

(2014) 08 BOM CK 0051

Bombay High Court

Case No: Writ Petition No. 3290 of 2014

Balu Gangaram More

APPELLANT

Vs

Bhivchandra Shankar
More

RESPONDENT

Date of Decision: Aug. 20, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 21, Order 9 Rule 13, 96
- Limitation Act, 1963 - Section 5

Citation: (2014) 6 ABR 446 : (2015) 2 ALLMR 321 : (2016) 1 BomCR 825 : (2015) 2 MhLj 879

Hon'ble Judges: R.P. Sondurbaldota, J

Bench: Single Bench

Advocate: Abhijit P. Kulkarni and Manoj Badgujar, Advocate for the Appellant; P.S. Dani, Tushar Sonawane and i/by Prashant S. Hagare, Advocate for the Respondent

Final Decision: Allowed

Judgement

R.P. Sondurbaldota, J.

Pursuant to the order dated 26th March, 2014 the petition is taken up for final hearing at the stage of admission. Heard the Counsel.

2. The short question arising for consideration in this appeal is, whether the proceedings taken out to set aside the ex-parte decree constitute "sufficient cause" within the meaning of Section 5 of the Indian Limitation Act so as to extend the period of limitation of an appeal against the ex-parte decree.

3. The brief facts required to be stated for deciding the question are as follows :-

The petitioners, the original plaintiffs filed Regular Civil Suit No. 35 of 2007 against the respondents for partition and separate possession of the suit property. It was decreed ex-parte on 4th July, 2008. A month thereafter, i.e. on 5th August, 2008 the respondents obtained its certified copy. On 12th August, 2008 they filed application

under Order 9 Rule 13 CPC ("CPC" for short) for setting aside the ex-parte decree. The trial Court by its detailed judgment and order dated 6th August, 2010 rejected the application. The respondents challenged the order by preferring appeal to the District Court on 29th September, 2010, but about three years after it's filing, withdrew it on 11th June, 2013. Immediately on the next day, i.e. on 12th June, 2013 they filed appeal against the ex-parte decree alongwith Civil Misc. Application No. 56 of 2013 for condonation of delay in filing the appeal of 4 years 10 months and 8 days. By the order dated 20th February, 2014 the District Court allowed the application and condoned the delay. Being aggrieved by the order, the petitioners have filed the present petition.

4. In their application for condonation of delay, the respondents claimed that the writ of summons in the suit was served upon the son of respondent no.2. Though the respondents are brothers, on account of differences, inter-se, respondent no.2 has been residing separately. Son of respondent no.2 is also not on good terms with him. He therefore did not inform the respondents about the service of writ of summons. In view of these facts, the respondents carried an impression that service of writ of summons upon them was not proper. Therefore, they filed the application for setting aside ex-parte decree. Under the same wrong impression, they also preferred appeal against the order rejecting their application for setting aside ex-parte decree. On realising their mistake, the respondents withdrew their appeal relating to setting aside ex-parte decree and filed Regular Civil Appeal to challenge the ex-parte decree. Since the respondents were pursuing wrong proceedings, the delay in filing the First Appeal should be condoned.

5. The petitioners had opposed the application contending that, the facts alleged in the application are false. According to them, there are no disputes or differences, inter-se the respondents. There are also no disputes between respondent no.2 and his son. The respondents had consciously remained absent before the Court after receipt of the writ of summons. It was also contended that, after having elected one remedy against the ex-parte decree, it is not open for the respondents to resort to another remedy.

6. The trial Court allowed the application by imposing costs of Rs.3,000/- upon the respondents. Though the order runs into 8 paras, the reasons stated in just two lines, read as follows :-

"Applicants did not get opportunity to contest the suit, to adduce their evidence. Applicants have spent time in wrong proceeding, hence it will be just and proper to condone delay in preferring Appeal."

7. For assailing the order of the trial Court, Mr. Kulkarni the learned Advocate appearing for the petitioners submits that, the order merely makes a brief reference to the petitioners' objections to the application but does not deal with the same. He also submits that, the remedy of application under Order 9 Rule 13 CPC resorted to

by the respondents, cannot be said to be wrong proceedings and hence the time spent in pursuing the remedy cannot be excluded for the purpose of limitation. It can also not be treated as sufficient cause for condonation of delay. Mr. Dani, the learned Advocate appearing for the respondents, on the other hand, seeks to justify the impugned order. He submits that, the defendant suffering ex-parte decree can, in law, resort to two remedies simultaneously i.e. to apply under Order 9 Rule 13 CPC for setting the ex-parte decree aside and prefer appeal against the decree u/s 96 CPC. Since the law provides for two remedies against the ex-parte decree, the defendant cannot be expected to exercise his rights to both the remedies at the same time.

8. The question, whether the proceedings taken out to set aside the ex-parte decree constitute "sufficient cause" within the meaning of Section 5 of the Indian Limitation Act so as to extend the period of limitation of an appeal against the ex-parte decree, had arisen for consideration of the various Courts earlier. But the answer to the question by the Courts is not consistent. Mr. Kulkarni, relies upon the following three decisions of our High Court to support his argument :-

(i) [Jotiba Limbaji Kanashenavar Vs. Ramappa Jotiba Kanashenavar,](#)

(ii) [Maharashtra Rajya Sahakari Adiwasi Vikas Mahamandal Maryadit Vs. Kanti Shantilal and Company,](#)

(iii) [Shri. Nandkishor Kanhyalal Agrawal Vs. Dhule Municipal Corporation, The Administrator Dhule Municipal Corporation and Deputy Commissioner Dhule Municipal Corporation,](#)

9. The two decisions relied upon by Mr. Dani are of the Andhra Pradesh High Court and Madras High Court. They are :-

(i). Chekuri Ramachandra Raju Versus. Pathapati Satyanarayana Raju, reported in LAWS (APH)-1962-11-10, and

(ii) [Balakrishnan Vs. Ayyaswami,](#)

10. Jotiba Limbaji's decision (supra) is the direct decision on the question in which Single Judge of our High Court held that proceedings taken to set aside an ex-parte decree do not constitute "sufficient cause" within the meaning of s. 5 of the Indian Limitation Act, 1908, so as to extend the period of limitation of an appeal against the ex-parte decree on the merits, which had become time barred. The reasons therefor stated in the order read as follows :-

"The only question is whether the fact that the appellant took proceedings to set aside the ex parte decree can be held to constitute "sufficient cause" within the meaning of this section. It is difficult, in my opinion, to hold that on the facts there was any sufficient cause for not preferring an appeal within the period of limitation. It was perfectly open to the appellant to prefer an appeal against the ex parte

decree on the merits whilst he was prosecuting his application to have the ex parte decree set aside. The result of accepting the contention of the appellant would involve considerable waste of time. It is conceivable that after his 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 case considerable time may be lost. There is no reason why the appellant should not have pursued the remedies which the law allowed him and which seem to me to be concurrent. This view has found favour with the Calcutta High Court in [Ardha Chandra Rai Chowdhry Vs. Matangini Dassi](#), where it was observed by the learned Chief Justice as follows (p. 327) :-

"But the petitioner elected to make it, instead of appealing as (even supposing that the decree could be called an ex parte decree) he was entitled to do u/s 540 of the Code, and having failed in that application on the merits, we think we cannot now allow him to fall back upon the remedy which was open to him at the time, and of which he did not choose to avail himself."

With that view I respectfully agree."

11. The other two decisions cited by Mr. Kulkarni also of Single Judge of our High Court, rely upon Jotiba Limbaji's decision, to hold that time consumed in proceedings under Order 9 Rule 13 CPC to set aside ex-parte decree is not sufficient cause for condoning the delay in filing appeal from the decree.

12. Chekuri Raju's case (supra) of Andhra Pradesh High Court cited by Mr. Dani, considers a similar, though not identical, situation. It was considering an application for condonation of delay in filing Second Appeal, where delay had taken place on account of filing of an application under Order 41 Rule 21 for re-hearing of the appeal decided ex-parte. The argument before the Andhra Pradesh High Court was that, the applicant was bona-fide, prosecuting the other alternate remedy open to him and that there were no laches or negligence on his part in conducting the same. The respondent had contended, per-contra, that the remedies open to the applicant were concurrent but not mutually exclusive. Nothing had prevented the applicant in prosecuting both the remedies to establish his bona-fides and that there was nothing to show that he was ill-advised or misled. Of the different citations placed before it, the Andhra Pradesh High Court followed the decision of Division Bench of Madras High Court in [Peer Ammal and Another Vs. N.S. Nallusami Pillai and Others](#), to hold that, time taken for prosecuting the application under Order 41 Rule 21 can be a sufficient cause for condoning the delay. Andhra Pradesh High Court felt that, the decision of Madras High Court was binding on it. The relevant observations of the Andhra Pradesh High Court are :-

"The above decision of a Division Bench of the Madras High Court is binding on me. It laid down a principle that appeal need not be filed during the pendency of proceedings to set aside the ex parte decree. It approved of the contention which

was raised incidentally that the period covered by such proceedings could be excused u/s 5 of the Limitation Act though it did not discuss and decide about it. The above decision, therefore, shows that the Madras High Court was inclined on principle to hold that the period covered by proceedings to set aside the ex-parte decree including the period covered by further proceedings in the High Court was not a period during which the petitioner was bound to file an appeal disregarding the uncertainty referred to above."

13. The rival side had cited two decisions of Calcutta High Court before the Andhra Pradesh High Court. They were :-

(i) [Ardha Chandra Rai Chowdhry Vs. Matangini Dassi](#), and

(ii) [Rajendra Nath Kanrar Vs. Kamal Krishna Kundu Chowdhury](#),

The Andhra Pradesh High Court, however, did not discuss the ratio in the two decisions cited. Apparently because, it felt compelled to follow the Madras High Court decision. The two decisions, however, are cited with approval in the Bombay decision as mentioned above. Thus, the decision of Andhra Pradesh High Court in Chekuri Raju's case, is of no assistance in arriving at the answer to the question.

14. In Balkrishnan's case, the Madras High Court had to consider the same question as in Chekuri Raju's case. After general comments upon the provision of Section 5 of the Limitation Act, Madras High Court held as follows :-

"It is true that a party against whom an ex parte judgment has been rendered can only very well appeal from it to an appealable forum. But, when the Code grants him another remedy to move the same Court, which rendered the ex parte judgment for redress, he is in my judgement, not only entitled to pursue that remedy, but also entertain a reasonable hope of its success. It would be a sad commentary on O. 41 R. 21 and the rationale behind that provision if we were to hold that persons in the petitioner's position should put little or no faith in that remedy even while pursuing it. We may take it that the provision has been put into the body of the Code in all seriousness so that parties may resort to it wherever it is available. If the argument addressed for the respondent were to hold good. then that would not only have the effect of consigning this remedy into decrepitude but would also tend to undermine the very credibility of our Court system which is charged with administering the provisions. Be that as it may, the question for decision in this case is whether there is sufficient cause for the petitioner filing the second appeal out of time, having particular regard to the proceedings taken by him under O. 41. R. 21 and the inevitable time-lag they entailed. In my view, the very pendency of those proceedings furnished sufficient cause for the delay in the filing of the second appeal."

15. The Madras High Court has opined that, since the law provides another remedy for redressal from ex-parte decree, the defendant must have an opportunity to

resort to it. Otherwise, the remedy would be consigned into "decrepitude" which would undermine the very credibility of the Court system. As against this, our High Court in identical situation has observed that, it was perfectly open for the defendant to prefer appeal against the ex-parte decree on merits, whilst he was prosecuting his application to have the ex-parte decree set aside. Not having done so, would amount to electing one of the remedies. I respectfully agree with the view expressed by our High Court. There is no legal impediment in filing appeal against ex-parte decree after filing application for setting aside ex-parte decree. Though the remedies are concurrent, their scope is entirely different. In an application under Order 9 Rule 13 CPC, all that the Court has to see is, whether the summons in the suit was duly served or whether the defendant was prevented from appearing before Court by sufficient cause. If the Court is satisfied on either count, it may set aside the ex-parte decree and restore the suit to its original position. But in an appeal u/s 96 CPC, the appellate Court has wider jurisdiction to go into the merits of the decree. Therefore, it is for the concerned defendant to elect his remedy. The election would depend upon the facts available to a defendant for challenge to ex-parte decree. The facts would differ from case to case. Every defendant suffering from an ex-parte decree may not be able to allege non-service of summons or sufficient cause to remain absent. But he would be able to challenge the decree on merit. It is obvious that, the two remedies provided are for the purpose of maintaining the balance of justice even. In the facts of the case, where there is no service of summons or even after service of summons, the defendant is prevented by sufficient cause from appearing in the Court, the provision of Order 9 Rule 13 CPC provides full opportunity of trial to the defendant. But where such facts are not available, the defendant still gets an opportunity to challenge the decree just like any other defendant. In such case, there is no loss of time for the plaintiff. An unscrupulous defendant may file the application under Order 9 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 plaintiff 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.

16. In the case on hand, the petitioners filed suit for partition in the year 2007. It was decreed on 4th July, 2008. The respondents filed application under Order 9 Rule 13 CPC on 15th October, 2008. The application was dismissed on merits by the order dated 6th August, 2010. The respondents preferred Civil Appeal against the order on 3rd September, 2010. About 3 years thereafter i.e. on 11th June, 2013 the respondents withdrew the appeal without stating any reasons and on the next day

i.e. on 12th June, 2013 filed appeal alongwith application for condonation of delay. The impugned order allowing the application was passed on 20th February, 2014. Thus, already six years are lost for the petitioners.

17. The petitioners contested the application under Order 9 Rule 13 CPC alleging that, the story made out by the respondents of non-service of summons is false. The petitioner's objections are upheld by the trial Court. Withdrawal of the appeal by the respondents, would mean acceptance by them of the findings of the trial Court, that the story of non-service of summons is not true. With such false story, the respondents have succeeded in dragging the decree for six long years. This conduct on the part of the respondents is not bona-fide conduct. The petition is therefore allowed in terms of prayer clause (b).