

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Second Appeal (ST) NO. 17982 OF 2015
With
Civil Application No.1438 of 2015
In
Second Appeal (ST) NO. 17982 OF 2015

Shri. Irgaonda Balgonda Patil
And Ors.

...Appellants

Versus

Shri. Dhulgonda Balgonda Patil

...Respondent

....

Mr.Manoj Patil, Advocate for the Appellants.

Mr. P.M. Arjunwadkar, Advocate for respondents No.1 to 3 and 10 to 12.

Mr.S.D. Rayrikar, AGP for the State.

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CORAM : R. G. KETKAR, J.

DATE : 21st APRIL, 2017

P.C.

1. In view of the administrative order dated 10.4.2017 passed by the Hon'ble Chief Justice directing the Registry to place Second Appeal (St.) No.17982/2015 with C.A. Nos.1437/2015 and 1438/2015, the matter is taken up for hearing.

2. Heard Mr.Manoj Patil, learned Counsel for the appellants and Mr.P.M. Arjunwadkar, learned counsel for

respondents No.1 to 3 and 10 to 12, at length.

3. The appellants had instituted Writ Petition No.5590/2015 challenging the order dated 18.3.2014 by which the appeal preferred by them was dismissed for want of taking further steps. Application made for recalling the order dated 18.3.2014 which was rejected by order dated 26.9.2014 which was also challenged. Writ Petition was disposed of on 26.6.2015 on the ground that the petitioners have to institute the substantive Second Appeal in this Court and the Petition is not maintainable. In view thereof, on the motion made on behalf of the petitioners, the Petition was allowed to be withdrawn with liberty to file Second Appeal challenging the orders dated 18.3.2014 and 26.9.2014.

4. Accordingly the appellants instituted Second Appeal in this Court. The matter was placed before this Court (Coram: N.M. Jamdar, J.) on 1.7.2016. On that date, the learned Counsel for the respondents submitted that the Second Appeal is not maintainable in view of Order XLIII Rule 1(t) wrongly mentioned as Order XLIII Rule 3 sub-clause (e) of C.P.C. The learned Single Judge was of the view that if the contention of the respondents

that Second Appeal is not maintainable is accepted, it will amount reviewing the order passed by me. The learned Judge, therefore, directed the Registry to take appropriate steps for placing the matter before me. Accordingly, Registry has placed this Second Appeal along with Civil Application before me.

5. Mr.Arjunwadkar fairly submitted that as the order dated 18.3.2014 recorded that it was passed below Exhibit-1 in Misc. Civil **Appeal** No.27/2012 as also clause (1) of the operative part of the order also records that the **appeal** is dismissed for want of further steps, he raised objection about the maintainability of the Second Appeal in view of Order XLIII Rule 1(t) of C.P.C. He submitted that the learned District Judge had passed order dated 18.3.2014 below Exhibit-1 in Misc. Civil **Application** No.27/2012. He, therefore, submitted that he has not raised objection to the maintainability of Second Appeal on the ground that the appellants can file Appeal from Order under Order XLIII Rule 1(t) of C.P.C. [emphasis supplied]

6. This Second Appeal is directed against the order dated 18.3.2014 below Exhibit-1 as also judgment and order dated

26.9.2015 below Exhibit-15 passed by the learned District Judge-1, Jaisingpur in Misc. Civil Application No.27/2012. By order dated 18.3.2014 below Exhibit-1, the learned District Judge dismissed application for want of taking further steps and imposed costs of Rs.1,000/- on the appellants to be paid to respondent No.1. By order dated 26.9.2014, the learned District Judge dismissed the application taken out for recalling the order dated 18.3.2014 thereby restoring Misc. Civil Application No.27/2012 to its original position.

7. Mr. Patil submitted that the learned trial Judge decided R.C.S. No.113/1994 on 14.2.2012. Aggrieved by that decision, the appellants preferred substantive appeal under Section 96 of C.P.C. before the District Court on 5.9.2012. Since there was delay of 6 months and 22 days in filing the appeal, they took out Misc. Civil Application No.27/2012 for condoning the delay. That application was dismissed for want of taking further steps. Mr. Patil submits that as process fees was not paid, notices were not issued to the respondents. He assures that after restoration of the Misc. Civil Application, he will take requisite steps on or before 29.4.2017.

8. After hearing the arguments advanced by learned Counsel appearing for the parties, appeal is admitted on the following substantial questions of law:

(1). Whether the learned District Judge was justified in dismissing the application for not taking further steps or should have imposed costs and / or passed conditional order against the appellants ?

(2). Whether the learned District Judge was justified in dismissing application Exhibit-15 ?

9. Admit. Mr. Arjunwadkar waives service. Having regard to the narrow controversy raised in the Second Appeal and at the request and by consent of the parties, Second Appeal is taken up for final hearing by dispensing with record and proceedings.

10. I have heard the learned Counsel appearing for the parties on these substantial questions of law. In the case of ***Kalipada Das and others v. Bimal Krishna Sen Gupta (dead) by L.Rs., AIR 1983 SC 876***, Apex Court observed in paragraphs-5 to 7 thus:

5. The only question is whether the appellant tenants who undoubtedly failed to comply with the

Court's order to supply the paper-books within the prescribed time should be visited with such serious consequences of a penal nature as described by the High Court itself. Supplying paper-books is a procedural requirement devised to facilitate rendering justice. In other words, it is a procedural step in aid of justice, and not substantive justice itself. Undoubtedly, Court's orders have to be obeyed. The institution of judiciary may not be able to function if there is no sanction behind the Court's order. But penalty of failure to comply with Court's order providing a procedural stage in aid of justice must be Commensurate with the gravity of the lapse. If the penalty imposed is disproportionate to the gravity of the lapse or omission, the procedural stage instead of becoming a step in aid of justice would be a roadblock to justice and at this stage it would be advantageous to recall what this Court said in *Sangram Singh v. Election Tribunal, Kotah and Anr.* [1955]2SCR1 at p.28 (AIR 1955 SC 425 at p. 429). It reads as under :

“Now a Code of Procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties, not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore, be guarded against (provided always that justice is done on both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be

precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle.”

6. We feel that omission or lapse arising out of non-compliance with the Court's order was not of such a serious gravity as to close the door of the Court to the appellants by dismissing the appeal. A procedural step which facilitates hearing of the appeal cannot impede access to justice. And that is what has happened.

7. If the Court felt that the appellants were trying to delay the hearing of the appeal and that on account of this dilatory tactics the respondents-landlords who had obtained a decree would suffer, it was open to the High Court to direct the respondents to get the paper-books prepared and impose the cost of the same on the appellants. That was the easiest way to deal with the situation and thwart the efforts of the appellants to delay the hearing of the appeal. We fail to see how the High Court by taking the step which it took has expedited the hearing of the appeal because from June 1979 the proceeding has reached October 1982 and pursuant to the order of this Court, would consume some more time before the appeal could be disposed of. If the other way the matter had been approached by now the appeal to this Court could have been finally disposed of.”

11. Applying the tests laid down by Apex Court to the facts of the present case, I am satisfied that the learned District Judge was not justified in dismissing the application for want of further steps. Hence, impugned order dated 18.3.2014 below

Exhibit-1 passed by the learned District Judge-1, Jaysingpur in Misc. Civil Application No.27/2012 is set aside. In view thereof, the consequential order dated 26.9.2014 below Exhibit-15 is also quashed and set aside. Misc. Civil Application No.27/2012 is restored to the file of learned District Judge. The appellants will take necessary steps on or before 5.5.2017 in Misc. Civil Application No.27/2012. The substantial questions of law are answered accordingly. Second Appeal stands allowed in the aforesaid terms with no order as to costs. In view of disposal of Second Appeal, Civil Application No.1438/2015 for stay does not survive and the same is also disposed of. Order accordingly.

12. All parties, including the District Court, to act upon the authenticated copy of this order.

(R. G. KETKAR, J.)

Deshmane (PS)