

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 11633 OF 2015

Suresh Fakirrao Kamthe

...Petitioner

Versus

Shri. Dattatray Sadashiv Bhapkar

And Ors

...Respondents

....

Mr.P.K. Dhakephalkar, Senior Advocate a/w. Rahul S. Kate,
Advocate for the Petitioner.

Mr.D.S. Patil, Advocate for Respondents No.1 & 2.

Mr.S.P. Thorat, Advocate for Respondents No.4 & 5.

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CORAM : R. G. KETKAR, J.

DATE : 06th MARCH, 2017

P.C.

1. Heard Mr.P.K. Dhakephalkar, learned Counsel for the petitioner, Mr. Drupad Patil, learned Counsel for respondents No.1 & 2 and Mr.S.P. Thorat, learned Counsel for respondents No.4 and 5, at length.

2. At the request of Mr. Dhakephalkar leave to delete respondents No.3 and 6 to 8 is granted. Amendment shall be carried out forthwith.

3. Rule. Learned Counsel for respective respondents

waive service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 15.4.2015 passed by the learned District Judge-7, Pune below Exhibit-22 in Civil Appeal No.140/2012. By that order, the learned District Judge dismissed the application made by respondent No.4 in the appeal for extension of period for filing cross-objections.

5. In support of this Petition, Mr. Dhakephalkar submitted that the suit instituted by respondents No.1 & 2, hereinafter referred to as the 'plaintiffs', was partly decreed by the learned trial Judge on 6.8.1996. Aggrieved by that decision, the plaintiffs preferred First Appeal No.13/1996 in this Court. It was transmitted to the District Court in the year 2007 on account of enhancement of pecuniary jurisdiction. The appeal was again transmitted in the year 2009 from District Court to this Court. Again in the year 2012, the appeal was transmitted

to the District Court. On 30.8.2013, the petitioner filed application Exhibit-22 for extension of time for filing cross-objections. He invited my attention to paragraphs-5 & 6 of the application. He also relied upon the decision of this Court in the case of ***State of Maharashtra vs. Kalu Ladku Mhatre, 2011(4) Mh.L.J. 741*** and in particular paragraph-7 thereof wherein this Court has considered the provisions of Section 5 of the Limitation Act, 1963 (for short, 'Act') vis-a-vis provisions of Order XLI Rule 22(1) of C.P.C. He submitted that the appeal is not effectively heard at any period of time and is not taken up for final hearing. He, therefore, submitted that this is a fit case for extension of time for filing cross-objections.

6. On the other hand, Mr. Patil and Mr. Thorat supported the impugned order. Mr. Patil submitted that after the suit was partly decreed on 6.8.1996, appeal preferred by the plaintiffs was heard for admission before this Court on 9.2.1997. The petitioner was also heard at the time of admission of the appeal. In other words, the petitioner had notice of hearing of that appeal. Within one month thereafter, he did not file cross-objections. Even after this Court transmitted the proceedings in

the year 2007 to the District Court, the Petitioner had notice. Even at that time the petitioner did not file cross-objections. Once again in the year 2009 appeal was transmitted to this Court. That time also the petitioner did not file cross-objections. Finally it was transmitted to the District Court in the year 2012 and on 30.8.2013 the petitioner filed application for extension of time. He submitted that there is no explanation or reason given by the petitioner for not filing the cross-objections within one month. The cross-objections are sought to be filed nearly after 17 years. Having regard to this inordinate delay, the learned District Judge was justified in dismissing the application. He submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

7. Mr. Patil relied upon the following decisions :

1. *Oil and Natural Gas Corporation vs. Punjsons Pvt. Ltd., 2008(6) Bom.C.R. 641* and in particular paragraph-18
2. *East India Hotels Ltd. vs. Smt. Mahendra Kumari and another, AIR 2008 Rajasthan 131* and in particular paragraph-13 thereof.

8. Mr. Thorat invited my attention to paragraphs-4 and 5 of the impugned order and submitted that the learned District

Judge, while rejecting the application has given reasons which cannot be called as perverse and, therefore, no case is made out for invocation of powers under Article 227 of the Constitution of India.

9. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute and is a matter of record that the trial Court partly decreed the suit on 6.8.1996. Aggrieved by that decision, the plaintiff preferred First Appeal No.13/1996 in this Court. In the year 2007, Appeal was transmitted to the District Court on account of enhancement of the pecuniary jurisdiction. Appeal was thereafter transmitted in the year 2009 to this Court. Again in the year 2012, Appeal was transmitted to the District Court. On 30.8.2013, the petitioner filed application for extension of time for filing cross-objections.

10. In the case of *State of Maharashtra* (supra), this Court has considered the provisions of Section 5 of the Act as also Order XLI Rule 22(1) of C.P.C. Section 5 of the Act reads thus :

“5. Extension of prescribed period in certain cases.

-- Any appeal or any application, other than an application under any of the provisions of Order XXI

of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation.--The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.”

11. Order XLI Rule 22 sub-rule (1) reads thus :

“ORDER XLI
APPEALS FROM ORIGINAL DECREES

22. Upon hearing respondent may object to decree as if he had preferred a separate appeal.-- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree-[but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour ; and may also take any cross-objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellant Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

Explanation.--A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other

finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.”

12. After considering these provisions, in paragraph-7 this Court observed thus :

“7. The last part of sub-rule (1) of Rule 22 of Order XLI deals with the grant of extension of time for filing of cross-objection and section 5 of the Limitation Act deals with the extension of time to prefer an appeal. Section 5 of the Limitation Act incorporates a condition precedent of the appellant satisfying the Appellate Court that he had sufficient cause for not preferring the appeal within the prescribed period of limitation. Sub-Rule (1) of Rule 22 of Order XLI does not incorporate the stringent requirement of establishing a sufficient cause. Thus, a wide power to extend the time to file cross-objection has been vested in the Appellate Court. Though there is no requirement of establishing sufficient cause within the meaning of section 5 of the Limitation Act, in the application for seeking extension of time to file cross-objection, brief reasons for delay will have to be set out. A wider discretion has been conferred on the Appellate Court under the sub-rule (1) of Rule 22 than what is conferred by section 5 of the Limitation Act. The power to extend time under sub-rule (1) of Rule 22 of Order XLI of the Code has to be liberally exercised in case where a cross-objection is sought to be filed before the appeal is heard for final hearing.”

13. As noted earlier, in the present case appeal was transmitted from High Court to the District Court and finally it is now transmitted to the District Court. It is not in dispute that

no effective hearing of the appeal has taken place. In the case of *State Of Nagaland vs Lipok Ao & Ors.*, (2005) 3 SCC 752, it is held by the Apex Court that what counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. The expression “sufficient cause” should be considered with pragmatism in a justice oriented approach rather than the technical detection of sufficient cause for explaining every day's delay.

14. Mr. Patil relied upon the decision of this Court in *O.N.G.C.* (supra) and in particular paragraph-18 thereof. In paragraph-18, this Court refused to condone the delay of 71 days in filing cross-objections. Perusal of the judgment of this Court does not indicate that any argument was advanced before this Court as regards language employed in Section 5 of the Act vis-a-vis language employed in Order XLI Rule 22(1) of C.P.C. As against this in the case of *State of Maharashtra* (supra), this Court compared the language employed in Section 5 of the Act as also Order XLI Rule 22(1) of C.P.C.

15. Apart from that in the case of *Mahadev Govind Gharge*

and others vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, (2011) 6 SCC 321 in paragraph-61, Apex Court has observed thus :

“61. Needless to notice that the cross-objections are required to be filed within the period of one month from the date of service of such notice or within such further time as the Appellate Court may see fit to allow depending upon the facts and circumstances of the given case. Since the provisions of Order XLI Rule 22 of the Code itself provide for extension of time, the Courts would normally be inclined to condone the delay in the interest of justice unless and until the cross-objector is unable to furnish a reasonable or sufficient cause for seeking the leave of the Court to file cross-objections beyond the statutory period of one month.”

16. Applying the principles laid-down by Apex Court in the case of *Mahadev Govind Gharge (supra)*, as also in the case of *State Of Nagaland (supra)* as also decision of this Court in *State of Maharashtra (supra)*, I am of the opinion that the learned District Judge should have extended the period in filing the cross-objections rather than dismissing it on the ground of limitation. The effect of dismissal of the application for extension of time is dismissal of the cross-objections on technical ground and not on merits. In view thereof, the impugned order cannot be sustained more so when the appeal is not taken up for effective hearing.

Impugned order is accordingly quashed and set aside. Application Exhibit-22 filed by the petitioner stands allowed. The learned District Judge will take on record the cross-objections and thereafter proceed to decide the appeal and cross-objections in accordance with law. Rule is made absolute with no order as to costs.

17. Parties are at liberty to file application for expeditious disposal of the appeal in a time bound manner. If such an application is made, the learned District Judge will pass appropriate order. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)