appellant has not come bonafidely as such they are not entitled for

extending the benefit of Section 5 of Limitation Act. She further submitted that the ground as mentioned in the application has already been considered and decided upto the apex Court so the same ground could not be sufficient cause for condoning the delay as prayed by Appellants.

It was also said that intentionally to prolong the litigation appeal was not filed within limitation despite the knowledge of the decree but getting unsuccessful in other proceedings this appeal has been preferred to prolong the litigation with mala fide intention. She also submitted that chairman of the Appellant institution is an officer having rank of Collector, who is acquainted with law and procedure so submission of other side that appeal could not be filed in the lack of advice cannot be considered and prayed for dismissal of the application.

Having heard the learned Counsel and on perusing the averments of the application, it is apparent, the ground as argued on behalf of Appellant that in the lack of advice the appeal was not preferred at the initial stage when other proceedings was filed has not been mentioned neither in the application nor in affidavit. So, this ground in the absence of any prima facie pleadings and evidence cannot be considered.

So far other grounds regarding sufficient cause are concerned, except ground regarding pendency of proceedings under Order 9 Rule 13 of Code of Civil Procedure, all other grounds are related with merits of the judgment, decree and property in dispute, which cannot be considered at this stage although that can be taken in some other proceedings if law provides and permits.

On consideration the legal objection of Respondent regarding right to file appeal after exhausting or adopting the remedy under Order 9 Rule 13 of Code of Civil Procedure. Appellant has no right to prosecute the appeal. In support of this objection Respondent has cited two decisions i.e. Rani Choudhary's case (supra) decided by the apex Court and Sumera's case (supra) decided by the Division Bench of this Court but both the cases are not profitable to the Respondent to give any strength to his objection because at a subsequent stage, the Full Bench of this Court has considered the aforesaid decisions in the matter of Archana Kumar (Smt.) and Anr. v. Purendu Prakash, reported in 2000 (2) JLJ 84, in which held as under:

21. Thus, we come to the conclusion that the case of Smt. Rani Choudhary (supra) does not lay down the law that once an application under Order 9 Rule 13 of the Code is rejected, a regular appeal u/s 96(2) of the Code is not maintainable. We with due respect, are constrained to hold that the Division Bench in the case of Sumera (supra) does not lay down the law correctly and as a logical corollary the decisions which have followed the said decision stand overruled.

Accordingly, we hold that even after dismissal of the application under Order 9 Rule 13 of the Code, a regular first appeal u/s 96(2) of the Code is maintainable.

Having held that a regular appeal u/s 96(2) of the Code is maintainable against an ex parte decree we further observe that a proceeding under Order 9 Rule 13 of the Code and a regular appeal can simultaneously be prosecuted. It would be open to the affected party to pray for stay of further proceedings in an appeal till the application under Order 9 Rule 13 of the Code is decided. It would be within the discretion of the appellate Court to pass appropriate order in this regard.

The lordship of apex Court has also answered this question in the matter of *Bhanu Kumar v. Archana Kumar* reported in 2005(3) JLJ 303 : 2005(3) MPLJ 3 and held as under:

26. When an ex parte decree is passed, the Defendant (apart from filing a review petition and suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and Anr. 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 event the appeal is dismissed as a result where 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, Explanation I appended to the said provision does not suggest that the converse is also true.

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.

Thus, in view of aforesaid dictum it is held that in spite of filing the proceedings under Order 9 Rule 13 of CPC the appeal could also be prosecuted by the Appellant.

Now coming to the ground of sufficient cause it is to be examined whether time spent in proceedings under Order 9 Rule 13 of the CPC can be treated as sufficient cause for condoning the delay and second ground as argued by counsel for Appellant that the appeal could not have been filed within limitation due to lack of advice.

So far first ground is concerned, it is admitted fact that apex Court has considered the facts and circumstances of the case under Order 9 Rule 13 of the CPC and upheld the dismissal of said proceedings. Although such proceeding was not on merits of the matter but as per decided case of the apex Court in the matter of *M.K. Prasad Vs. P. Arumogam*, in which it was held as under:

10. In the instant case, the Appellant tried to explain the delay in filing the application for setting aside the ex parte decree as is evident from his application filed u/s 5 of Limitation Act accompanied by his own affidavit. Even though the

Appellant appears not be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigate him as an irresponsible litigant. He should have been more vigilant but his failure to adopt such extra vigilance should not have been made aground for ousting him from the litigation with respect to the property, concededly to be valuable. While deciding the application for setting aside the ex parte decree, the Court should have kept in mind the judgment impugned, the extent of the property involved and the stake of the parties. We are of the opinion that the inconvenience caused to the Respondent for the delay on account of Appellant being absent from the Court in this case can be compensated by awarding appropriate and exemplary costs. In the interests of justice and under the peculiar circumstances of the case, we set aside the order impugned and condone the delay in filing the application for setting aside ex parte decree. To avoid further delay, we have examined the merits of the main application and feel that sufficient grounds exist for setting aside the ex parte decree as well.

In aforesaid decisions, there Lordship of the apex Court has also observed that while deciding the application for setting aside the ex parte decree the Court should have kept in mind the judgment impugned the extent of the property involved and the stake of the parties and with this back ground by imposing the ex parte decree was set aside.

But, in the case at hand, it is apparent and matter of record that apex Court, on considering the matter of Civil Appeal No. 641/03 (might have considered the aforesaid circumstances and merits as said in aforesaid apex Court decision) dismissed the Appellant's appeal regarding setting aside of the exparte decree. So in view of the apex Court decision dated 19.8.2004 in Civil Appeal No. 641/03, the hand of this Court is tied and thus the proceedings which have been struck down by the apex Court on considering the aforesaid aspect, the same could not be a ground or a sufficient cause for condoning the delay in filing the present appeal.

The other ground regarding lack of advice is not sustainable in the absence of pleadings either in the application or in affidavit.

In view of the aforesaid case cited by Appellant Chhotelal's case (supra) is also not helping to him.

Appellants could have filed this appeal at the initial stage when they knew about the ex parte judgment and decree and filed the proceedings under Order 9 Rule 13 of CPC but not availed the remedy of appeal and in view of aforesaid discussion and dictum of the apex Court no sufficient cause was found for condoning the long delay of more than ten years.

Thus, I.A. No. 4242/05 has no force and deserves to be and is hereby dismissed resultantly this appeal is also dismissed as barred by time.