

(2000) 12 BOM CK 0042

In the Bombay High Court

Case No : Civil Revision Application No. 1198 of 2000

Vasantdada Shetkari Sahakari Sakhar Karkhana Limited,
Sangli

APPELLANT

Vs

B.B. Consulting "N" Engineering Pvt. Ltd. Co. and Others

RESPONDENT

Date of Decision : 12-12-2000

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Section 104, 122
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Income Tax Act, 1922 — Section 30(2), 32
Limitation Act, 1963 — Section 5

Citation : (2001) 2 BomCR 515 : (2001) 2 BOMLR 923 : (2001) 2 CivCC 133 :
(2001) 1 MhLj 871

Hon'ble Judges : V.C. Daga, J

Bench : Single Bench

Advocate : M.M. Sakhardande and S.G. Page, for the Appellant; V.A. Thorat, instructed by N.N. Vaishnava and Co. and A.K. Abhyankar, instructed by A.V. Jain and Associates, for the Respondent

Judgement

V.C. Daga, J.—Rule, Returnable forthwith. Respondents waive service. By consent revision application is taken up for final hearing and disposal.

2. The main question falls for determination in the present revision application is as under : whether dismissal of appeal against the ex-parte decree on the ground that the appeal is barred by limitation attracts the provisions contained in Explanation-11 of Order 9 Rule 13 of the CPC (C.P.C.) and creates bar to the maintainability of the application under Order 9 Rule 13 of the C.P.C. for setting aside ex-parte decree?

FACTS-IN-BRIEF

3. The facts and circumstances giving rise to the aforesaid question are as under :

The petitioners/plaintiffs filed special civil suit in the Court of Civil Judge, Senior

Division, Sangli against the respondents/defendants for payment of damages in the sum of Rs. 32,35,879/- with interest thereon at the rate of 18% from the date of notice till the date of its realisation. The said suit came to be registered as Special Civil Suit No. 65 of 1991 and came to be assigned to the Joint Civil Judge, Senior Division, Sangli.

4. The respondents/defendants were duly served with the suit summonses. After service of summonses, the respondents/defendants appeared through their counsel on 24th July, 1992. On the same day, an application (Exh. 16) came to be moved by the respondents seeking time to file written statement. Accordingly, time was granted to the respondents/ defendants to file their written statement. The hearing of the suit was fixed on the following dates : 13th August, 1992, 15th September, 1992, 7th November, 1992. 7th December, 1992 and 19th January, 1993. On every date of hearing applications were tendered by the respondents/defendants seeking time to file written statement and every time applications were granted by the Trial Court. In spite of several adjournments, the respondents/defendants failed and neglected to file their written statement. Consequently, in presence of advocate for the respondents/defendants on 28th February, 1993, the Trial Court passed order to the effect suit to proceed in default of written statement. Even after passing of the said order no written statement was filed by the respondents/defendants.

5. The hearing of the suit was adjourned from time to time on various dates such as 23rd March, 1993, 27th April, 1993, 18th June, 1993. 28th June. 1993. 15th July, 1993. 28th July, 1993, 21st August, 1993. 18th September, 1993, 19th September, 1993, 18th October, 1993, 17th December, 1993, 24th January, 1994, 28th January, 1994 and 22nd February, 1994. Though advocates of both the sides were present, hearing of the suit could not be proceeded with since the Trial Court was busy in some other matters. On 15th April, 1994, when the suit was taken up for hearing, petitioners/plaintiffs and their Advocate were present; whereas the respondents/defendants and their Advocate chose to remain absent though the matter was called out twice. The Trial Court left with no option and was compelled to proceed with recording of deposition of plaintiffs witnesses. The Trial Court, ultimately, fixed the suit for hearing on 18th June, 1994. On 18th June, 1994, arguments of petitioners/plaintiffs were heard and on 28th June, 1994, the Trial Court decreed the suit in favour of petitioners/plaintiffs. The Trial Court held that the petitioners/plaintiffs were entitled to recover suit claim of Rs. 32,35,879/- together with future interest at the rate of 18% from the date of suit till the realisation of entire amount from the respondents/defendants jointly and severally.

FIRST ROUND OF LITIGATION

6. The respondents/defendants, on 12th September, 1996, filed appeal in this Court being First Appeal (Stamp) No. 23021 of 1996 to challenge the judgment and decree of the Trial Court dated 28th June. 1994. The appeal was accompanied with Civil Application No. 5874 of 1996 for condonation of delay in

filing first appeal. The respondents/defendants (appellants in appeal) also prayed for stay of execution of decree in question.

7. This Court had, by order dated 30th September, 1996, granted ex-parte order of ad-interim stay of execution and/or implementation and/or operation of the judgment and decree impugned in appeal subject to condition that the respondents/defendants deposit entire decretal amount within two months from the date of order of stay. The respondents/ defendants failed to comply with the condition imposed by the Division Bench of this Court while granting ad-interim stay to the execution of decree in question.

8. The Division Bench of this Court, after hearing to the parties to this appeal, by order dated 4th July, 1997, rejected an application seeking condonation of delay and, consequently, dismissed first appeal preferred by the respondents/defendants and also vacated (ad-interim stay granted in favour of respondents/defendants. The SLP preferred by the respondents/defendants, challenging judgment and order of the Division Bench of this Court, was also dismissed by the Hon'ble Supreme Court on 13th January, 1998.

SECOND ROUND OF LITIGATION

9. The respondents/defendants, having lost the first round of litigation right up to the Apex Court, on 30th March, 2000, filed an application under Order 9 Rule 13 of the C.P.C. for setting aside decree dated 28th June, 1994 referred to hereinabove along with an application for condonation of delay. The said application was opposed by the petitioners/plaintiffs by filing detailed reply to the said application. In the said reply, the petitioners/ plaintiffs challenged the very maintainability of application under Order 9 Rule 13 of the C.P.C. in view of dismissal of first appeal by the Division Bench of this Court, inasmuch as, it was further brought to the notice of the learned Trial Court that similar averments made in the application for condonation of delay made by the respondents/defendants having already been considered by the High Court, which ultimately resulted in rejection of the application, the application for condonation of delay in filing application under Order 9 Rule 13 of the C.P.C. deserves to be rejected for the same reasons with compensatory costs in favour of the petitioners/plaintiffs.

10. The learned Civil Judge, Senior Division, Sangli, considering rival contentions, framed two issues for determination; one relating to maintainability of the application under Order 9 Rule 13 for setting aside ex-parte decree and another relating to entitlement of respondents/defendants for condonation of delay for the reasons mentioned in the application u/s 5 of the Limitation Act. The learned Civil Judge, by his order dated 14th August, 2000, held that the application moved under Order 9 Rule 13 for setting aside ex-parte decree was maintainable and allowed the application for condonation of delay and further directed to register application of the respondents/defendants under Order 9 Rule 13 of the C.P.C. for setting aside ex-parte decree.

11. Being aggrieved by the aforesaid order of the learned Trial Court dated 14th

August, 2000, the petitioners/plaintiffs invoked revisional jurisdiction of this Court to challenge the said order and served respondents/defendants copy of revision application who were on caveat before this Court.

RIVAL CONTENTIONS

12. The main contention raised on behalf of petitioners/plaintiffs is that on true interpretation of explanation-II incorporated in Order 9 Rule 13 of the C.P.C., an application for setting aside ex-parte decree must be held to be incompetent and not maintainable. It has been urged that the Trial Court erred in holding that Explanation II did not impose any bar to the maintainability of the application in a case where the appeal is not dismissed on merits. The submission is that interpretation of the said explanation by the Trial Court was wrong and was clearly unwarranted by the plain language used therein. It is further urged that it is not right to hold that when an appeal is filed beyond time and is dismissed on the ground of limitation, there is no appeal in the eye of law and therefore, no disposal of an appeal as contemplated in the said Explanation.

13. The learned Counsel further contended that the Trial Court went wrong in condoning the delay in presenting an application under Order 9 Rule 13 the C.P.C. for setting aside ex-parte decree. According to the learned Counsel for the petitioners/plaintiffs, no sufficient cause had been made out for condonation of delay in filing application under Order 9 Rule 13 of the C.P.C. and, in any event, there was no justifiable reason for not preferring the application well within time. It is further urged by the learned counsel for the petitioners/plain tiffs that the application for condonation of delay having similar averments made by the respondent's/defendants in the first appeal before Division Bench of this Court having already been considered and rejected, the Trial Court was not justified in condoning the delay ignoring rejection of the similar reasons by the Division Bench of this Court. In nutshell, the petitioners/plaintiffs prayed for reversal of the order of the Trial Court on both counts.

14. On behalf of respondents/defendants In reply it was urged that so far as maintainability of the application under Order 9 Rule 13 of the C.P.C. is concerned, the Trial Court was wrong in considering the said issue along with application for condonation of delay as, in their submission, that was not a proper stage of the proceedings warranting consideration of issue relating to the maintainability of such application. Therefore, the learned counsel appearing for the respondents/defendants prayed that the findings recorded by the Trial Court in this behalf be set aside and the question relating to maintainability of application under Order 9 Rule 13 of the C.P.C. be remitted back to the Trial Court for considering afresh, so that both the parties would get an adequate opportunity to address Trial Court on maintainability of application.

The learned counsel appearing for the respondents/defendants further contended that the order of the Trial Court relating to condonation of delay should not be interfered with in the revisional jurisdiction of this Court as, in their submission,

this part of the order does not suffer from jurisdictional error nor it exhibits any material irregularity apparent on the face of record. The learned counsel further argued that in the facts and circumstances of the case, the Trial Court was perfectly justified in holding that sufficient cause was made out for not moving an application under Order 9 Rule 13 of the C.P.C. within prescribed time. In substance, the learned counsel appearing for the respondents/defendants prayed for rejection of the revision application. It is submitted that In any event this Court in its revisional jurisdiction should not interfere with the findings of the Trial Court as the impugned order, if allowed to stand, would not occasion failure of justice or cause irreparable injury to the party against whom it was made.

CONSIDERATION

15. I may now deal with issue noted at the beginning of the Judgment. The principal question as to whether the application moved by the respondents/defendants for setting aside ex-parte decree was competent or not, in view of the provisions contained in explanation to Order 9 Rule 13 of the C.P.C., turns to interpretation of explanation. Order 9 Rule 13 and explanation thereto read as under : Order 9 Rule 13

"In any case in which a decree is passed ex-parte against 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 ;

Provided

Provided

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 that ex-parte decree."

Order 9 Rule 13 of the C.P.C. makes provision for setting aside ex-parte decree against the defendant. It lays down a condition for setting aside decree. The explanation was introduced in C.P.C. by the amendment Act 104 of 1976 and it has come into force from 1st April, 1977. The said rule 13 was further amended by this Court In exercise of powers u/s 122 of the C.P.C. with effect from 1st October, 1983 and the original Explanation brought on the statute book by virtue of the Act 104 of 1976 was renumbered as Explanation II. In other words, the amendment made by this High Court is identical to the Explanation which was introduced In Order 9 Rule 13 by virtue of Act 104 of 1976, which reads as under :

"Explanation II - 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 that ex-parte decree.

16. The real question as to whether in the facts and circumstances, the bar resulted by dismissal of appeal for setting aside ex-parte decree is attracted to the present application. The plain reading of the explanation clearly indicates that if any appeal against any ex-parte decree is disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application for setting aside ex-parte decree under Order 9 Rule 13 of the C.P.C. will lie. The words used in the explanation are clear and unambiguous. In the teeth of the aforesaid provision, the Trial Court could not have held that the application under Order 9 Rule 13 of the C.P.C. for setting aside ex-parte decree was maintainable. The Trial Court was persuaded to accept the contention that the rejection of application for condonation of delay resulting in dismissal of appeal by the Division Bench of this Court did not result in merger of the decree of the Trial Court with that of appellate order. The said view was taken by the Trial Court based on the judgment of the learned single Judge of this Court in *Lalita v. S. G. Punjabi* 1989 M. L. J. 1074 wherein learned single judge Hon"ble Smt. Sujata Manohar, J. (as she then was) observed in paragraph-7 as under :

"7. It is contended by Shri Dalvi, learned Advocate for the Petitioners that in view of the rejection of the appeal filed by the First Respondent, the application for setting aside the ex-parte decree cannot survive and it ought to have been dismissed. Now, under Order 9, Rule 13 of the Code of Civil Procedure, It is provided as under :

Explanation II is as follows :

In the present case, the appeal was merely lodged. It could not be numbered because there was delay in filing the appeal and without the condonation of delay, the appeal could not have been numbered. The defendant did not press the application for condonation of delay and hence the appeal was automatically rejected. In such a case where the application for condonation of delay is withdrawn and the appeal comes to be rejected, there is no consideration of the appeal at all by the Appellate Court. Explanation II makes it clear that if the appellant has withdrawn the appeal, the application under Order 9, Rule 13 is maintainable. The present case is similar to a case of withdrawal of the appeal. In fact the withdrawal in the present case is at an earlier stage of considering the application for condonation of delay. In such a situation, there can be no bar to maintainability of an application under Order 9, Rule 13 of the Code of Civil Procedure."

The Trial Court also relied upon another judgment of the learned single Judge of this Court in *S. K. Mulla v. S. A. K. S. Mohammad*, wherein an appeal against ex-parte decree was delayed and application for condonation of delay was filed which was allowed subject to cost. Cost was not deposited, with the result, it was held that the appeal was non-est and that such presentation of appeal would not bar maintainability of application under Order 9 Rule 13 of the C.P.C. Based on

aforesaid two judgments of this Court, the Trial Court was persuaded to hold that the application under Order 9 Rule 13 for setting ex-parte decree filed by the respondents/ defendants was maintainable and, accordingly, the Trial Court recorded affirmative finding on the issue relating to maintainability of the said application.

17. At this juncture, it may not be out of place to mention that the aforesaid question is no longer res integra in view of law laid down by the Apex Court in this behalf. The Apex Court, as back as in the year 1956, had an occasion to deal with the similar question arising out of provisions of the Indian Income Tax Act, 1922 in *Mela Ram and Sons v. Commissioner of Income Tax, Punjab*, wherein the Apex Court ruled that the appeal presented beyond time is an appeal and an order dismissing it as time-barred is one passed in appeal. In that case the appeal was dismissed as barred by limitation. The Apex Court held that the order of the Assistant Commissioner holding that there was no sufficient reason for excusing delay u/s 30(2) of the Income Tax Act and rejecting the appeal as time-barred is an order passed u/s 31 and appeal lies from that order to the Appellate Tribunal. It makes no difference whether the order of dismissal is made before or after the appeal is admitted. The Apex Court while taking aforesaid view relied upon decision of this Court in *K. K. Porbunderwalla v. Commissioner of Income Tax*, wherein Hon''ble Shri Chagla, C.J. (as he then was) observed :

" although the Appellate Assistant Commissioner did not hear the appeal on merits and held that the appeal was barred by limitation his order u/s 31 and the effect of that order was to confirm the assessment which had been made by the Income Tax Officer."

18. The Apex Court after the aforesaid judgment had second occasion to interpret and consider the explanation incorporated in Order 9 Rule 13 of the C.P.C. in the case of *Rani Choudhary v. Suraj Jit Choudhury*, wherein the Apex Court, following the earlier view referred to hereinabove, held as under:

"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 the 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.

As in our view, the application for setting aside the ex-parte decree does not lie and cannot be entertained, in view of the provisions contained in the

Explanation, it does not become necessary for us to go into the merits of the application to consider whether sufficient cause had been shown by the respondent for his non-appearance at the hearing at the date fixed and also for not preferring the application within the time prescribed."

19. Having taken survey of the aforesaid judicial authoritative pronouncements of the Apex Court, I do not think remand as prayed for would be in interest of justice. It will not be out of place to mention that the aforesaid two judgments of the Supreme Court have not been pointed out when the cases in *Lalita v. S. C. Punjabi* (supra) and in *S. K. Mulla v. S. A. K. S. Mohammad* (supra) were decided by this Court. On the face of clear-cut law laid down by the Apex Court that an appeal presented out of time is an appeal and an order dismissing it as time-barred is one passed in appeal, both the aforesaid judgments of this Court being per incuriam cannot be of any assistance to the respondents/defendants. In my view, the application for setting aside ex-parte does not lie and cannot be entertained in view of the provisions contained in the explanation.

20. In the wake of the above finding it is really not necessary for me to go into the merits of the issue as to whether sufficient cause has been shown by the respondents/defendants for not preferring application under Order 9 Rule 13 of the C.P.C. within the time prescribed. However, since the parties to the revision application addressed this Court on the issue relating to the condonation of delay. I propose to consider the same. At this stage it will not be out of place to mention that the Trial Court decreed the suit of the petitioners/plaintiffs on 28th June, 1994 against which the appeal was filed in the High Court on 12th September, 1996. Presentation of appeal was delayed by 717 days. According to the respondents/defendants delay had occurred as one of their directors was in America for the treatment of his wife and that he was prevented from contacting and communicating the counsel in India. Based on this solitary fact, cause of delay was sought to be explained. The Division Bench of this Court, while rejecting the application for condonation of delay, in its order dated 4.7.1997 categorically observed that no application for setting aside ex-parte order was moved and despite ex-parte order the case was adjourned from time to time for recording evidence of the plaintiffs, but no attempts were made to get the ex-parte order set aside. The matter was taken for hearing on 15th April, 1994. Even during this period of more than one year, the respondents/defendants (appellants therein) have not applied for setting aside the ex-parte order. Thereafter the matter was adjourned from time to time for arguments and ultimately, judgment and decree was passed on 28th June, 1994. Even after Judgment and decree, no attempts were made for moving an application under Order 9 Rule 13 of the C.P.C. for setting aside ex-parte decree. The Division Bench found that entire altitude of the respondents/defendants was totally callous; they were grossly negligent and the cause shown was without any justification. The direction given by the Division Bench of this Court directing respondents/ defendants (appellants therein) to deposit decretal amount within two months was also not complied with. There was sufficient indication in the

order of the High Court indicating necessity to move an application under Order 9 Rule 13 of the C.P.C. The said order of the Division Bench was delivered on 4th July, 1997. In spite of clear-cut indication indicated by the Division Bench through its order, no attempts were made to move an application under Order 9 Rule 13 of the C.P.C. Apart from this, on the face of the judgment of the Division Bench of this Court holding that no sufficient cause has been made out for delay in presenting appeal, the Trial Court could not have condoned delay for the same reasons which were repeated in the application under consideration seeking condonation of delay in presenting an application under Order 9 Rule 13 of the C.P.C. In these circumstances, the order of the Trial Court condoning delay cannot be said to be legal and valid. Apart from this, once it is held that application under Order 9 Rule 13 was not maintainable then the Trial Court had no jurisdiction to consider the application seeking condonation of delay much less to condone delay. The said order of condonation of delay can only be viewed as an order beyond jurisdiction of the Court. Consequently, the impugned order of the Trial Court passed below Exh. H. allowing the application u/s 5 of the Limitation Act in Special Civil Suit No. 65 of 1991 cannot stand to the scrutiny of law and the same is thus quashed and set aside.

21. Revision application is allowed. Rule is made absolute in terms of prayer clauses (b) and (c) with no order as to costs.