

CASE DETAILS

THE KOUSHIK MUTUALLY AIDED COOPERATIVE HOUSING
SOCIETY

v.

AMEENA BEGUM & ANOTHER

(Civil Appeal No. 7903 of 2023)

DECEMBER 01, 2023

[B. V. NAGARATHNA AND UJJAL BHUYAN, JJ.]

HEADNOTES

Issue for consideration: Application filed by the Respondent seeking condonation of delay in filing the petition to set aside the ex-parte decree was dismissed by Trial Court. Consequently, the petition filed under Order IX Rule 13 CPC seeking setting aside of the ex-parte decree was also dismissed. In revision, High Court set aside the order by which the application seeking condonation of delay was dismissed thereby allowing the petition filed under Order IX Rule 13 CPC which was dismissed by the Trial Court. Order of the High Court whether justified.

Code of Civil Procedure, 1908 – Order IX r.13; s.115 – Appellant filed suit seeking a decree of specific performance of an agreement to sell – Ex-parte decree passed – Respondent filed an application u/Order IX r.13 for setting aside of ex-parte decree along with an application for condonation of delay – Dismissed – Revision Petition filed u/s.115, High Court set aside the aforesaid order implying that the petition filed u/Order IX r.13 which had also stood dismissed was allowed – Propriety:

Held: When an application or petition filed under Order IX r.13 CPC is dismissed, the defendant can avail a remedy by preferring an appeal in terms of Order XLIII r.1 CPC – Thus, Civil Revision Petition u/s.115 of the CPC would not arise when an application/petition under Order IX r.13 CPC is dismissed – Thus, when an alternative and effective appellate remedy is available to a defendant, against an ex-parte decree, it would not be appropriate for the defendant to resort to filing of revision u/s.115 of the

CPC challenging the order refusing to set aside the order of setting the defendant ex-parte – In view of the appellate remedy under Order XLIII r.1(d) CPC being available, revision under Section 115 of the CPC filed in the instant case was not maintainable – When there is an express provision available under the CPC or any statute under which an appeal is maintainable, by-passing the same, a Revision Petition cannot be filed – Impugned order set aside – Alternative Remedy. [Paras 16, 17]

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES
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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7903 of 2023.

From the Judgment and Order dated 08.01.2021 of the High Court for the State of Telangana at Hyderabad in CRP No.4866 of 2018.

Appearances:

C. S. Vaidyanathan, Gopal Sankaranarayanan, Sr. Advs., Vinay P. Tripathi, Ms. Monalisa Kosaria, B. Shravanth Shanker, B. Yeshwanth Raj, Vinayak Goel, Nitish Raj, Ms. Shivani Vij, Ms. Jhanvi Dubey, Advs. for the Appellant.

Sajan Poovayya, Sr. Adv., Mrs. Sanjanthi Sajan Poovayya, Yelamanchili Shiva Santosh Kumar, Rudrajit Ghosh, Tarun Gupta, Advs. for the Respondents.

JUDGMENT / ORDER OF THE SUPREME COURT
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ORDER

1. Leave granted.

2. Being aggrieved by order dated 08.01.2021 passed by the learned Single Judge of the High Court for the State of Telangana at Hyderabad in Civil Revision Petition No. 4866/2018, this appeal has been preferred.

3. We have heard Sri C. S. Vaidyanathan, learned senior counsel along with Sri Gopal Sankaranarayanan, learned senior counsel for the appellant and Sri Sajan Poovayya, learned senior counsel for the first respondent and

perused the material on record. The second respondent has been deleted from the array of parties in terms of this Court's Order dated 25.04.2023.

4. Briefly stated, the facts are that the appellant herein had filed O.S. No.1144/1988 on the file of the V-Senior Civil Judge, City Civil Court, Hyderabad seeking a decree of specific performance of an agreement to sell dated 26.04.1985. In the said suit, the respondent(s) herein were set ex-parte. Thereafter, an *ex-parte* decree was passed on 15.02.1999. It is stated that execution proceedings as against the *ex-parte* decree are still pending before the Executing Court. However, the first respondent herein filed an application on 07.01.2016 seeking setting aside of ex-parte decree dated 15.02.1999 along with an application under Section 5 of the Limitation Act, 1963 seeking condonation of 5767 days delay in filing the said application seeking setting aside of *ex-parte* decree.

5. By order dated 07.06.2018, the V-Senior Civil Judge, City Civil Court, Hyderabad dismissed I.A. No.30/2016 filed for seeking condonation of delay of 5767 days in filing the application seeking setting aside of the ex-parte decree under Order IX Rule 13 Code of Civil Procedure, 1908 ('CPC' for the sake of convenience). The said application was considered by the Trial Court and by order dated 07.06.2018, the application seeking condonation of delay was dismissed. Consequently, the petition filed under Order IX Rule 13 CPC seeking setting aside of the ex-parte decree also stood dismissed.

6. Being aggrieved, the first respondent herein filed a Civil Revision Petition under Section 115 of the CPC before the High Court contending that Trial Court was not right in dismissing the application seeking condonation of delay of 5767 days in filing the petition to set aside the ex-parte decree dated 15.02.1999.

7. By the impugned order dated 08.01.2021, the High Court has set aside Order dated 07.06.2018 passed in I.A. No.30/2016 in O.S. No.1144/1988, which also implies that the petition filed under Order IX Rule 13 CPC which had also stood dismissed has been allowed. In the Civil Revision Petition, the High Court condoned the delay of 5767 days in filing the petition filed under Order IX Rule 13 CPC seeking setting aside the ex-parte decree dated 15.02.1999 by directing the Trial Court to dispose of the petition filed under Order IX Rule 13 CPC and to complete the trial of the

suit expeditiously, within a period of four months from the date of receipt of certified copy of this order.

8. Being aggrieved by the said order passed in Civil Revision Petition by the High Court, the plaintiff/appellant has preferred this appeal.

As noted above, we have heard learned senior counsel for the respective parties and perused the material on record.

9. At the outset, this Court queried as to how a Civil Revision Petition was maintainable against an order passed by the Trial Court dismissing the application filed seeking condonation of delay in filing the petition under Order IX Rule 13 CPC and consequently rejecting or dismissing the said petition also.

10. During the course of submissions, it was noted that, in fact, the rejection of a petition filed under Order IX Rule 13 CPC is an appealable order and, therefore under Order XLIII Rule 1(d) CPC, an appeal ought to have been filed before the High Court rather than a Civil Revision Petition under Section 115 of the CPC.

11. For the sake of immediate reference, Order XLIII Rule 1(d) CPC is extracted as under in juxtaposition to Section 115 of the CPC:

“Order XLIII Rule 1. Appeal from orders – An appeal shall lie from the following orders under the provisions of section 104, namely:-

(a) xxx

(c) xxx

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex-parte.”

Section 115 – Revision.

(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation.—In this section, the expression “any case which has been decided” includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.”

12. As against the ex-parte decree, a defendant has three remedies available to him. First, is by way of filing an application under Order IX Rule 13 CPC seeking for setting aside ex-parte decree; the second, is by way of filing an appeal against the ex-parte decree under Section 96(2) of the CPC and the third, is by way of review before the same court against the ex-parte decree.

13. The filing of an application under Order IX Rule 13 CPC as well as the filing of appeal under Section 96(2) of the CPC against the ex-parte decree are concurrent remedies available to a defendant. However, once the appeal preferred by the defendant against the ex-parte decree is dismissed, except when it is withdrawn, the remedy under Order IX Rule 13 CPC cannot be pursued. Conversely, if an application filed under Order IX Rule 13 CPC is rejected, an appeal as against the ex-parte decree can be preferred and continued under Section 96(2) of the CPC. Thus, an appeal against an ex-parte decree even after the dismissal of an application under Order IX Rule 13 CPC is maintainable.

14. In *Bhanu Kumar Jain vs. Archana Kumar*, AIR 2005 SC 626 : (2005) 1 SCC 787, speaking through Sinha, J. observed in paragraph 26 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 IX 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 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 IX Rule 13 of the Code a petition under Order IX Rule 13 would not be maintainable. However, the Explanation I appended to the said provision does not suggest that the converse is also true.”

15. Against the order passed under Order IX Rule 13 CPC rejecting an application for seeking setting aside the decree passed ex-parte, an appeal is provided. When an application is filed seeking condonation of delay for seeking setting aside an ex-parte decree and the same is dismissed and consequently, the petition is also dismissed, the appeal under Order XLIII Rule 1(d) CPC is maintainable. Thus, an appeal only against the refusal to set aside the ex-parte decree is maintainable whereas if an order allowing such an application is passed, the same is not appealable.

16. Thus, when an application or petition filed under Order IX Rule 13 CPC is dismissed, the defendant can avail a remedy by preferring an appeal in terms of Order XLIII Rule 1 CPC. Thus, Civil Revision Petition under Section 115 of the CPC would not arise when an application/petition under Order IX Rule 13 CPC is dismissed. Thus, when an alternative and effective appellate remedy is available to a defendant, against an ex-parte decree, it would not be appropriate for the defendant to resort to filing of revision under Section 115 of the CPC challenging the order refusing to set aside the order of setting the defendant ex-parte. In view of the appellate remedy under Order XLIII Rule 1(d) CPC being available, revision under Section 115 of the CPC filed in the instant case was not maintainable.

17. When there is an express provision available under the CPC or any statute under which an appeal is maintainable, by-passing the same,

a Revision Petition cannot be filed. It is needless to observe that in the absence of an appellate remedy, a revision may be maintainable.

18. It is clarified that once the Trial Court dismissed the application seeking condonation of delay in filing petition under Order IX Rule 13 CPC, and consequently, the main petition under Order IX Rule 13 CPC also stood dismissed which is also noted by the trial Court as “In the result, the petition is dismissed”.

19. Realising this aspect regarding the maintainability of a revision petition before the High Court, Sri Sajan Poovayya, learned senior counsel submitted that liberty may be reserved to the first respondent herein to file an appeal and if such an appeal is filed within a time frame to be granted by this Court, the issue of limitation in filing the appeal under Order XLIII Rule 1(d) CPC may not be raised by the High Court

By way of response, Sri C. S. Vaidyanathan, learned senior counsel submitted that if the impugned order is set aside and liberty is reserved to the first respondent herein, the appellant may not be prejudiced by such an order.

20. In the circumstances, we set aside the impugned order on the ground that the said order was passed in a Civil Revision Petition which was not at all maintainable under Section 115 of the CPC. However, liberty is reserved to the first respondent herein to file an appeal under Order XLIII Rule 1(d) CPC, if so advised, on or before 31.12.2023.

21. If such an appeal is filed before the High Court, the point of limitation ought not to be raised by the High Court.

22. It is needless to observe that the High Court shall dispose of the appeal to be filed by the first respondent herein in accordance with law.

23. All contentions on both sides are left open, to be advanced in the appeal to be filed before the High Court.

24. This Appeal is allowed and disposed of in the aforesaid terms.

No costs.

Pending application (s) shall stand disposed of.