

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on : 25.05.2011*
Judgment delivered on : 30.05.2011

+ **R.S.A.No. 137/2009 & CM No. 15370/2009**

LAL CHAND RAJORA Appellant
Through: Mr.Ajay Bansal & Mr. Sanjay
Dass, Advocates.

Versus

SANT LAL & OTHERS Respondents
Through: Ms. Manjusha Wadhwa &
Ms Gagan Deep Kaur,
Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 02.09.2009 which has endorsed the finding of the trial Judge dated 26.02.2001. Vide judgment and decree dated 26.02.2001 an ex-parte decree had been passed in favour of the plaintiff Sant Lal; the impugned judgment had dismissed the appeal; the appeal had been dismissed on limitation; it was held that there was a

delay of seven years and seven days delay in filing the appeal; dismissal of the appeal had resulted in endorsement of the decree of the trial Judge.

2 The plaintiff had filed the present suit against the defendant for dissolution of partnership and for rendition of accounts. Further details of the case are not necessary for the disposal of this appeal.

3 This is a second appeal. It has been admitted and on 02.12.2010, the following substantial question of law was formulated:-

“Whether the impugned judgment dated 2.9.2009 dismissing the appeal of the appellant on the ground of limitation without giving him the benefit of Section 14 of the Indian Limitation Act, 1963 was a perverse finding? If so, its effect?”

4 Following facts are undisputed:-

(i) an ex-parte decree had been passed in favour of the plaintiff and against the defendant on 26.02.2001 decreeing the suit of the plaintiff.

(ii) Application under Order 9 Rule 13 of the Code of Civil Procedure (hereinafter referred to as the ‘Code’) had been preferred on 08.08.2001.

(iii) The application under Order 9 Rule 13 of the Code had been dismissed on 08.11.2002.

(iv) Appeal under Order XLIII of the Code filed against the order dated 08.11.2002 had been dismissed on 02.04.2003; it was dismissed on the ground of limitation; it was held that the delay of seven days has not been explained.

(v) Revision petition had been filed against the order dated 02.04.2003. Revision petition had been allowed on 31.10.2006; delay had been condoned and the matter had been remanded back to the first appellate court to decide the appeal.

(vi) The first appellate court vide impugned judgment and decree dated 25.02.2008 dismissed the appeal.

(vii) Thereafter the second set of litigation started; appeal under Section 96 of the Code impugning the ex-parte decree dated 26.02.2001 was preferred; this was after a delay of 7 years and 7 days. It had been dismissed vide the impugned judgment dated 02.09.2009. It was held that it was barred by limitation; there was an unexplained delay of seven years and seven days. The impugned judgment had noted the contention of the appellant that he had been pursuing his remedy under Order 9 Rule 13 of the Code; it had noted that there were two avenues available to such an appellant against whom an ex-parte decree had been passed; he could pursue his remedy under Order 9 Rule 13 of the Code or

file an appeal under Section 96 of the Code; he having preferred

to choose his remedy under Order 9 Rule 13 of the Code and having spent more than 7 years and 7 days in pursuing that litigation; he could not after such an inordinate delay file an appeal under Section 96 of the Code; pursuance of remedy under Order 9 Rule 13 of the Code was not by itself a “sufficient cause” to condone the delay of 7 years and 7 days; appeal had accordingly been dismissed.

5 On behalf of the appellant, it has been urged that “sufficient cause” has to be construed with a liberal mind which should be a justice oriented approach. To support this proposition reliance has been placed upon (1987) 2 SCC 107 Collector, Land Acquisition, Anantnag & another Vs. Mst. Katiji & others as also another judgment of the Apex Court reported in (2005) 3 SCC 752 State of Nagaland Vs. Lipok AO and others. Reliance has also been placed upon AIR 2003 Bombay 52 Khurshed Banoo Vs. Vasant Mallikarjun Manthalkar to support his submission that only when the application under Order 9 Rule 13 of the Code is decided, can resort be taken to proceedings under Section 96 of the Code. The impugned judgment is liable to be set aside.

6 Arguments have been countered. Reliance has been placed upon 2004 INDLAW SC 1072 Bhanu Kumar Jain Vs. Archana Kumar & Another to support the submission that once the

applicant had availed of his remedy under Order 9 Rule 13 of the Code and his application had been dismissed right upto the High Court, he could not now avail a second remedy under Section 96 of the Code which was even otherwise admittedly barred by time i.e. by a period of 7 years and 7 days for which merely because he was pursuing his alternate remedy under Order 9 Rule 13 of the Code would not by itself entitle him to make out a case of 'sufficient cause' for condonation of delay.

7 Record has been perused.

8 At the outset learned counsel for the appellant has conceded that he is not pressing his submission qua Section 14 of the Limitation Act; his case would not fall in that category not relating to a defect of jurisdiction. The decree suffered by the appellant/defendant is dated 26.02.2001; it was an ex-parte decree. There is no dispute to the proposition that against such a decree there are alternate remedies available to such a party. The appellant could have filed an application under Order 9 Rule 13 of the Code for setting aside the ex-parte decree which he had done so in this case. Alternatively he could have preferred an appeal under Section 96 assailing the ex-parte decree on merits as also on the premise that he was prevented by sufficient cause from appearing before the concerned court at the relevant time.

9 Order 9 Rule 13 of the Code is relevant. It reads as follows:-

“13. Setting aside decree ex parte against defendant.-In any case in which a decree is passed ex parte against a 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 as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

¹[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim]

²[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.]”

10 The applicant in an application under Order 9 Rule 13 of the Code has to satisfy the following:-

- (i) Summons were not duly served.
- (ii) He was prevented from ‘sufficient cause’ from appearing when the suit was called for hearing.

11 If either of these two contingencies are satisfied, the ex-

parte decree may be set aside and the matter will fixed for hearing of the suit. The explanation appended to the Section is also relevant. It stipulates that where the applicant has chosen the remedy of filing an appeal under Section 96 of the Code and if the appeal has been dismissed on any ground other than for the reason that he had withdrawn the appeal, an application under Order 9 Rule 13 of the Code would not lie. This is clearly for the reason that once the ex-parte decree has been assailed on its merits; such an appeal having been preferred under Section 96 of the Code and the said appeal having been disposed of, by the necessary application of the doctrine of merger, the judgment of the trial court would merge with the judgment of the appellate court thereby confirming the ex-parte decree on merits. In these circumstances, an application under Order 9 Rule 13 of the Code which is much narrower in scope would not lie. The converse is however not correct. Even if the appellant has availed of his remedy under Order 9 Rule 13 of the Code, he is not precluded from seeking the alternate remedy under Section 96 of the Code; however the remedy sought should be as per the law.

12 In this case, the ex-parte decree dated 26.02.2001 had been challenged; that application had been dismissed on 08.11.2002.

Pursuant to other intervening litigations, the appeal against the
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order dated 08.11.2002 had been decided vide judgment dated 25.02.2008. It had been dismissed; this judgment had endorsed the finding of 08.11.2002; the ex-parte decree dated 26.02.2001 had been endorsed.

13 Thereafter the second set of proceedings was preferred by the appellant which was an appeal under Section 96 of the Code. This was after a delay of 7 years and 7 days; delay being attributed to the fact that in this 7 years and 7 days he was pursuing the alternate remedy of Order 9 Rule 13 of the Code in a bonafide manner.

14 The valuable right of a first appeal to be filed before the first appellate Court cannot be lost sight of; the scope of an appeal under Section 96 of the Code and an appeal under Order XLIII of the Code challenging the dismissal order dismissing the application under Order 9 Rule 13 of the Code have two different connotations. The scope of an appeal under Section 96 of the Code is much wider; powers of the first appellate court include powers to pass any order which it may deem fit in the interest of justice; the first appellate court is in fact duty bound to examine each and every aspect of the judgment of the trial court both on facts as also on law. The scope of an appeal under Order XLIII of the Code (which is the provision under which an order rejecting

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an application under Order 9 Rule 13 of the Code is assailable) is much narrower; Order 9 Rule 13 of the Code is restricted in its scope; in such an application the ex-parte decree may be set aside if the applicant is able to show that there is a sufficient cause for his absence on the said date or if he shows that the summons had not been duly served upon him.

15 Remedy available to such an applicant against whom an ex-parte has been passed is both under Order 9 Rule 13 of the Code as also under Section 96 of the Code. There was no bar in pursuing both the remedies simultaneously. Limitation for the purposes of availing the said two remedies is also different. An application under Order 9 Rule 13 of the Code had to be filed within 30 days from the date of the order; an appeal under Section 96 of the Code is maintainable within 90 days in this case. The plaintiff has slumbered over his right for 7 years and 7 days which was for no valid reason; pursuing his remedy under Order 9 Rule 13 of the Code for this long period does not fall within the scope of a "sufficient cause". There is no doubt that "sufficient cause" has to be construed liberally to advance the substratum of justice but at the same time, the provisions of Section 5 of the Limitation Act is not available to a casual litigant; approach of the plaintiff in this case appears to be casual, bordering on the point of

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negligence. Explanation of Order 9 Rule 13 of the Code also reflects the intent of the Legislature. The explanation clearly states that if a person has pursued his remedy under Section 96 of the Code and his appeal stands dismissed, he cannot avail of his remedy under Order 9 Rule 13 of the Code. The converse to this is that the remedy under Section 96 of the Code is not barred; right of first appeal is a valuable right and this has been recognized by the Supreme Court in Bhanu Kumar Jain (Supra) but at the same time this remedy has to be availed of as per the law which in this case has provided limitation of 90 days for filing such an appeal.

16 The Apex Court in the case of Bhanu Kumar Jain (Supra) had noted herein as under:-

“In an application under Order 9 Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

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 9 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 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable.

However, Explanation I appended to the said provision does not suggest that the converse is also true.

In an appeal filed in terms of Section 96 of the Code having regard to Section 105 thereof, it is also permissible for an appellant to raise a contention as regards correctness or otherwise of an interlocutory order passed in the suit, subject to the conditions laid down therein.

It is true that although there may not be a statutory bar to avail two remedies simultaneously and an appeal as also an application for setting aside the ex parte decree can be filed; one after the other; on the ground of public policy the right of appeal conferred upon a suitor under a provision of statute cannot be taken away if the same is not in derogation or contrary to any other statutory provisions.

There is a distinction between “issue estoppel” and “res judicata”. (See *Thoday v. Thoday*¹⁵.)

Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by accord.

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We have, however, no doubt in our mind that when an application under Order 9 Rule 13 of the Code is dismissed, the defendant can only avail a remedy available there against viz. to prefer an appeal in terms of Order XLIII Rule 1 of the Code. Once such an appeal is dismissed, the appellant cannot raise the same contention in the first appeal. If it be held that such a contention can be raised both in the first appeal as also in the proceedings arising from an application under Order 9 Rule 13, it may lead to conflict of decisions which is not contemplated in law.

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*⁵, *P. Kiran Kumar*⁶ and *Shyam Sundar Sarma v. Pannalal Jaiswal and others* {2004 (9) SCALE 270}

17 The Apex Court in *Bhanu Kumar Jain* has also noted that in an application under Order 9 Rule 13 of the Code, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to plead that he had sufficient cause for not being able to attend the hearing on the relevant time. Even otherwise, an ex-parte decree is based on averment of the plaintiff emanating from his pleading and his evidence; defence of the defendant is not under consideration.

The plaintiff having availed and exhausted his remedy under Order 9 Rule 13 of the Code and there being no valid explanation amounting to a "sufficient cause" to condone this inordinate delay of 7 years and 7 days in filing the appeal under Section 96 of the Code, the impugned judgment dismissing his appeal calls for no interference.

18 Substantial question of law is accordingly answered in favour of the respondent and against the appellant. There is no merit in this appeal. Appeal as also pending application are dismissed.

INDERMEET KAUR, J.

MAY 30, 2011

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