
(2010) 10 BOM CK 0045
In the Bombay High Court
Case No : Writ Petition No. 381 of 2007

Suresh G. Ramnani

APPELLANT

Vs

Mrs. Aurelia Ana da Piedade Miranda alias Araiyo Alvares,
SEFAA Vidyanagar, Aquem, Margao, Goa, (dead, rep.
Through LRs) and Others

RESPONDENT

Date of Decision : 18-10-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (2010) 10 BOM CK 0045

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : S.G. Dessai and Mr. A. Gaonkar, for the Appellant; A.F. Diniz, Advocate for respondent No. 1(i), (ii), 2, 3 and 4. Respondent No. 5 absent, though served., for the Respondent

Final Decision : Dismissed

Judgement

A.P. Lavande, J.—Herd learned Counsel for the parties. Both these writ petitions were heard together since they are between the same parties and the issues involved in both the petitions are interconnected. The petitioner in both the writ petitions was defendant No. 1(c) in Regular Civil Suit No. 21/85/2 filed by respondent nos. 1 to 4. An ex-parte decree came to be passed against the petitioner on 26th August, 2003. On 25th September, 2003, the petitioner filed an application bearing No. 28/2003/C for setting aside ex-parte decree under Order IX, Rule 13, C.P.C. The application was opposed by respondent nos. 1 to 4 and by order dated 7th August, 2004, the application for setting aside ex-parte decree was dismissed by the trial Court. The petitioner preferred Miscellaneous Civil Appeal No. 71/2004 challenging the said order. Respondent nos. 1 to 4 contested the appeal. The Lower Appellate Court dismissed the appeal holding that no sufficient cause was made out by defendant No. 1(c) (the petitioner herein) not to appear when the suit was called for hearing and held that the appeal was not maintainable. The petitioner has filed writ petition No. 372/2008

challenging both the orders.

2. The petitioner had also filed First Appeal with an application for condonation of delay of 386 days bearing No. Civil Miscellaneous Application No. 101/2004 challenging the decree dated 26th August, 2003 passed against him. The application for condonation of delay was opposed by respondent nos. 1 to 4. By judgment and order dated 26th April, 2007, the District Judge-III, South Goa, Margao dismissed the said application holding that the petitioner had not made out sufficient cause for preferring the appeal against the impugned judgment and decree. The petitioner has filed Writ Petition No. 381/2007 challenging the order passed by the Lower Appellate Court. The petitioner has also filed Second Appeal challenging the order dated 26th April, 2007 passed in Civil Miscellaneous Application No. 101/2004 along with an application seeking condonation of delay, which is pending consideration.

3. Notices were issued in both the writ petitions to the respondents.

4. Mr. Diniz appearing on behalf of respondent nos. 1(i),(ii), 2 to 4, submitted that both the writ petitions are not maintainable in as much as against the order dated 26th April, 2007, Second Appeal lies. He further states that pursuant to order dismissing the application for condonation of delay, the appeal filed by the appellant against the ex-parte decree also stands dismissed. Mr. Diniz in support of his submissions, placed reliance upon the judgment of the Apex Court in the case of Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others, and order dated 21st April, 2009 passed by the learned Single Judge of this Court in W.P. No. 311/2008 in which the learned Judge has held that against the order passed by the Lower Appellate Court dismissing the application for condonation of delay in filing the appeal, Second Appeal would lie.

5. Per contra, Mr. Dessai, learned Senior Counsel appearing for the petitioner submitted that the petitioner cannot be non-suited on the ground that Second Appeal is maintainable against the order dated 26th April, 2007. He further submitted that the Lower Appellate Court ought to have decided application for condonation of delay in the appeal preferred against the ex-parte decree first since the said appeal as well as appeal against an order passed on the application filed under Order IX, Rule 13, C.P.C., were filed on the same day. He further submitted that the writ petitions filed by the petitioners are maintainable. In support of his submissions, Mr. Dessai placed reliance upon the following judgments Ratansingh vs. Vijaysingh and Others; (2001)1 SCC 469 , Radhika Devi Vs. Bajrangi Singh and others, , South Konkan Distilleries and another Vs. Prabhakar Gajanan Naik and Others; (2008)14 SCC 632 and Bhanu Kumar Jain Vs. Archana Kumar and Another, .

6. I have considered the rival submissions and perused the record and judgments relied upon.

7. Perusal of the record discloses that although the petitioner had preferred appeal against the order dismissing the application under Order IX, Rule 13,

C.P.C. and the appeal against ex-parte decree along with application for condonation of delay, the Lower Appellate Court decided the application for condonation of delay on 26th April, 2007 and dismissed the appeal against ex-parte decree on 26th April, 2007. The appeal preferred against the order passed under Order IX, Rule 13, C.P.C. was dismissed on 22nd April, 2008. In view of the above factual position, the question which arises for consideration is whether the writ petitions filed by the petitioners challenging both these orders are maintainable.

8. In the case of Shyam Sundar Sarma (supra) relied upon by Mr. Diniz, the Apex Court held that after dismissal of an appeal against the ex-parte decree on the ground that it was time barred by rejecting the application for condonation of delay, the application for setting aside decree would not be maintainable. The Apex Court further held that the fact that appeal was filed subsequent to application under Order IX, Rule 13, C.P.C. would be of no consequence and explanation to Order IX, Rule 13, C.P.C. applies to the cases where appeal was filed subsequent to application under Order IX, Rule 13 of C.P.C. The Apex Court referred to the judgment of the Apex Court in the case of M/s. Mela Ram and Sons Vs. Commissioner of Income Tax, Punjab; AIR 1956 SCR 166, in which the Apex Court held that an appeal presented out of time is an appeal and the order dismissing it as time barred, is one passed in an appeal.

9. The Apex Court also referred to judgment delivered by Four Judges' Bench in the case of Sheodan Singh Vs. Smt. Daryao Kunwar, , in which the Apex Court held that when a decision is given on merits by the Trial Court and the matter is taken in the appeal and the appeal is dismissed on some preliminary ground like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the Trial Court on merits, itself amounts to appeal being heard and finally decided on merits whatever may be the ground for dismissal of the appeal.

10. The Apex Court also referred to the judgment in the case of Ratansingh Vs. Vijaysingh; (2001)1 SCC 469, upon which reliance has been placed by Mr. Dessai and held that the view expressed in the said case cannot be accepted as laying down correct law since it runs counter to the judgment in Sheodan Singh's case (supra), which was delivered by four Learned Judges of the Apex Court.

11. In view of the above legal position, it is evident that against the order dated 26th April, 2007 by which the Lower Appellate Court has dismissed the appeal preferred against the ex-parte decree on the ground that no sufficient cause was made out for condonation of delay, Second Appeal would be maintainable.

12. Therefore, Writ Petition No. 381/2007 filed by the petitioner challenging the order dated 26th April, 2007 is not maintainable. In my opinion, the ratio laid down in the case of Sheodan Singh's (supra) is squarely applicable in the present case.

13. In so far as Writ Petition No. 372/2008, which has been filed challenging the

order passed by the Lower Appellate Court dismissing the appeal preferred against the order passed under Order IX, Rule 13, C.P.C. by the Trial Court is concerned, in my opinion, the same also deserves to be dismissed. Once the application for condonation of delay in filing appeal against the impugned decree stands dismissed, the decree passed by the Trial Court stands confirmed by the Lower Appellate Court on merits. Therefore, the question of setting aside ex-parte decree would not arise in view of plain language of Order IX, Rule 13 of C.P.C. Order IX, Rule 13 of C.P.C. reads thus :

Order IX, Rule 13-Setting aside decree ex parte against defendants. -In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.

Explanation - Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree."

14. Explanation to Order IX, Rule 13, C.P.C. provides that when the appeal is preferred against the ex-parte decree and the same has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside ex-parte decree. In view of the explanation, after the application for condonation of delay in filing appeal against the ex-parte decree preferred by the petitioner was dismissed by the Lower Appellate Court, the application challenging the order passed under Order IX, Rule 13, C.P.C. even if already filed by the defendant, would not be maintainable. In the present case, admittedly, when Miscellaneous Civil Appeal No. 71/2004 was considered on merits, the Lower Appellate Court had already dismissed the application for condonation of delay in filing the appeal against the ex-parte decree. Therefore, in my considered opinion, the Lower Appellate Court was perfectly justified in holding that the said appeal was not maintainable. Therefore, the petition filed challenging the order passed by the Lower Appellate Court deserves to be dismissed.

15. I shall now deal with the authorities relied upon by Mr. Dessai. In the case of Ratansingh, the Apex Court held that dismissal of an application for condonation of delay would not amount to decree and, therefore, dismissal of an appeal as time barred would also not be a decree. This judgment has been specifically held to be not laying down good law in the judgment delivered by four Learned Judges in the case of Sheodan Singh (supra). Therefore, this judgment does not advance the case of the petitioner.

16. The judgment in the case of Radhika Devi is in relation to Order VI, Rule 17, C.P.C. and as such, is of no help to the petitioner.

17. The judgment in the case of South Konkan Distilleries (supra) was also in relation to Order VI, Rule 17, C.P.C. and the ratio of the said judgment is also of no help to the petitioner.

18. In case of Bhanu Kumar Jain (supra), the Apex Court held that a party can simultaneously file an application under Order IX, Rule 13, C.P.C. and appeal against ex-parte decree u/s 96(2), but if an appeal against ex-parte decree is dismissed in the light of explanation to Order IX, Rule 13, C.P.C. which is to be strictly construed, an application under Order IX, Rule 13, C.P.C. would not be maintainable although the converse is not true. In my opinion, the said judgment instead of helping the petitioner squarely supports the respondents.

19. It is also pertinent to note that the petitioner herein has filed Second Appeal along with the application seeking condonation of delay challenging the order dated 26th April, 2007 dismissing the application for condonation of delay in filing the appeal against ex-parte decree dated 26th August, 2003. In my opinion, the petitioner has resorted to the correct remedy of filing Second Appeal along with the application for condonation of delay. In view of the above discussion, I find no merit in both the writ petitions filed by the petitioner. Consequently, both the writ petitions stand dismissed.