

(2012) 09 BOM CK 0037

In the Bombay High Court

Case No : S.A. No. 417 of 2011 with Civil Application No's. 10070 of 2011 and 10712 of 2012

Taher Khan

APPELLANT

Vs

Sambhaji Khanduji Nagare (Deceased) and Others

RESPONDENT

Date of Decision : 26-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 41 Rule 3A, 100, 141, 96

Citation : (2013) 1 MhLj 866

Hon'ble Judges : S.B. Deshmukh, J

Bench : Single Bench

Advocate : A.P. Bhandari, for the Appellant; A.D. Kasliwal for Respondent Nos. 1 to 3 and 1A to 1E, for the Respondent

Judgement

S.B. Deshmukh, J.—I have heard learned counsel for the parties present before the Court. During pendency of this second appeal Respondent No. 1 Sambhaji died. His legal representatives are brought on record as Respondent Nos. 1-A to 1-G.

2. This second appeal takes an exception to the judgment and order passed by the first Appellate Court in MARJI No. 86 of 2011 below Exhibit-1.

3. Few relevant facts for consideration of this second appeal are listed herein below:

(a) Deceased Respondent No. 1 had filed Regular Civil Suit No. 346 of 1995 on 19th April, 1995 in the Court of learned 3rd Joint Civil Judge, Junior Division, Aurangabad. This suit was for recovery of possession of Agricultural Land bearing Gat No. 291, corresponding Survey No. 187 situated at village Satara, Taluka and District Aurangabad, admeasuring 4 Acres and 27 Gunthas. It is alleged by deceased Respondent Sambhaji and Respondent Nos. 2 and 3 i.e. the original plaintiffs that Land Gat No. 187 was owned and possessed by Narayan Shivilal Lohari, subsequently Original Plaintiff No. 1 and Ganpat Ranuji Chopde father of

defendant No. 1 jointly purchased the suit land. There was approximate division of the property. However, specific measurement of the property was not done, demarcating shares of the joint owners. According to the plaintiffs, original Defendant No. 2 Taher Khan Wahed Khan Patel purchased 2 Acres land from original defendant No. 1 Mr. Piraji Ganpat Chopde by registered sale deed on 17th September, 1993. After this transaction, there was private measurement in the year 1994; by the plaintiff No. 1 Sambhaji Nagare. This measurement revealed that only 9 Acres 27 Gunthas land was in possession of plaintiff No. 1 Sambhaji. Land to the tune of 4 Acres 27 Gunthas was found in excess in possession of Ganpat Chopde i.e. father of defendant No. 1. The plaintiff, therefore, filed suit for possession of 4 Acres 27 Gunthas land from the defendants.

(b) In this suit, ex parte decree came to be passed with costs by the learned trial Court on 31st March, 2001. Possession of land to the tune of 4 Acres 27 Gunthas from defendants as part of Survey. No. 187, original Gat No. 291, situated at village Satara, Taluka and District Aurangabad with boundaries given in the decree, was directed to be handed over to the plaintiffs. Separate inquiry under Order XX, Rule 12 of CPC was also directed.

(c) The judgment and decree passed by the trial Court in RCS No. 346 of 1995 was challenged by filing First Appeal u/s 96, CPC by original defendant No. 2 Taher Khan Wahed Khan Patel. Copy of the first appeal memo is not on record. Learned counsel Mr. Bhandari and Mr. Kasliwal admit that said first appeal was filed after inordinate delay. It was delayed by 9 years 11 months 2 days. The original defendant No. 2 Taher Khan Wahed Khan Patel preferred application for condonation of delay being MARJI No. 86 of 2011. Annexure B is the copy of MARJI No. 86 of 2011.

(d) I have perused application MARJI 86 of 2011. I am not reiterating grounds raised for condonation of delay of 9 years 11 months and 2 days, occurred in filing first appeal by the original defendant No. 2 Taher Khan Wahed Khan Patel.

(e) Application MARJI 86 of 2011 was listed for hearing before first Appellate Court on 11th August, 2011. Learned counsel admit that on 11th August, 2011 Taher Khan was not present before the first Appellate Court nor his Advocate was present. This position is also reflected from the order passed by learned District Judge-4, Aurangabad on 11th August, 2011. Said order makes it clear that the petitioner Taherkhan Wahedkhan is called consistently up to 4.30 p.m. His Advocate Shri A.P. Malani was also called till 4.30 p.m. However, nobody turned up nor any application is filed though applicant was directed to adduce oral evidence looking towards the huge delay of 9 years and 11 months in filing appeal against the decree passed by the trial Court in RCS No. 346 of 1995. On the background of these facts, the learned first Appellate Court rejected MARJI No. 86 of 2011 on 11th August, 2011. The said order is challenged in this second appeal u/s 100 of Civil Procedure Code.

4. The substantial questions of law in the present appeal are:

(i) As to whether the first Appellate Court has followed proper procedure while disposing of MARJI No. 86 of 2011?

(ii) Whether remand of the case, in the facts, is necessary?

5. This second appeal is admitted on the above said substantial question of law.

6. Both the learned counsel submit that there is no point in keeping the second appeal pending in this Court for indefinite period of time. They request this Court to consider this appeal for final disposal at this stage since in MARJI No. 86 of 2011 neither oral evidence of any of the party was recorded nor documentary evidence was placed on record by any of the party. They, therefore, submit that the question of preparation of print paper book or private paper book also does not arise. Their submission, in the facts of the present case, seems to be reasonable.

7. At the request, and by consent of both learned counsel present before the Court, this second appeal is taken up for final hearing.

8. With the assistance of learned counsel for the parties, I have considered the provisions laid down under Order 41, Rule 3A of CPC which reads as follows:

3A. Application for condonation of delay.-- (1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under Rule 11 or Rule 13, as the case may be.

9. At the outset it is noticed by me that Rule 3A has been inserted by CPC (Amendment) Act, 1976 with effect from 1st February, 1977. Sub-rule (1) of Order 41, Rule 3A provides that when an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period. Sub-rule (2) of said Rule 3A explicitly states that if the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under Rule 11 or Rule 13, as the case may be.

10. If the memorandum of appeal is filed without an application to condone the delay, the Court can regard, in such a case, that there was no valid presentation of the appeal. In turn, it means that if the appellant subsequently files an

application to condone the delay before the appeal is rejected, the same should be taken up along with the already filed memorandum of appeal. Only then the Court can treat the appeal as lawfully presented. There is nothing wrong if the Court returns the memorandum of appeal (which was not accompanied by an application explaining the delay) as defective. Such defect can be cured by the party concerned and presented the appeal without further delay. It is, at this stage, useful to refer to a judgment of the Honourable Supreme Court in the case of State of M.P. and Another Vs. Pradeep Kumar and Another, . There, the Honourable Supreme Court has considered this objective behind Order 41, Rule 3A, CPC and has held that this Rule 41, Rule 3A of the Code cannot be interpreted very harshly and make the noncompliance punitive to an appellant. The Supreme Court observed that "it can happen that due to some mistake or lapse an appellant may omit to file the application explaining the delay along with appeal." It is further observed that "even the vigilant litigant is prone to commit mistakes as the aphorism "to err is human" is more a practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of a litigant should not normally cause the doors of the judiciary permanently closed before him. The effort of the Court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by him, but to see whether it is possible to entertain his grievance if it is genuine." Ultimately, the Honourable Supreme Court, in para 19 of its judgment, held:

The objective of enacting Rule 3-A in Order 41 of the Code seems to be twofold. First is, to inform the appellant himself who filed a time-barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the Court has to deal with application for condonation of delay as a condition precedent.

11. Now turning to the admitted facts of the case on hand, the first appeal filed by the Appellant was delayed by 9 years 11 months and 2 days. However, it was accompanied by an application seeking condonation of delay. This was application contemplated under Rule 3A brought on statute book with effect from 1st February, 1977. As per the prevailing practice at District Court, Aurangabad it was registered as MARJI No. 86 of 2011. Learned first Appellate Court did issue notice to the Respondents. On the date of hearing i.e. 11th August, 2011 neither the Applicant/Appellant nor his advocate was present. It is, at this stage, relevant to consider the provision laid down u/s 141 of CPC which provides that the procedure provided in this CPC in regards to suits shall be followed as far as it can be made applicable in all proceedings in all Court of Civil jurisdiction. I have also noticed the explanation to section 141 of Civil Procedure Code. Suffice to notice that, learned first Appellate Court did not consider these two provisions and rejected the application, seeking condonation of delay.

12. Mr. Bhandari, learned counsel for the Appellant, submits that the suit property is valuable property. Substantial rights of the Appellant are involved and, therefore, by quashing and setting aside the impugned order, the matter needs to be remanded back to the first Appellate Court for consideration of Application MARJI No. 86 of 2011 on merits. Learned counsel Mr. Kasliwal for the Respondent opposed the submission. According to him, there is no justification for remand of the matter. He submitted that the appeal be dismissed.

13. I have given due consideration to the submissions advanced by learned counsel for the parties. There is no dispute amongst learned counsel present before the Court that the adjudication of rights of the parties regarding landed property situated at village Satara, Taluka and District Aurangabad having N.A. potential, is involved in the appeal. I have perused the decree passed by the trial Court. Fact remains that in the trial Court also it was an ex parte decree passed by the trial Court.

14. So far as first Appellate Court is concerned, it indisputably is a Court of facts and law. In the interest of justice, in my view, the order impugned in this second appeal can be set aside by remanding the matter back to the first Appellate Court for enabling the parties to lead evidence either oral or documentary in support of their contentions.

15. In this view of the matter, I am inclined to allow this second appeal by quashing and setting aside the order impugned. However, considering the inconvenience caused to the Respondents, costs of Rs. 10,000/- needs to be imposed on the Appellant.

16. Learned counsel for the Respondents submits that considering the span of time from the date of passing of ex parte decree after remand direction needs to be given to the first Appellate Court to decide MARJI No. 86 of 2011 within two months. Learned counsel Mr. Bhandare, however, opposed this submission. Second Appeal is allowed. The impugned order is quashed and set aside on condition that the Appellant shall deposit Rs. 10,000/- in the first Appellate Court on or before 8th October, 2012. Liberty to the Respondent Nos. 1 to 3/original plaintiffs to seek withdrawal of the said amount from the first Appellate Court.

Application MARJI No. 86 of 2011 is restored to file of first Appellate Court. The first Appellate Court shall hear and decide the application within three months from today on its own merits and by giving opportunity of hearing to the parties.

Parties shall appear before the first Appellate Court on 8th October, 2012 at 11.00 A.M.

Registry is directed to return the record and proceeding to the first Appellate Court on or before 8th October, 2012.

It is made clear that this Court has not entered into merits regarding delay occurred in filing the appeal. The first Appellate Court shall independently consider the evidence, if any, led by the parties and decide the said application

on merits.

Interim relief was granted from time to time and is in operation till today. Now, the second appeal has been disposed of. In view of this, civil applications and 10070 of 2011 and 10712 of 2012 also stand disposed of.

Learned counsel Mr. Bhandari submits that ad interim relief earlier granted may be continued till disposal of MARJI No. 86 of 2011 by the first Appellate Court. Mr. Kasliwal submits that Purshish is filed in MARJI No. 86 of 2011 on behalf of original plaintiffs. Copy of the said Purshis is at page No. 57 of the civil application.

Both the civil applications also stand disposed of in view of final disposal of the second appeal itself.