

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**REVIEW PETITION (ST) NO.1297 OF 2016
IN
WRIT PETITION NO. 9439 OF 2015**

Jagannath Mithu Shinde and Ors Petitioners
Vs

Sahebu Dharmu Shinde (since deceased) through LRs and Ors. .. Respondents

Mr. Vishwanath S. Talkute, Advocate for Petitioners.
Mr. Prabhanjan Gujar, Advocate for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 02/03/2016

PC:

1. Heard Mr. V.S.Talkute, learned counsel for the petitioners and Mr. Prabhanjan Gujar, learned counsel for the respondents, at length.
2. By this Petition under Section 114 read with Order 47 Rule 1 of CPC, the petitioners have sought review of order dated 8.12.2015 passed by this Court in Writ Petition No.9439 of 2015. By that order, the Judgment and order dated 4.8.2015 passed by the learned District Judge, Satara, below Exhibit-1 in Civil Misc. Application No.82 of 2013 was set aside. By order dated 4.8.2015, the learned District Judge refused to condone the delay in filing the application for restoration of Regular Civil. Appeal No.69 of 1997, which was dismissed in default on 21.1.2004.
3. Mr. Talkute submitted that on 6.1.2004, the learned District Judge directed the respondents to deposit paper book charges on

or before 21.1.2004, failing which the Appeal was to stand dismissed. The respondents/appellants did not deposit the paper book charges. On 21.1.2004, the learned District Judge passed the following order:

“Nobody is present for the appellants. They have not deposited necessary paper book charges. Hence, the Appeal is dismissed under Order 41, Rule 18-A of CPC.”

4. Mr. Talkute submitted that as the Appeal was dismissed under Order 41, Rule 18-A, the appellants had remedy of filing application under Order 41, Rule 19 for re-admission of the appeal which was dismissed for default. He invited my attention to Bombay High Court Amendment to Order 41, Rule 19 and submitted that if the Appeal is dismissed under Order 41, Rule 18-A, the appellant has to apply to the appellate court for re-admission of the appeal. If application is rejected by the District Court, the respondents have remedy of preferring Appeal from Order under Order 43, Rule 1(t) read with Section 106 of C.P.C. in this Court. In short, he submitted that the writ petition instituted by the respondents in this Court against the order dated 4.8.2015 itself was not maintainable and the respondents ought to have preferred Appeal from Order as contemplated by Order 43, Rule 1(t) read with section 106 in this Court.

5. He further submitted that if the respondents have an equally efficacious alternate statutory remedy, this Court should not invoke powers under Article 227 of the Constitution of India.

He relied upon the decision of the Apex Court in the case Durga Prasad Vs. Navinchandra, (1996) 3 SCC 300 and in particular paragraph 3 thereof. He, therefore, submitted that the order under review deserves to be recalled, thereby, dismissing the writ petition on the ground of maintainability.

6. On the other hand, Mr. Gujar supported the impugned order. He submitted that, in the first place, no such contention was advanced while deciding the writ petition. Secondly, he submitted that after the appeal was dismissed in default on 21.1.2004, the respondents filed application for restoration. As there was delay in filing the application for restoration, the respondents took out application for condoning the delay in filing the application for restoration. That application was rejected by the learned District Judge. In short, he submitted that the learned District Judge did not reject the application made by the respondents for re-admitting the appeal as contemplated by Order 41, Rule 19 of C.P.C. and, therefore, it is not appealable order under Order 43, Rule 1.

7. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the suit instituted by the respondents-plaintiffs, being Regular Civil Suit No.80 of 1989 for partition and separate possession was dismissed by the trial Court on 11.10.1996. The respondents thereafter instituted

Regular Civil Appeal No. 69 of 1997. On 6.1.2004 the learned District Judge directed the plaintiffs to deposit paper book charges on or before 21.1.2004, failing which, the appeal would stand dismissed. As paper book charges were not deposited on or before 21.1.2004, the learned District dismissed the appeal under Order 41, Rule 18-A of C.P.C. The respondents thereafter filed restoration application and since there was delay in filing the restoration application, they took out application dated 15.4.2013 for condoning the delay in filing restoration application. By order dated 4.8.2015, the learned District Judge rejected the application.

8. The moot question is whether against the order dated 4.8.2015, the respondents have an equally efficacious statutory remedy of filing Appeal from Order under Section 106 read with Order 43 Rule 1(t) of C.P.C. Order 41, Rules 18-A and Rule 19, as applicable to Bombay, read thus:

“18-A. Dismissal for want of prosecution.— Where after the admission of an appeal the rules or the special directions of the Court require the appellant to take any steps in the prosecution of the appeal before a fixed date, and where after due notice intimating the steps to be taken the appellant fails to take such steps within the time prescribed by the rules or allowed by the Court, the Court may direct the appeal to be dismissed for Want of prosecution or may pass such other order as it thinks fit, (1.10.1983) and (1.4.1987).”

“19. Re-admission of appeal dismissed for default.— Where an appeal is dismissed under Rule 11, sub-rule (2), or Rule 18-A or Rule 17 or Rule 18, the appellant may apply to the Appellate Court for readmission of the appeal and where it is proved that he was prevented by any sufficient cause from

appearing when the appeal was called on for hearing or in taking the necessary steps in the prosecution of the appeal or from depositing the sum so required the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”

9. Perusal of order 41, Rule 18A shows that where the Court after admission of the appeal issues special directions requiring the appellant to take any steps in prosecution of appeal before a fixed date and where after due notice intimating the steps to be taken, the appellant fails to take such steps within the time prescribed by the Rules or allowed by the Court, the Court is empowered to dismiss the appeal for want of prosecution or pass such other orders as it thinks fit.

10. Order 41, Rule 19 shows that where an appeal is dismissed under Rule 18-A, among others, the appellant may apply to the appellate court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or in taking steps in the prosecution of the appeal or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit. Perusal of this provision shows that if the appellate court is satisfied that the cause made out by the appellant is sufficient that prevented him from taking necessary steps in prosecuting the appeal or from depositing the sum so required, the court has power to readmit the appeal.

Section 104(1) reads thus:

“104. Orders from which appeal lies.- (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:—

[Cls. (a) to (f) omitted by Act 10 of 1940]

[(ff) an order under section 35A;]

[(ffa) an order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be;]

(g) an order under section 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

[Provided that no appeal shall lie against any order specified in clause (if) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.]”

Section 104(1) lays down that an appeal shall lie from the orders enumerated therein and **from no other orders**.

(emphasis supplied)

11. Order 43 Rule 1(t) reads thus:

“XLIII, Rule 1. Appeals from orders – An appeal shall lie from the following orders under the provisions of section 104, namely:-

(a) to (s) xx xx xx

(t) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-her, an appeal;”

12. Perusal of Order 43 (1)(t) shows that Appeal from order lies from an order of refusal under Rule 19 of Order 41 to re-admit. In

the present case, the order impugned is not the order refusing to re-admit the appeal under Rule 19 of Order 41 of C.P.C. In view thereof, I do not find any merit in the submission of Mr Talkute that the respondents herein ought to have instituted Appeal from order against the order dated 4.8.2015 as basically the said order does not fall under Order 41, Rule 19 of C.P.C.

13. Mr. Talkute relied upon the following decisions:

(i) Sheodan Singh Vs. Smt Daryao Kunwar, AIR 1966 SC 1332;

(ii) Taibai Motiram Bhagat Vs. Shri Gopinath Babu Patil (Coram R.M.Savant, J.) in Writ Petition No.7869 of 2012 decided on 1.12.2014, to contend that where appeal is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial Court's decision stands confirmed, the decision of the appeal court is res judicata and the appeal court must be deemed to have heard and decided the matter. In such a case, result of the decision of the appeal court is to confirm the decision of the trial court given on merits and if that is so , the decision of the appeal court will be res judicata whatever may be the reason for the dismissal. He further submitted that the said decision is considered subsequently in the following decisions:

(1) Sheodan Singh (supra)

(2) Shyam Sundar Sarma Vs Pannalal Jaiswal (2005) 1 SCC 436;

(3) Taibai Motiram Bhagat Vs. Shri Gopinath Babu Patil (Coram R.M.Savant, J.) in Writ Petition No.7869 of 2012 decided on

1.12.2014.

(4) Sarjerao Bhanudas Gulamkar Vs. Minabaksha Gulab Tamboli, Writ Petition No.466 of 2016 of this Court decided on 19.1.2016.

14. In the case of Shyam Sundar Sarma (supra), it is held that where an appeal is dismissed for refusing to condone delay, nevertheless, a decision in appeal and, therefore also writ petition is not maintainable. In the case of Taibai Motiram Bhagar (supra), the learned Single Judge of this Court referred the decision of Sheodan Singh case and observed that the respondents will have to take recourse to filing of appeal against the order dated 4.8.2015. In the case of Sarjerao Bhanudas Gulamkar (supra), the learned Single Judge of this Court observed that writ petition under Article 227 of the Constitution was not maintainable.

15 In my opinion, reliance placed by Mr. Talkute on the decision of Apex Court in Shiodan Singh (supra) as also , does not advance the case of the petitioner as I have already held that Appeal from order lies against order rejecting the application under Order, 41 Rule 19 for re-admission of the appeal. Mr. Talkute does not contend that respondents ought to have preferred Second Appeal. What he contends is that they must prefer Appeal from order against order dated 4.8.2015.

16. Mr Gujar relied upon the decision of this Court in Shahurao

Sitaram Bhalerao Vs Vishwanath Rama Jadhav, 2014 (2)

Bom.C.R. 389. This Court considered the decision of Shyam

Sundar Sarma (supra) and observed in paragraphs 6 to 8 thus:

“6. Both the learned Counsel have strenuously argued this short point. In the case of Shyam Sundar Sarma (supra), appeal was not filed but appeal along with application for condonation of delay was filed and the said application for condonation was refused, the appeal in the result, was dismissed. In the present case, appeal was already filed, notices were also served on some of the respondents. However, it was dismissed for want of prosecution. If the appeal is dismissed for default under Rule 11 and Rule 17 of Order XLI of the Code of Civil Procedure, then the remedy available is to apply to the Court for re-admission of the appeal under Rule 19 of Order XLIII of the Civil Procedure Code. If that application for restoration or re-admission is rejected, then the appellant is required to file appeal from the said order, as provided under Order XLIII, Rule 1(t) of the Code of Civil Procedure.

7. In the present case, the issue is of re-admission of the appeal, as the appeal is dismissed for default. If the application for restoration or re-admission would have been rejected, the appellant had clear remedy under Order XLIII Rule 1(t) of the Code of Civil Procedure. In the present case, there is one more step i.e. filing and refusal of application for condonation of delay for filing the restoration application. Order XLIII of the Civil Procedure Code states about the appeals from orders, which are mentioned under Section 104 of the Code of Civil Procedure. Thus, Section 104 of the C.P.C. has direct bearing over Order XLIII of the C.P.C. Thus, the orders which are specifically mentioned under Section 104 of the C.P.C. and thereby enumerated under Order XLIII of the C.P.C. are appealable under the caption " Appeals from orders ". Section 104(2) of the C.P.C. explains the scope of Order XLIII of the C.P.C. which reads as, "No appeal shall lie from any order passed in appeal under this section".

8. Under Section 5 of the Limitation Act, application for condonation of delay is moved and the said provision is not listed in Rule 1 of Order XLIII of the C.P.C. Though there is provision of appeal against order of refusal of application for re-admission/restoration, made under Rule 19 of Rule XLI of the C.P.C., there is no provision of appeal against order of

rejection of application for condonation of delay. Thus, Rule 1(t) of Order XLIII of the C.P.C. specifically covers order of refusal under Rule 19 of Order XLI to readmit, or under rule 21 of Order XLI to re-hear an appeal. Therefore, submission of Mr. Thigle that the petitioners ought to have filed appeal from order under Order XLIII Rule 1(t) of the C.P.C., is not sustainable within the folds of Order XLIII of the C.P.C.”

Perusal of paragraphs 6 to 8 shows that this Court held that under Order 43 Rule 1(t) specifically covers order of refusal of application under Rule 19 of Order 41 to readmit, or under Rule 21 of Order 41 to re-hear an appeal and, the application made for condonation of delay is not covered under Order 43 Rule 1(t). In my opinion, the decision in the case of Shahurao S Bhalerao (supra) applies to the facts of the present case.

17. In view thereof, I do not find any merit in the submission of Mr. Talkute that the respondents ought to have instituted Appeal from order and writ petition under Article 227 of the Constitution of India was not maintainable.

18. No other contention was advanced.

19. In the case of **Kamlesh Verma Vs. Mayawati**, AIR 2013 Supreme Court 3301, it is observed by the Apex Court as under:

“The jurisdiction and scope of review is not that of an appeal and it can be entertained only if there is an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected, but lies only for patent error. Error contemplated under the rule must be such which is apparent on the face of the

record and not an error which has to be fished out and searched. It must be an error of inadvertence. The power of review can be exercised for correction of a mistake but not to substitute a view. “

20. In view thereof, no case is made out for review of the order.

Hence, Petition fails and is dismissed.

(R.G.KETKAR, J.)