

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9132 OF 2014
WITH
WRIT PETITION NO. 9285 OF 2015

Ramsagar Shivmurti Yadav .. Petitioner
VS.
State of Maharashtra & Ors. .. Respondents

Mr. Uday Warunjikar with Mr. Anil Tripathi i/b. Mr. Prem Kumar Pandey for Petitioner.

Mr. S. D. Rayrikar – AGP for Respondent No. 1.

Mr. Rajesh S. Datar for Respondent No. 3.

CORAM : M. S. SONAK, J.
DATE: 23 SEPTEMBER 2015

P.C. :-

1] The challenge in both these petitions is to the common order below Exhibits '22' and '28' in Misc. Application No. 124 of 2014 instituted by the petitioner seeking condonation of delay for over three and half years in filing application under Order IX Rule 13 of the CPC to set aside exparte decree dated 18 October 2010. By the order under Exhibit '28', the learned Trial Judge has refused to condone the delay. The order Exhibit '22' frames an issue as to whether the suit itself was maintainable. However, there is an obvious error in the wordings used, in as much as what was intended was whether application under Order IX Rule 13 of the CPC was at all maintainable.

2] In view of the facts circumstances of this case, it is quite clear that application under Order IX Rule 13 of the CPC was not at all maintainable and therefore, there is absolutely no necessity to interfere with the impugned order. In this case, ex parte decree was made on 18 October 2010. The petitioner instituted an appeal against the same. Since such appeal was lodged almost 368 days beyond the prescribed period of limitation, the application was made for condonation of delay. The Appeal Court by its order dated 6 March 2013 declined to condone the delay and consequently the Appeal was also dismissed. Against the order dated 6 March 2013, the petitioner instituted writ petition no. 6086 of 2013, which was also dismissed by judgment and order dated 21 December 2013.

3] Thereafter, i.e. on 10 February 2014, the petitioner filed application under Order IX Rule 13 of the CPC seeking to set aside the ex parte decree dated 18 October 2010. Since this was lodged much beyond the prescribed period of limitation, an application was filed seeking condonation of delay. Although the application seeking condonation of delay does not specify the quantum of delay, it was obvious that the delay is well over three and half years. The Respondent landlord filed application at Exhibit '22' objecting to the maintainability of application under Order IX Rule 13 of the CPC,

relying upon the Explanation to Order IX Rule 13 of the CPC. By the impugned order, the Trial Court has declined to condone the delay and further, allowed the application at Exhibit '22'. Hence, the two petitions.

4] The writ petition no. 9132 of 2014 is virtually infructuous considering that the Trial Court has dismissed the application under Order IX Rule 13 of the CPC by refusing to condone the delay in the lodging of the same. Nevertheless both these petitions are being disposed of by this common order.

5] Order IX Rule 13 of the CPC reads thus :

“13. Setting aside decree ex parte against defendants.-

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;

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 plaintiffs claim.

Explanation.- Where there has been an appeal against a decree against 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 or setting aside the ex parte decree."

6] The Explanation to Order IX Rule 13, in terms provides that where the appeal has been preferred against the decree passed exparte 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 the exparte decree. Mr. Warunjikar, the learned counsel for the petitioner however contends that in this case, though the appeal had been filed against the exparte decree the same was not disposed of on merits but rather, the appeal was not at all entertained because the application seeking condonation of delay in filing the appeal came to be dismissed. In such circumstances, Mr. Warunjikar submitted that the Explanation to Order IX Rule 13 will not apply and therefore an application for setting aside the exparte decree was very much maintainable. It is not possible to accept the contention of Mr. Warunjikar both on the basis of the letter of the law as also precedent. The Explanation is quite clear, it

provides that where the *exparte* decree is appealed against and such appeal is disposed of on any ground, other than the ground that the appellant has withdrawn the appeal, no application shall lie under Order IX Rule 13 of the CPC for setting aside the *exparte* decree. In the present case, the appeal instituted by the petitioner has no doubt been disposed of. Further, such appeal was not disposed of on the ground that the petitioner had withdrawn the same. Therefore, the Explanation to Order IX Rule 13 clearly applies and on the basis of the same, the petitioner's application under Order IX Rule 13 for setting aside the *exparte* decree was not at all maintainable.

7] The aforesaid issue is no longer *res integra*. The Hon'ble Apex Court, in the case of *Shyam Sunder Sarma vs. Pannalal Jaiswal & Ors.*,¹ in almost identical circumstances and upon duly considering the provisions of Order IX Rule 13 of the CPC and the Explanation thereto has held that even when an appeal against the *exparte* decree came to be disposed of on the ground that no sufficient cause was shown to condone the delay in filing the same, the Explanation to Order IX Rule 13 of the CPC will apply and no further application will lie to set aside the very same *exparte* decree by resort to the provisions of Order IX Rule 13 of the CPC. The Hon'ble Apex Court placed reliance upon its earlier decision in the

1 2005 (5) ALL MR (S.C.) 152

case of *Rani Choudhury vs. Lt. Col. Suraj Jit Choudhury*² and at paragraph 13 has observed thus :

“13. In the context of the explanation to Order IX Rule 13 of the Code, the question was squarely considered by this Court in Rani Choudhury’s case (supra). The High Court, in our view, has rightly held that the decision of this case is directly covered by that decision. Therein, the plaintiff, the wife, obtained an ex parte decree for divorce against the husband, the defendant. The husband preferred an appeal in the High Court against the decree and also made an application under Section 5 of the Limitation Act for condoning the delay in filing that appeal. The High Court dismissed the appeal as being time barred. The husband, the defendant, then filed a petition under Order IX Rule 13 of the Code for setting aside the ex parte decree along with an application under Section 5 of the Limitation Act. The trial court dismissed the application holding that no sufficient cause was made out for condoning the delay in filing the petition under Order IX Rule 13 of the Code. The husband filed a Civil Miscellaneous Appeal in the High Court challenging the said order of the trial court. The High Court took the view that the explanation to Order IX Rule 13 of the Code did not create a bar to the maintainability of the petition under that Rule as the appeal against the ex parte decree had been dismissed not on merits but on the ground of limitation by not accepting the application for condonation of delay which meant that no appeal was preferred in the eye of law. This view of the High Court was challenged in appeal before this Court. It was argued that the High Court has misunderstood the scope and ambit of the explanation to

2 (1982) 2 SCC 596

Order IX Rule 13 of the Code and that in the circumstances, the High Court should have held that the petition under Order IX Rule 13 of the Code would not lie. This Court accepted that contention. This Court held that where there has been an appeal against an ex parte decree and the appeal has not been withdrawn by the appellant and had been disposed of on any ground, the application under Order IX Rule 13 of the Code would not lie and should not be entertained. Hence, even though the appeal against the ex parte decree was disposed of on the ground of limitation and not on merits, the explanation to Order IX Rule 13 of the Code was attracted and hence no petition under Order IX Rule 13 of the Code would lie. On the scope of the explanation, it was stated that the disposal of the appeal as contemplated in the explanation was not intended to mean or imply a disposal on merits resulting in the merger of the decree of the trial court with a decree, if any, of the appellate court on the disposal of the appeal. The disposal of the appeal may be on any ground and though the withdrawal of an appeal by an appellant is also to be considered a disposal of the appeal, the same has been expressly exempted by the explanation. It was also observed that the legislative intent incorporated in the explanation to Order IX Rule 13 of the Code was to confine the defendant to a single course of action and to discourage the prolonging of the litigation on the ex parte decree, namely, by preferring an application to the trial court under Order IX Rule 13 of the Code for setting aside the decree and by filing an appeal to a superior court against it. If he did not withdraw the appeal filed by him or allowed the appeal to be disposed of on any other ground, he was denied the right to apply under Order IX Rule 13 of

the Code. The Court also clarified that by the introduction of the explanation, the area of operation of the doctrine of merger was enormously extended. By virtue of the explanation, the disposal of the appeal on any ground whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation. In the light of this, it was held that though in that case the appeal filed by the husband against the ex parte decree was dismissed on the ground of it being barred by limitation, it was a disposal of the appeal and the petition under Order IX Rule 13 of the Code was hit by the explanation. In P. Kiran Kumar vs.A.S. Khadar and others [(2002) 5 SCC 161] this Court followed the decision in Rani Choudhury (supra) and held that the dismissal of the appeal against an ex parte decree as barred by limitation, prevented the trial court which passed the ex parte decree, from exercising its power under Order IX Rule 13 of the Code in view of the explanation."

[Emphasis supplied)

8] The aforesaid is a clear answer to the contentions of Mr. Warunjikar that since appeal in the present case, was allegedly not decided on merits, the further application under Order IX Rule 13 of the CPC was maintainable in the facts and circumstances of this case. Both, in terms of the provisions contained in Order IX Rule 13 of the CPC as also decisions of the Hon'ble Apex Court, it is clear that said application under Order IX Rule 13 of the CPC was not at all maintainable.

9] In view of the aforesaid, there is absolutely no jurisdictional error in the making of the impugned orders. These petitions are accordingly dismissed. There shall however be no order as to costs.

(M. S. SONAK, J.)

Chandka

CERTIFICATE

“Certified to be true and correct copy of the original
signed Order.”