

IN THE HIGH COURT OF JUDICATURE AT MUMBAI  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO.8502 OF 2016

M/s. Amratlal Dhirajlal & Co. ... Petitioner  
Vs.  
Kamelsingh Harnamsingh Chowhan and another ... Respondents

Mr. G. S. Godbole, Senior Advocate i/b. Mr. Parag M. Tilak for Petitioner.  
Mr. A. A. Kumbhakoni, Senior Advocate a/w. Mr. Vivek Kantawala and  
Mr. Amey Patil i/b. M/s. Vivek Kantawala & Co. for Respondent No.1.

**CORAM : R. G. KETKAR, J.**  
**DATE : AUGUST 08, 2016**

**ORDER :**

Heard Mr. Godbole, learned Senior Counsel for petitioner and  
Mr. Kumbhakoni, learned Senior Counsel for respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'defendant No.2' has challenged the judgment and order dated 27.06.2016 passed by the Appellate Bench of the Small Causes Court at Mumbai in 5b(i) Marji Application No.142 of 2016. By that order, the appellate Court rejected the application filed by the petitioner for condoning the delay of 793 days in preferring appeal against the judgment and order dated 26.02.2014 passed by the learned trial Judge in R.A.E. Suit No.291/451 of 2007.

3. Respondent No.1, hereinafter referred to as 'plaintiff', had instituted R.A.E. Suit No.291/451 of 2007 against defendant No.1 - Parekh & Company and defendant No.2 M/s. Amratlal Dhirajlal & Co. for recovery of possession of rooms No.A-10 and A-11 on the first floor of Lalsingh Mansingh Building surrounded on three sides by Lohar Chawl, Seikh Memon Street and Kitchen Garden Lane at Mumbai 400

002, hereinafter referred to as 'suit premises' and 'suit building' respectively. Defendants were duly served with the summons. Defendant No.1 failed to appear and file written statement and Suit proceeded ex-parte against it. Defendant No.2 resisted the Suit by filing written statement at exhibit-12. On the basis of the pleadings of the parties, the learned trial Judge framed necessary issues. In support of plaintiff's case, he examined himself at exhibit-32 and filed additional affidavit of evidence at exhibit-60. Plaintiff examined P.W.2 Anant Dattatreya Shintre, Architect and Structural Engineer at exhibit-67. P.W.1 was partly cross-examined by the defendants. Defendants failed to lead evidence. By judgment and decree dated 26.02.2014, the learned trial Judge decreed the Suit.

4. On 25.07.2014, Kishanlal Maganlal Parekh, partner of defendant No.2 filed Marji Application No.436 of 2014 under Order IX, Rule 13 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') inter alia for setting aside ex-parte decree and restoration of the Suit, after condoning the delay in taking out the application. By order dated 05.12.2014, the learned trial Judge rejected the application. Aggrieved by that decision, defendant No.2 preferred Miscellaneous Appeal No.5 of 2015. By judgment and order dated 16.01.2016, the Appellate Bench of the Small Causes Court dismissed the Appeal. Aggrieved by these orders, defendant No.2 instituted Civil Revision Application No.109 of 2016 in this Court. By order dated 21.04.2016, C.R.A. was rejected. Aggrieved by this order, defendant No.2 preferred Special Leave Petition. By order dated 24.05.2016, the Apex Court dismissed the S.L.P.

5. It is thereafter defendant No.2 instituted substantive appeal on 02.06.2016 under Section 96 of the C.P.C. challenging the judgment and decree dated 26.02.2014 passed by the learned trial Judge. Defendant

No.2 also took out Marji Application No.142 of 2016 on 02.06.2016 for condoning the delay in filing the first appeal. By the impugned judgment and order dated 27.06.2016, the appellate Court dismissed the application. It is against this order, defendant No.2 has instituted the present Petition.

6. In support of this Petition, Mr. Godbole strenuously contended that the appellate Court should have condoned the delay in filing the substantive appeal. By refusing to condone the delay, the substantive appeal stands dismissed on technical ground and not on merits. This has resulted into serious consequences as the eviction decree can be executed against the defendant No.2. Mr. Godbole relied upon the following decisions:

- a. *Khurshed Banoo Murtaza Hasan Vs. Vasant Mallikarjun Manthalkar*, 2003 (2) Bom.C.R.627;
- b. *Shyamlal Kanti Danda Vs. Chunilal Choudhary*, (1984) 4 SCC 345;
- c. *Collector, Land Acquisition Vs. Katiji*, (1987) 2 SCC 107;
- d. *Sheshrao Vithobaji Lakhapurkar Vs. Shyamrao Shiladin Jaiswal*, 2011 (5) Bom.C.R. 23;
- e. *Jyoti Sakharam Bhogle Vs. Saraswat Co-operative Bank Limited*, 2014 (3) All.M.R.344;
- f. *Bhanu Kumar Jain Vs. Archana Kumar*, (2005) 1 SCC 787;
- g. *Balu Gangaram More Vs. Bhivchandra Shankar More*, 2015 (2) Mh.LJ 879 and
- h. *Rani Choudhary Vs. Lt. Col. Suraj Jit Choudhury*, (1982) 2 SCC 596.

7. Relying upon these judgments, he submitted that if defendant No.2 were to file application under Order IX, Rule 13 as also substantive first appeal under Section 96 of C.P.C., plaintiff would be placed in an unfortunate position of being dragged through two courts in simultaneous proceedings. Public time and private convenience and money was sought to be saved by enacting the Explanation to Order IX, Rule 13. The Code of Civil Procedure (Amendment) Act, 1976 was enacted with the avowed purpose of abridging and simplifying the procedural law. By enacting the Explanation, PWParliament left it open to the defendant to apply under Order IX, Rule 13 for setting aside an ex-parte decree only if the defendant had opted not to appeal against the ex-parte decree or, in the case where he had preferred an appeal, the appeal had been withdrawn by him. It obliged the defendant to decide whether he would prefer an adjudication by the appellate court on the merits of the decree or have the decree set aside by the trial court under Order IX, Rule 13. The legislative attempt incorporated in the Explanation was to discourage a two-prolonged attack on the decree and to confine the defendant to a single course of action as held by Hon'ble Mr. Justice R. S. Pathak (as the learned Chief Justice of India then he was).

8. Mr. Godbole also relied upon the decision of Andhra Pradesh High Court in the case of ***Polsani Jagannath Reddy Vs. Gurram Vijaya*, 1998 (4) ALT 257**. He invited my attention to the decision of this Court in the case of ***Balu Gangaram More* (supra)**, and in particular paragraph 15. In paragraph 15, the learned Single Judge referred to the decision of the Madras High Court in ***Balakrishnan Vs. Ayyaswami*, Laws (Mad.) 1982-7-7** and observed thus,

“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 IX 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 under Section 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 IX 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 IX 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.”**

*(emphasis supplied)*

9. In paragraph 15, the learned Single Judge observed that this Court in identical situation has observed that, it was perfectly open to 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. He submitted that this statement of law is contrary to the decision of the Apex Court in the case of **Rani Choudhury** (*supra*). On merits, he has taken me through the application made by the defendant No.2 for condoning the delay and submitted that for the reasons stated therein, defendant No.2 made out sufficient cause and the appellate Court should have condoned the delay.

10. On the other hand, Mr. Kumbhakoni relied upon the following decisions:

- a. ***Jotiba Limbaji Kanashenavar Vs. Ramappa Jotiba Kanashenavar***, AIR 1938 BOM 459;
- b. ***Maharashtra Rajya Sahakari Adiwasi Vikas Mahamandal Maryadit through its Regional Manager Vs. M/s. Kanti Shantilal & Co.***, (2003) Vol. 105 (2) Bom.L.R. 349;
- c. ***Nandkishor Kanhayalal Agarwal Vs. Dhule Municipal Corporation***, 2012 (1) Mh.L.J. 918;
- d. ***Jokam Reddy Vs. Kokar Malliah***, AIR 1976 AP 399, and in particular paragraph 6 thereof.

11. He also relied upon paragraph 26 of **Bhanu Kumar Jain** (*supra*) and in particular paragraph 26 thereof to contend that the remedies under Order IX, Rule 13 and Section 96 are concurrent / simultaneous. He, therefore, submitted that no case is made out for condoning the delay and consequently, interfering with the impugned order.

12. I have considered the rival submissions advanced by the learned Senior Counsel appearing for the parties. I have also perused the material on record. The facts noted hereinabove are not in dispute. As noted earlier, the application filed by the defendant No.2 under Order IX, Rule 13 of C.P.C. was rejected by the trial Court. Appeal preferred by the defendant No.2 was dismissed. C.R.A. filed by the defendant No.2 was rejected, and ultimately, S.L.P. was dismissed on 24.05.2016. It is only thereafter, defendant No.2 filed Marji Application on 02.06.2016 for condoning the delay of 793 days in filing substantive appeal under Section 96 of the C.P.C. The moot question is whether the time spent by defendant No.2 in pursuing remedy under Order IX, Rule 13 constitutes sufficient cause as contemplated by Section 5 of the Limitation Act. In my opinion, the answer is in the negative for the following reasons.

13. In the case of **Jotiba Limbaji Kanashenavar** (*supra*), the learned Single Judge of this Court observed thus,

“... 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.”

14. The learned Single Judge relied upon the decision of Calcutta High Court in ***Ardha Chandra Rai Chowdhry Vs. Matangini Dassi***, (1895) 23 Cal 325. That case was approved in ***Rajendranath Kanrar***

***Vs. Kamalkrishna Kundu Chaudhuri*, 59 Cal 1057.** In the case of ***Ardha Chandra Rao Chowdhry (supra)***, the learned Chief Justice observed thus,

“ 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 under Section 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.”

15. Mr. Godbole heavily relied upon the decision of ***Rani Choudhury (supra)***, and in particular, concurring judgment of Hon'ble Mr. Justice Pathak to contend that the remedy under Order IX, Rule 13 and Section 96 of C.P.C. is not concurrent / simultaneous. It is not possible to accept this submission. In the case of ***Bhanu Kumar Jain (supra)***, the three Judge Bench of Apex Court considered the decision of ***Rani Choudhury (supra)***. In paragraphs 26 and 28, it was observed thus,

“26. 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 IX, 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 IX, Rule 13 of the Code a petition under Order IX, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

28. **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.

*(emphasis supplied)”*



16. In paragraph 26 extracted hereinabove, the Apex Court has observed that 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 IX, 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 IX, Rule 13 of the Code a petition under Order IX, Rule 13 would not be maintainable.

17. In paragraph 28, the Apex Court observed that there is no statutory bar to avail two remedies simultaneously and an appeal as also an application for setting aside ex-parte decree can be filed.

18. Mr. Godbole submitted that if the defendant were to file application under Order IX, Rule 13 as also substantive appeal under Section 96 of C.P.C. and the appellate Court dismissing the appeal, in that event, the application under Order IX, Rule 13 will be infructuous. I do not find any merit in this submission. It will be always open to the defendant to request the appellate Court to postpone the hearing of the appeal till the disposal of the application under Order, 9, Rule 13 by inviting attention of the Court to the Explanation to Order IX, Rule 13. In that situation, bearing in mind, the ratio laid down by the Apex Court in **Bhanu Kumar Jain's** case (*supra*), the appellate Court is expected to postpone hearing of the appeal so as not to render application under Order IX, Rule 13 infructuous.

19. Mr. Godbole submitted that as per the concurring decision of

Hon'ble Mr. Justice R. S. Pathak in **Rani Choudhury's case** (*supra*), plaintiff would be placed in an unfortunate position of being dragged through two courts in simultaneous proceedings. Public time and private convenience and money was sought to be saved by enacting the Explanation to Order IX, Rule 13. The Code of Civil Procedure (Amendment) Act, 1976 was enacted with the avowed purpose of abridging and simplifying the procedural law. By enacting the Explanation, Parliament left it open to the defendant to apply under Order IX, Rule 13 for setting aside an ex-parte decree only if the defendant had opted not to appeal against the ex-parte decree or, in the case where he had preferred an appeal, the appeal had been withdrawn by him. It obliged the defendant to decide whether he would prefer an adjudication by the appellate court on the merits of the decree or have the decree set aside by the trial court under Order IX, Rule 13. The legislative attempt incorporated in the Explanation was to discourage a two-prolonged attack on the decree and to confine the defendant to a single course of action.

20. In the case of **Rani Choudhary** (*supra*), the question that fell for consideration before Bench comprising of two Hon'ble Judges of the Apex Court was whether the dismissal of an appeal against the ex-parte decree on the ground that appeal is barred by limitation attracts provisions contained in Explanation to Order IX, Rule 13 of C.P.C. and creates a bar to the maintainability of an application under Order IX, Rule 13 for setting aside the ex-parte decree. In that case, appellant-wife had obtained ex-parte decree on 06.12.1979. Respondent-husband preferred appeal in the High Court beyond time. He filed an application under Section 5 of the Limitation Act for condonation of delay in filing the appeal. By order dated 17.03.1981, the High Court dismissed the application for condonation of delay holding that no sufficient cause for

condonation had been made out. By the same order, the appeal was also dismissed by holding that appeal being barred by time is dismissed. Respondent moved an application before the trial Court under Order IX, Rule 13 for setting aside ex-parte decree. Respondent also filed application under Section 5 of the Limitation Act for condonation of delay in filing application under Order IX, Rule 13. The learned trial Judge rejected both the applications on the ground that no sufficient cause was made out. Against the order of the trial Court, respondent filed an appeal. The High Court held that as the appeal was not dismissed on merits by the appellate Court and was dismissed being barred by limitation, it meant that no appeal was preferred in law and dismissal of appeal as barred by time would not be disposal of the appeal as contemplated under Explanation to Order IX, Rule 13 of C.P.C. It is against that order, the appellant-wife had preferred S.L.P. before the Apex Court.

21. In the concurring judgment of the Hon'ble Mr. Justice Pathak, it was observed in paragraph 2 that where the appeal was disposed of, and the appellate decree superseded the trial court decree by reversing, confirming or varying it that the trial court could not proceed to set aside its ex-parte decree. Various circumstances for dismissal of the appeal were referred. In paragraph 3, it was observed that a defendant intending to avoid an ex parte decree could apply to the trial court for setting it aside and could also appeal to a superior court against it. The courts were open to a duplication of proceedings, and although the immediate relief claimed in the two proceedings was not identical, both, ultimately aimed at a re-decision on the merits. By enacting the Explanation, Parliament left it open to the defendant to apply under Order IX, Rule 13 for setting aside an ex-parte decree only if the defendant had opted not to appeal against the ex parte decree or, in the

case where he had preferred an appeal, the appeal had been withdrawn by him. In that case, no contention was advanced about the permissibility or otherwise of simultaneous proceedings under Order IX, Rule 13 and Section 96 of C.P.C. In fact, as noted earlier, the question that fell for consideration was whether after dismissal of the substantive appeal, *albeit* on the ground of bar of limitation, would bar remedy under Order IX, Rule 13 of C.P.C. I, therefore, do not find that the decision in **Rani Choudhary's case** (*supra*) advances case of the defendant No.2.

22. Mr. Godbole submitted that after exhausting remedy under Order IX, Rule 13, a party can file substantive appeal. If this contention is accepted, it will lead to unending litigation. As noted earlier, in paragraph 26 of **Bhanu Kumar Jain's case** (*supra*), the Apex Court has observed that 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 under Order IX, Rule 13 for setting aside ex-parte decree. An unscrupulous defendant may first file application under Order IX, Rule 13 and carry the order to the highest forum irrespective of merit in it and thereafter he may file review petition and again carry the order to the highest forum irrespective of merit in it. He may thereafter file substantive appeal under Section 96 and after dismissal of the appeal, he may carry the order to the highest forum irrespective of merit in it. He, still, would be in a position to institute the suit for setting aside ex-parte decree on the ground of fraud. Thus, there will be unending litigation and the plaintiff will be kept out of the suit premises and will not get fruits of decree for years together. The contention that the remedies under Order IX, Rule 13 and Section 96 are consecutive cannot be accepted.

23. The decision of **Jotiba Limbaji Kanashenavar** (*supra*) was subsequently followed by this Court in **Maharashtra Rajya Sahakari Adiwasi Vikas Mahamandal Maryadit** (*supra*) and **Nandkishor** (*supra*). In the case of **Nandkishor** (*supra*), the contention based upon Section 14 of the Limitation Act was also considered. After considering the decision of this Court in **Jotiba Limbaji Kanashenavar** (*supra*) and **Maharashtra Rajya Sahakari Adiwasi Vikas Mahamandal Maryadit** (*supra*), the learned Single Judge of this Court observed that delay in filing the appeal, time consumed in proceedings under Order IX, Rule 13 of the C.P.C. to set aside *ex parte* decree is not a sufficient cause for not preferring the appeal within time.

24. As indicated earlier, right from 1938, the consistent view of this Court is that pursuing remedy under Order IX, Rule 13 does not constitute sufficient cause while considering the application for condonation of delay in filing the substantive appeal. Hence, Petition fails and the same is dismissed.

25. At this stage, Mr. Godbole orally applies for stay of this order for a period of 8 weeks from today. He states that defendant No.2 is in possession and nobody else is in possession of the suit premises. Defendant No.2 has neither created third party interest nor parted with possession of the suit premises. Defendant No.2 will hereafter neither create third party interest nor part with possession. He assures that within two weeks from today, defendant No.2 and all the adult family members / partners using the suit premises, will file usual undertaking incorporating therein that,

- i) they are in possession and nobody else is in possession of the suit premises;
- ii) they have neither created third party interest nor parted

with possession of the suit premises;

iii) they will hereafter neither create third party interest nor part with possession of the suit premises;

iv) they will pay up-to-date arrears of rent, if any, to the plaintiff within two weeks from today;

v) in case they are unable to obtain suitable orders from the higher Court within eight weeks from today, they will vacate and handover vacant and peaceful possession of the suit premises to the plaintiff;

26. Subject to the defendant No.2 and all the adult family members using the suit premises filing undertaking in the aforesaid terms within two weeks from today after giving advance copy to the other side, this order shall remain stayed for a period of eight weeks from today. It is made clear that in case they do not file undertaking within two weeks from today, the interim order shall stand vacated without further reference to the Court.

27. List the Petition for 'reporting compliance' after three weeks.

**(R. G. KETKAR, J.)**

*Minal Parab*