

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

SECOND APPEAL NO. 397 OF 2015

Chandrakant Somnath Melge Appellant

Versus

Balasaheb somnath Melge Respondent

Ms. Priyal G. Sarda for Appellant.

G.N.Salunkhe I/by. Umesh Kurund for Respondent.

CORAM : S.C.GUPTE, J.

DATE : 5 JANUARY 2017.

P.C.

. By consent the Second Appeal is taken up for hearing at the admission stage, since it involves a short question of law as noted herein below.

2. This Second Appeal arises from a decision of the First Appellate Court refusing to entertain the Appeal preferred by the Appellant herein from the decree passed by the Civil Judge, Junior Division, Mohol against the Appellant. The decree was passed exparte on the Respondent's suit granting permanent injunction directing the Appellant not to obstruct his peaceful possession of the suit property.

3. It was the case of the Appellant before the First Appellate Court that no notice of the suit was served on the Appellant. It was the Appellant's case that he did not know about this suit, that he had filed Regular Civil Suit No. 345 of 2012 against the Respondent for partition and possession of the suit property and when the Respondent filed his written statement in that suit referring to the exparte decree, the Appellant came to know about the filing of the suit, and that he thereafter applied for a certified copy of the Judgment and Decree passed in the Respondent's suit and after getting the same, filed his Appeal.

4. There was a delay of about 11 years 4 months and 16 days in filing the Appeal. The Appellant applied for condonation of this delay. The First Appellate Court by its impugned order dated 26 March 2014 rejected the Appellant's application for condonation of delay. While rejecting the application, the First Appellate Court held that admittedly the suit summons was served on the Applicant/Defendant, but that he had failed to appear in the Court and accordingly the suit was proceeded exparte and the impugned decree was passed. The First Appellate Court, in the premises, came to the conclusion that the Appellant was negligent in prosecuting the Appeal and had no sufficient or reasonable cause for the delay.

5. A preliminary objection is raised to the maintainability of this Second Appeal by learned Counsel for the Respondent. It is submitted that an order refusing to condone the delay in filing the Appeal and dismissing the Appeal on that footing does not amount to a decree of the Appellate Court. Learned Counsel relies on a decision of the Supreme Court in the case of *Chandi Prasad and others V/s Jagdish Prasad and others*, (2004) 8 Supreme Court Cases 724 and submits that when an appeal is dismissed on the ground that delay in filing the same is not condoned, there is no merger between the decree passed by the Trial Court and the dismissal order passed by the Appellate Court. In the premises, it is submitted that there is no effective decree passed by the Appellate Court and no Second Appeal lies to this Court under Section 100 of the Code of Civil Procedure.

6. Learned Counsel for the Appellant counters this submission by relying on the decision of the Supreme Court in the case of *Shyam Sundar Sharma V/s Pannalal Jaiswal and others*, (2005) 1 Supreme Court Cases 436. Relying on this decision, it is submitted that when an appeal is dismissed on refusal to condone the delay, there is nevertheless a decision in the appeal and the fact that there is no merger of the decree of the trial court in the decision of the appellate court, does not imply either that there is no decision in the appeal or that there is no decree passed by the appellate court.

7. As noticed by the Supreme Court in the case of Shyam Sundar Sharma *supra*, the Privy Council in the case of *Nagendra Nath Dey V/s Suresh Chandra Dey* as also the Supreme Court in the case of *Mela Ram and Sons V/s CIT* has considered the concept of an appeal. There is no definition of “appeal” in the Civil Procedure Code. The Privy Council in *Nagendra Nath Dey's* case held that, any application by a party to an appellate court, asking it to set aside or revise a decision of a subordinate court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because either it is irregular or incompetent. So also the Supreme Court in *Mela Ram and Sons' case* held that, an appeal presented out of time is nevertheless an appeal and an order dismissing it as time-barred is one passed in the appeal.

8. What is relevant for the purposes of Section 100 of the Code of Civil Procedure is that, there must be a decree passed by the first appellate court. A decree means a formal expression of adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The matter in controversy in the appeal between the parties was as to the entitlement of the Appellant herein to challenge the *exparte* decree passed against him by the trial court. That matter is conclusively determined and the right of the Appellant with regard to the same is conclusively

denied, when in the appeal an order was passed on the application for condonation of delay, rejecting the same, and thereby dismissing the appeal. Just because there is no formal merger between the appellate order and the decree passed by the trial court in the sense of the doctrine of merger implied by law, it cannot be said that there is no decree of the appellate court. Since in this case, the appeal is dismissed on the ground that delay is not condoned, the order passed by the appellate court is nevertheless a decree and a second appeal from such decree would certainly lie under Section 100 of the Code if it does give rise to a substantial question of law.

9. Coming now to the questions of law raised in the present appeal, namely, whether or not the first appellate court could have dismissed the appeal on the ground of limitation by holding that the suit summons was admittedly served on the Applicant/Defendant and whether, the first appellate court could have disposed of the matter merely on pleadings and without allowing the Applicant/Defendant to lead evidence or without the Applicant/Defendant having filed any pursis of closure of evidence, the following needs to be noted. The Appellant herein had expressly approached the First Appellate Court on a plea of non-service of the notice of the suit. In the face of such plea, the Appellate Court could not have proceeded on the basis that the

suit summons was admittedly served on the Applicant/Defendant. This is plainly contrary to the pleadings and there is no possible justification for the same.

10. As held by this Court in the case of *Holya Lasha Mahale and another V/s Raghunath Holya Mahale, 2006 (5) Mh.L.J. 80*, whenever an application for condonation of delay is made and there are contested facts, the court must allow the applicant to lead oral evidence on the ground of condonation applied for. This is all the more so, when there is an *ex parte* decree and there is a delay in filing an appeal. In the absence of a *pursis* of the parties that they do not intend to lead evidence and/or that they have closed their evidence, it was inappropriate on the part of the First Appellate Court to dispose of the matter merely on the basis of the pleadings of the parties. The first appellate court, in the present case, has not only disposed of the matter contrary to this mandate on the basis of pleadings of the parties, but it has actually decided the Appeal in the face of such pleadings. That is clearly impermissible.

11. The second appeal, in the premises, deserves to be allowed. The impugned order of the first appellate court dated 26 March 2014 is accordingly set aside and the matter is remanded to the District Court for a fresh hearing in accordance with law. The

learned District Judge-1, Solapur is directed to hear the application for condonation of delay after allowing the parties to lead such evidence, as they may desire to lead.

(S.C.Gupte, J.)