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MAMTAZ & ORS.

v.

GULSUMA ALIAS KULUSUMA

(Civil Appeal No. 315 of 2022)

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JANUARY 18, 2022

**[M. R. SHAH AND SANJIV KHANNA, JJ.]**

C *Civil Procedure Code, 1908 – Or.9 r 13 – sec. 96 – Ex-Parte Decree – Setting aside – Power of Appellate Court – Condonation of Delay – In Absence of Application – The appellants filed a suit for declaration and possession – Ex-parte decree was passed by the trial Court against the respondents – Appeal was preferred by the respondents before the First Appellate Court after delay of 2 years and 7 months – Respondent filed application for*  
D *condonation of delay, however he withdrew the same later on – First Appellate Court dismissed the appeal on the ground of limitation in absence of any application to condone the delay – Respondents filed second appeal before the High Court – The High Court allowed the second appeal and also set aside the ex-parte judgment and decree passed by the Trial Court – High Court*  
E *remanded the matter to the Trial Court for fresh decision of the suit in accordance with law – On appeal, held: What was challenged before the High Court was the judgment and order passed by the First Appellate Court dismissing the first appeal u/s. 96 of the CPC as not maintainable in absence of any delay condoned application*  
F *– It appears that the High Court proceeded further with the hearing of the appeal as if the High Court was considering the appeal against the order passed on an application under Order IX Rule 13 CPC – Whereas the appeal was against the order and decree passed by the trial Court, which was affirmed by the First Appellate Court as*  
G *barred by limitation – The procedure adopted by the High Court is unknown to the procedure known to law under the provisions of the CPC – Therefore, the impugned judgment and order passed by the High Court is unsustainable.*

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Allowing the appeal, the Court

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**HELD: 1.** It is required to be noted that what was challenged before the High Court was the order/judgment and order passed by the First Appellate Court dismissing the first appeal under Section 96 of the CPC as not maintainable in absence of any delay condoned application. There was no decision by the First Appellate Court on merits. If the High Court was of the opinion that the First Appellate Court erred in not condoning the delay in appeal and dismissing the appeal on the ground of limitation, in that case the High Court could have set aside the order passed by the First Appellate Court dismissing the appeal on the ground of limitation and thereafter remand the matter to the First Appellate Court to decide the appeal on merits. From the impugned judgment and order passed by the High Court, it appears that the High Court proceeded further with the hearing of the appeal as if the High Court was considering the appeal against the order passed on an application under Order IX Rule 13 CPC, whereas the appeal was against the order and decree passed by the Trial Court, which was affirmed by the First Appellate Court as barred by limitation. Therefore, the procedure adopted by the High Court is unknown to the procedure known to law under the provisions of the CPC. Therefore, the impugned judgment and order passed by the High Court is unsustainable. [Paras 5 & 6][987-G-H; 988-A-C]

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 315 of 2022.

From the Judgment and Order dated 21.04.2021 of the High Court of Karnataka Kalaburagi Bench in R.S.A. No.200073 of 2021.

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Sharanagouda Patil, Ms. Supreeta Sharanagouda, Advs. for the Appellants.

S. N. Bhat, Sr. Adv., Ms. Parvati Bhat, Tarun Kumar Thakur, D. P. Chaturvedi, Shahnawaz Mamadapur, Ms. Anuradha Mutatkar, Advs. for the Respondent.

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A The Judgment of the Court was delivered by

**M. R. SHAH, J.**

B 1. Feeling aggrieved and dissatisfied with the impugned judgment  
and order dated 21.04.2021 passed by the High Court of Karnataka,  
Kalaburagi Bench in R.S.A. No.200073 of 2021 by which the High Court  
has allowed the said appeal preferred by the respondent herein and has  
quashed and set aside the order passed by the First Appellate Court in  
R.A. No. 22 of 2020 and has also quashed and set aside the judgment  
and decree passed by the Trial Court and remanded the matter to the  
Trial Court for fresh disposal in accordance with law, the original plaintiffs  
C have preferred the present appeal.

2. The facts leading to the present appeal, which are necessary  
for the purpose of disposal of the present appeal in nutshell are as under:-

D 2.1 That the appellants herein filed a suit for declaration and  
possession. The Trial Court by judgment and decree dated 08.01.2018  
decreed the said suit. As such the said suit proceeded ex parte and the  
judgment and decree passed by the Trial Court was ex parte decree.

E 2.2 Two remedies were available to the defendant – one, filing an  
application for setting aside the ex parte decree under Order IX Rule 13  
of the Civil Procedure Code (hereinafter referred to as “CPC”) and the  
other preferring an appeal against the judgment and decree passed by  
the Trial Court.

F 2.3 The defendant – respondent herein preferred the second option  
and preferred appeal before the First Appellate Court against the judgment  
and decree passed by the Trial Court. There was a delay of 2 years and  
7 months in preferring the first appeal. Therefore, the respondent herein  
– original defendant -the appellant before the First Appellate Court filed  
I.A. No. 1 of 2020 requesting to condone the delay. However, the appellant  
before the First Appellate Court – original defendant for whatever reason  
withdrew the said application for condonation of delay.

G 2.4 That the first appeal came up before the First Appellate Court.  
As there was no fresh application to condone the delay and the earlier  
condonation of delay application requesting to condone the delay of 2  
years and 7 months was withdrawn, by order dated 10.12.2020, the First  
Appellate Court dismissed the first appeal on the ground that in absence  
of any application to condone the delay the appeal under Section 96  
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CPC shall not maintainable. Thus, the First Appellate Court dismissed the first appeal solely on the aforesaid ground of limitation and the First Appellate Court did not go into the merits of the case at all. A

2.5 Feeling aggrieved and dissatisfied with the order passed by the First Appellate Court dismissing the appeal as not maintainable in absence of any delay condoned application, the respondent herein – original defendant – appellant before the First Appellate Court preferred second appeal before the High Court. By the impugned judgment and order, the High Court has allowed the said second appeal and has not only set aside the judgment and order passed by the First Appellate Court dismissing the appeal as not maintainable in absence of delay condoned application, but has also set aside the ex parte judgment and decree passed by the Trial Court as if the High Court was considering the order passed in an application under Order IX Rule 13 CPC and has also quashed and set aside the judgment and decree passed by the Trial Court and has remanded the matter to the Trial Court for fresh decision of the suit in accordance with law. B C D

2.6 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, the original plaintiffs have preferred the present appeal.

3. We have heard Shri Sharanagouda Patil, learned counsel appearing on behalf of the appellants and Shri S.N. Bhat, learned Senior Advocate appearing on behalf of the contesting respondent – original defendant. E

4. Having heard the learned counsel for the respective parties and considering the facts narrated hereinabove, we are of the opinion that the impugned judgment and order passed by the High Court quashing and setting aside the judgment and decree passed by the Trial Court and remanding the matter back to the Trial Court is unsustainable. F

5. It is required to be noted that what was challenged before the High Court was the order/judgment and order passed by the First Appellate Court dismissing the first appeal under Section 96 of the CPC as not maintainable in absence of any delay condoned application. There was no decision by the First Appellate Court on merits. If the High Court was of the opinion that the First Appellate Court erred in not condoning the delay in appeal and dismissing the appeal on the ground of limitation, in that case the High Court could have set aside the order passed by the G H

A First Appellate Court dismissing the appeal on the ground of limitation and thereafter remand the matter to the First Appellate Court to decide the appeal on merits.

6. From the impugned judgment and order passed by the High Court, it appears that the High Court proceeded further with the hearing of the appeal as if the High Court was considering the appeal against the order passed on an application under Order IX Rule 13 CPC, whereas the appeal was against the order and decree passed by the Trial Court, which was affirmed by the First Appellate Court as barred by limitation. Therefore, the procedure adopted by the High Court is unknown to the procedure known to law under the provisions of the CPC. Therefore, the impugned judgment and order passed by the High Court is unsustainable.

7. At this stage, Shri S.N. Bhat, learned Senior Advocate appearing on behalf of the respondent herein - original defendant – appellant before the First Appellate Court has requested to permit the original defendant–appellant before the First Appellate Court to revive the application for condonation of delay being I.A. No.1 of 2020, which was withdrawn mistakenly on wrong applying the provisions of the Limitation Act. Shri Bhat, learned Senior Advocate has submitted that if the original defendant is not permitted to revive the application for condonation of delay, he would be remediless.

8. In view of the above and for the reasons stated above, present appeal succeeds. The impugned judgment and order passed by the High Court dated 21.04.2021 passed in RSA No.200073 of 2021 is hereby quashed and set aside. The matter is remanded to the First Appellate Court. The appeal before the First Appellate Court being R.A. No.22 of 2020 is ordered to be restored to the file in the Court of the First Appellate Court. The respondent herein – original defendant – appellant before the First Appellate Court is permitted to move an appropriate application for revival of I.A. No.1 of 2020 and the First Appellate Court is directed to revive I.A. No.1 of 2020, which seems to have been withdrawn by the original defendant – appellant before the First Appellate Court mistakenly and thereafter the First Appellate Court to first decide and dispose of the said application for condonation of delay and if the delay is condoned in that case the First Appellate Court to finally decide and dispose of the first appeal in accordance with law and on its own merits. If for any valid reasons, the application for condonation of delay is

dismissed by the First Appellate Court, it goes without saying that it will be open for the original defendant to challenge the same before a higher forum/court, which may be considered in accordance with law and on its own merits. A

Present appeal is allowed accordingly to the aforesaid extent. In the facts and circumstances of the case, there shall be no order as to costs. B

Ankit Gyan  
(Assisted by : Rahul Rathi, LCRA)

Appeal allowed.