Bhivchandra Shankar More vs Balu Gangaram More on 7 May, 2019

Equivalent citations: AIRONLINE 2019 SC 1915, 2019 (6) SCC 387, (2019) 135 ALL LR 215, (2019) 144 REVDEC 708, (2019) 199 ALLINDCAS 187, (2019) 2 ALL RENTCAS 342, (2019) 2 WLC(SC)CVL 386, (2019) 3 CGLJ 48, (2019) 3 CIVLJ 278, (2019) 3 ICC 1, (2019) 3 PAT LJR 178, (2019) 3 RECCIVR 123, (2019) 4 ALLMR 409, (2019) 5 MAD LJ 370, (2019) 7 SCALE 551, AIRONLINE 2019 SC 2344

Author: R. Banumathi

Bench: R. Subhash Reddy, R. Banumathi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4669 OF 2019
(Arising out of SLP(CIVIL) NO. 28938 OF 2014)

BHIVCHANDRA SHANKAR MORE ....Appe

VERSUS

BALU GANGARAM MORE & ORS. ...Responden

JUDGMENT

R. BANUMATHI, J.

Leave granted.

2. This appeal arises out of the judgment dated 20.08.2014 passed by the High Court of Judicature at Bombay in Writ Petition No.3290 of 2014 in and by which the High Court refused to condone the delay in filing the first appeal challenging the ex- parte decree passed in Regular Civil Suit No.35 of 2007 dated 04.07.2008.

3. Brief facts which led to filing of this appeal are as under:-

> Respondents-plaintiffs No.1 to 13 filed a suit for partition in Regular Civil Suit No.35 of 2007 before the Joint Civil Judge, Junior Division, Daund seeking partition and separate possession of the suit property. In the said suit, son of defendant No.2 viz.

Tanaji received the suit summons on 25.02.2007. According to appellant-defendant, they were in the neighbouring village in search of work and Tanaji did not inform them about the service of suit summons and therefore, they could not appear in the suit for partition. The said suit was decreed ex-parte and preliminary decree for partition was passed on 04.07.2008. On 15.10.2008, appellant and respondents No. 14 and 15 filed an application under Order IX Rule 13 CPC for setting aside the ex-parte decree. After considering the contentions of both the parties, the said application came to be dismissed by the trial court by order dated 06.08.2010. The trial court noted that the appellant and respondents No.14 and 15 are coming up with different reasons for their non-appearance when the suit was called for hearing.

The trial court pointed out that though number of amendments were made in the application filed under Order IX Rule 13 CPC, only in the last amendment, the defendants have stated that suit summons was served on the son of applicant No.2 viz. Tanaji.

The trial court observed that said Tanaji was an adult and the suit summons served on him was deemed to be an effective service of summons on the defendants.

4. Being aggrieved by the dismissal of application filed under Order IX Rule 13 CPC, on 03.09.2010, the appellant and respondents No.14 and 15 filed Civil Appeal No.108 of 2010 and the same was withdrawn on 11.06.2013. On the very next day i.e. on 12.06.2013, the appellant and respondents No.14 and 15 filed regular appeal challenging the ex-parte decree passed in Regular Civil Suit No.35 of 2007. Along with the said appeal, they also filed Civil Misc. Application No.56 of 2013 for condonation of delay of four years, ten months and eight days. The said application for condonation of delay was allowed by the Additional District Judge, Baramati vide order dated 20.02.2014. The court noted that the appellant and respondents No.14 and 15 did not get an opportunity to contest the suit on merits. The learned District Judge observed that the appellant and respondents No.14 and 15 have spent their time in wrong proceedings viz. application filed under Order IX Rule 13 CPC and the appeal thereon and therefore, it will be just and proper to condone the delay in preferring the appeal challenging the ex- parte decree passed in the partition suit. The District Court accordingly set aside the order of the trial court and allowed the application for condonation of delay in filing the appeal against the ex-parte decree.

5. Being aggrieved by the order condoning the delay and entertaining the appeal, respondents No.1 to 8 filed WP No.3290 of 2014 before the High Court. By the impugned judgment dated 20.08.2014, the High Court allowed the writ petition by holding that the application filed under Order IX Rule 13 CPC cannot be said to be wrong proceedings and hence, the time spent in pursuing the remedy by filing application under Order IX Rule 13 CPC cannot be excluded for calculating the limitation. The High Court relied upon its own judgment in Jotiba Limbaji Kanashenavar v. Ramappa Jotiba Kanashenavar 1937 Vol.XL Bom. Law Reporter 957 and held that having elected to pursue the remedy by filing an application under Order IX Rule 13 CPC and having not pursued the remedy of appeal which was open to him at that time and having failed in the application filed under Order IX Rule 13 CPC, the appellant-defendants cannot fall back upon the remedy of filing appeal and seek

condonation of delay. The High court pointed out that two remedies have to be pursued simultaneously and cannot be converted into consecutive remedies and on those findings, allowed the writ petition which is the subject matter challenge.

6. Mr. Sushil Karanjkar, learned counsel appearing for the appellant submitted that the suit summons was served upon the son of defendant No.2 by name Tanaji and at the relevant point of time, the appellant and respondents No.14 and 15 were in the neighbouring village for some work and they could not pursue the matter and hence, the delay in filing the appeal cannot be said to be intentional. Placing reliance upon B. Madhuri Goud v. B. Damodar Reddy (2012) 12 SCC 693, it was submitted that consistent view taken by the Supreme Court is that the words "sufficient cause" should be liberally construed and the District Court rightly condoned the delay in filing the appeal. It was submitted that unless the delay in filing the appeal is condoned, the appellants and respondents No.14 and 15 will lose their valuable rights in the suit property which is the joint family property, without having an opportunity to contest the same on merits.

7. Mr. Vinay Navare, learned senior counsel appearing on behalf of the respondents submitted that the time spent in prosecuting the proceedings for setting aside the ex-parte decree under Order IX Rule 13 CPC is wholly irrelevant since those proceedings under Order IX Rule 13 CPC never operated as a bar for filing an appeal under Section 96(2) CPC. It was further submitted that the application filed under Order IX Rule 13 CPC was dismissed on merits and the said order has attained finality and having filed the appeal challenging the said order, the appellants cannot seek for condonation of delay on the ground that they were pursuing the other remedy under Order IX Rule 13 CPC.

8. We have carefully considered the submissions and perused the impugned judgment and other materials placed on record. The following points arise for consideration:-

> (i) Whether the time spent in the proceedings taken to set aside the ex-parte decree constitute "sufficient cause" within the meaning of Section 5 of the Indian Limitation Act, 1908 so as to condone the delay in preferring an appeal against the ex-parte decree on merits?
>
> (ii) When an application filed under Order IX Rule 13 CPC has been dismissed on merits, whether regular appeal under Section 96(2) CPC is barred?

9. The facts are not in dispute. The suit for partition was filed by respondents No.1 to 13 in the year 2007. It was decreed ex- parte on 04.07.2008. The appellant and respondents No.14 and 15 filed application under Order IX Rule 13 CPC on 15.10.2008 and the said application was dismissed on merits by the order dated 06.08.2010. Challenging the said order, the appellant and respondents No.14 and 15 preferred an appeal on 03.09.2010. About three years after its filing i.e. on 11.06.2013, the said appeal was withdrawn and on the next day i.e. on 12.06.2013, the appellant and respondents No.14 and 15 filed appeal challenging the decree passed in Regular Civil Suit No.35 of 2007 along with an application to condone the delay of four years, ten months and eight days.

10. A conjoint reading of Order IX Rule 13 CPC and Section 96(2) CPC indicates that the defendant who suffered an ex-parte decree has two remedies:- (i) either to file an application under Order IX Rule 13 CPC to set aside the ex-parte decree to satisfy the court that summons were not duly served or those served, he was prevented by "sufficient cause" from appearing in the court when the suit was called for hearing; (ii) to file a regular appeal from the original decree to the first appellate court and challenge the ex-parte decree on merits.

11. It is to be pointed out that the scope of Order IX Rule 13 CPC and Section 96(2) CPC are entirely different. In an application filed under Order IX Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any "sufficient cause" from appearing when the suit was called for hearing. If the Court is satisfied that the defendant was not duly served or that he was prevented for "sufficient cause", the court may set aside the ex- parte decree and restore the suit to its original position. In terms of Section 96(2) CPC, the appeal lies from an original decree passed ex-parte. In the regular appeal filed under Section 96(2) CPC, the appellate court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different. Merely because the defendant pursued the remedy under Order IX Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order IX Rule 13 CPC is dismissed.

12. The right of appeal under Section 96(2) CPC is a statutory right and the defendant cannot be deprived of the statutory right of appeal merely on the ground that the application filed by him under Order IX Rule 13 CPC has been dismissed. In Bhanu Kumar Jain v. Archana Kumar and Another (2005) 1 SCC 787, the Supreme Court considered the question whether the first appeal was maintainable despite the fact that an application under Order IX Rule 13 CPC was filed and dismissed. Observing that the right of appeal is a statutory right and that the litigant cannot be deprived of such right, in paras (36) and (38), it was held as under:-

> "36. ..... A right to question the correctness of the decree in a first appeal is a statutory right. Such a right shall not be curtailed nor shall any embargo be fixed thereupon unless the statute expressly or by necessary implication says so. [See (2004) 5 SCC 385, Deepal Girishbhai Soni and Others v. United India Insurance Co. Ltd., Boaroda and Chandravathi P.K. and Others v. C.K. Saji and Others (2004) 3 SCC 734]." .....

"38. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him under Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr Chaudhari that the "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this Court in Rani Choudhury v. Lt.-Col. Suraj Jit Choudhary (1982) 2 SCC 596, P. Kiran Kumar v. A.S. Khadar

and Others (2002) 5 SCC 161 and Shyam Sundar Sarma v. Pannalal Jaiswal and Others (2005) 1 SCC 436."

13. After referring to its own judgment in Jotiba Limbaji, the High Court held that after the appeal from the order of the lower court refusing to set aside the ex-parte decree, the defendant may think of applying to the High Court in revision and in that process, considerable time might be lost. After referring to other judgments, in the impugned judgment, the High Court held as un- der:-

> "15..... An unscrupulous defendant may file the application under Order IX Rule 13 CPC and carry the order to the highest forum irrespective of the merit in it and thereafter still file appeal against the decree. Considerable time would be lost for the plain- tiff in that case. Every provision under the law of procedure is aimed at justness, fairness and full opportunity of hearing to the parties to the court proceedings. It caters to every conceivable situation. But at the same time, the law expects a litigant to be straight, honest and fair. The two remedies provided against ex-parte decree are in respect of two different situations and are expected to be resorted to only if the facts of the situation are available to a litigant. The remedies provided as simultaneous and cannot be converted into consecutive remedies."

14. The above observation of the High Court that "the remedies provided as simultaneous and cannot be converted into consecu- tive remedies" cannot be applied in a rigid manner and as a strait- jacket formula. It has to be considered depending on the facts and circumstances of each case and whether the defendant in pursuing the remedy consecutively has adopted dilatory tactics. Only in cases where the defendant has adopted dilatory tactics or where there is lack of bonafide in pursuing the two remedies con- secutively, the court may decline to condone the delay in filing the first appeal. If the court refuses to condone the delay in the time spent in pursuing the remedy under Order IX Rule 13 CPC, the defendant would be deprived of the statutory right of appeal in challenging the decree on merits.

15. It is a fairly well settled law that "sufficient cause" should be given liberal construction so as to advance sustainable justice when there is no inaction, no negligence nor want of bonafide could be imputable to the appellant. After referring to various judgments, in B. Madhuri, this Court held as under:-

> "6. The expression "sufficient cause" used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that substantive rights of the parties are not defeated only on the ground of delay."

16. Observing that the rules of limitation are not meant to destroy the rights of the parties, in N. Balakrishnan v. M. Krishnamurthy (1998) 7 SCC 123, this Court held as under:-

> "11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time." As pointed out earlier, an appeal under Section 96 CPC is a statutory right. Generally, delays in preferring appeals are required to be condoned, in the interest of justice, where there is no gross negligence or deliberate inaction or lack of bonafide is imputable to the party seeking condonation of delay.

17. In the case in hand, respondents No.1 to 13 filed a suit for partition in the year 2007, which was decreed ex-parte on 04.07.2008. Appellant and respondents No.14 and 15 filed application under Order IX Rule 13 CPC and the same came to be dismissed on 06.08.2010. Being aggrieved by dismissal of application under Order IX Rule 13 CPC, the appellant and respondents No.14 and 15 preferred an appeal under Order XLIII Rule 1(d) CPC on 03.09.2010. Of course, the said appeal was pending for about three years and the same was withdrawn on 11.06.2013. Thereafter, on the next day i.e. on 12.06.2013, the appellant and respondents No.14 and 15 filed an appeal challenging the ex-parte decree and judgment dated 04.07.2008 passed in Regular Civil Suit No.35 of 2007. It cannot be said that the appellant and respondents No.14 and 15 were grossly negligent in pursuing the matter more so, when the decree was passed in the suit for partition.

18. It is pertinent to note that as per Section 97 CPC where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. The object is that the questions decided by the court at the stage of passing preliminary decree cannot be challenged at the time of final decree. If no appeal had been preferred against the preliminary decree, the suit filed by the respondents-plaintiffs being a suit for partition, the appellant would be deprived of the opportunity in challenging the decree on merits. In the interest of justice, the appellant and respondents No.14 and 15 are to be given an opportunity to challenge the ex-parte decree dated 04.07.2008 on merits, notwithstanding the dismissal of their application filed under Order IX Rule 13 CPC.

19. In the facts and circumstances of the present case, the time spent in pursuing the application under Order IX Rule 13 CPC is to be taken as "sufficient cause" for condoning the delay in filing the first appeal. The impugned judgment of the High Court cannot be sustained and is liable to be set aside.

20. In the result, the impugned judgment dated 20.08.2014 passed by the High Court in WP No.3290 of 2014 is set aside and this appeal is allowed. The delay in filing the appeal against the judgment passed in Regular Civil Suit No.35 of 2007 is condoned and the appeal filed by the appellant and respondents No.14 and 15 shall stand restored. The first appellate court shall take the appeal titled "Shri Bhivchand Shankar More & Ors. v. Shri Balu Gangaram More & Ors." on file and proceed with the same in accordance with law. We make it clear that we have not expressed any opinion on the merits of the matter.

.....J. [R. BANUMATHI] .....J. [R. SUBHASH REDDY] New Delhi;

May 07, 2019