

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CIVIL APPLICATION NO. 13940 OF 2017
WITH
SECOND APPEAL NO. 658 OF 2007
WITH
CIVIL APPLICATION NO. 13941 OF 2017
IN
X-OBJST NO. 31233 OF 2017
WITH
SECOND APPEAL NO. 701 OF 2007

Chhagan Trimbak Lokhande,
Age : 83 years, Occu. Agri.
R/o.Pimpalner, Tq. Sakri,
Dist. Dhule

...Appellant

Versus

1) Dattatraya Krishna Patil
Age 65 years, Occu. Agri.
R/o. Pimpalner, Tq. Sakri,
Dist. Dhule.

2) Sau. Kalpana W/o.Rajendra Dhamane
Age 53 years, Occu. Household & Agri.
R/o. Pimpalner, Tq. Sakri,
Dist. Dhule.

...Orig. Appellants

3) Subhash Shivram Bhadane,
Age 60 years, Occu. Agri.
R/o. Pimpalner, Tq. Sakri,
Dist. Dhule.

4. Kashinath Trimbak Lokhande
Since Deceased through legal heirs

4-A) Shakuntalabai Kashinath Lokhande
Age 66 years, Occ. Household,

4-B) Ajay Kashinath Lokhande
Age 48 years, Occ. Service,

4-C) Ashish Kashinath Lokhande
Age 46 years, Occ. Business

4-D) Avinash Kashinath Lokhande
Age 44 years, Occ. Business,
All R/o. 'Akash' Navrang Colony,
Deopur, Tq. & Dist. Dhule.

Respondents
(Orig. Respondents)

Mr. B.R. Warma, Advocate for Applicant
Mr. S.S. Choudhari, Advocate holding for
Mr. A.A. Mukhedkar, Advocate for Respondent Nos. 1 and 2
Mr. Subhodh Shah, Advocate for Respondent No. 3

CORAM : A.M. DHAVALÉ, J.

DATE OF RESERVING THE ORDER : 27.11.2018

DATE OF PRONOUNCING THE ORDER : 19.12.2018.

ORDER :

1. This is an application for condoning delay of 3015 and 3166 days in filing cross objection and for admitting cross objection in Second Appeals 658/2007 and 701/2007.

2. Heard the learned Advocate Mr. Warma for the applicant, Mr. Subdoh Shah, Advocate for Respondent No. 3- original plaintiff and Mr. S.S. Choudhari, Advocate for respondent Nos. 1 and 2.

3. Subhash - respondent No.1 in the Appeal is original

plaintiff. He had filed Special Civil Suit No.142/1992 against Kashinath the owner, the appellant in Second Appeal No. 701 of 2007 for specific performance of contract. As per his plaint, Kashinath had agreed to sell the suit land at block No. 18 admeasuring 6858 sq.ft. at Pimpalner, Tal. Sakri to him by agreement to sell dated 23.04.1984 for price of Rs.15/- per sq.ft. He claimed that he had paid Rs.11,000/- as earnest. He was ready and willing to perform his part of contract. Thereafter, defendant No. 3 Chhagan filed Regular Civil Suit 6/1984 against his brother (the plaintiff's vendor) Kashinath, claiming himself to be the exclusive owner of the property. The suit came to be dismissed in default on 08.09.1987. The application for restoration was also dismissed on 13.02.1989. The appeal against the same was also dismissed. The plaintiff noticed on 04.03.1992 that there was paper publication showing that defendant No.2 Dattatraya was purchasing the suit property from Kashinath. The plaintiff issued notice and filed suit for specific performance of the contract. Meanwhile, on 01.09.1992, Kashinath sold the suit property to defendant No.2 by registered sale deed. Hence, Dattatraya (D2) and Chhagan (D3) were made parties. He claimed specific performance in the alternative refund of money and damages and declaration that sale in favour of defendant No. 2 is void and the perpetual injunction.

Defendant No. 1 denied execution of agreement to sell and also claimed that suit was barred by limitation. He claimed that plaintiff and defendant No. 3 in collusion were trying to deceive him. Defendant No.1 claimed that father of the plaintiff had taken his signature on blank stamp paper while purchasing another portion of the land block No. 18 and it was misused. Defendant No. 2 Dattatraya claimed that he was bona fide purchaser for value. Defendant No.3 Chhagan claimed that it was an ancestral property and it was allotted to him in partition in 1975-76. By Judgment dated 17.01.1998, learned Civil Judge, Senior Division granted decree for specific performance against defendant No. 1. He also declared that the sale deed in favour of defendant No. 2 dated 01.09.1992 was null and void. As such, there was no specific order against defendant No. 3 Chhagan.

4. Defendant Nos. 1, 2 and 3 preferred Civil Appeals No.37/2001, 38/2001 and 65/2004 against the plaintiff Subhash. Learned Ad-hoc District Judge-1, Dhule by a common lengthy Judgment dated 03.08.2007 dismissed all the the appeals.

5. Aggrieved defendant No.2 Dattatraya preferred Second Appeal No. 658/2007, whereas aggrieved vendor Kashinath has preferred Appeal No.701/2007. Defendant No. 3 Chhagan is respondent No.3 in both the matters. By order dated

27th August, 2008, both the appeals were admitted by framing substantial question of law as to whether the suit was barred by limitation and whether the Courts below did not exercise the discretion in the light of settled principles while granting decree for specific performance. Mr. Chhagan has not challenged the Judgment against him. He appeared long back but did not file any cross objection earlier. On 12th September, 2017, the present application has been submitted for filing cross objection. In Second Appeal No. 701/2007, there is delay of 3166 days in preferring the cross objection. In Second Appeal No. 658/2007 delay is of 3015 days. The respondent No.3 Chhagan by cross objection wants to challenge the findings of the lower Courts holding defendant No.1 as the sole owner. The appellant as well as the respondent-original plaintiff have challenged the cross objection.

6. Mr. Warma, the learned Advocate for the applicant submitted that though as per Order 41 Rule 22 cross objection are to be filed within 30 days, the period of limitation is not applicable and the Court has discretion to enlarge the period of limitation independent of Section 5 of Limitation Act. This can be done under Order 41 Rule 22. He relied on ***State of Maharashtra Vs. Kalu Ladku Mhatre 2012 (1) Bom. C.R.***

193 to submit that the delay in preferring cross objection should be liberally construed. Rule 22(1) does not incorporate stringent requirement of establishing sufficient cause and the discretion should be liberally exercised when cross objection is filed before the final hearing. He relied on ***Mahant Dhangir Vs. Madan Mohan AIR 1988 SC 54*** to submit that cross objection against the respondent is also maintainable. He submitted that the contentions regarding merits of the cross objections can be considered independently and on that count, respondent No. 3 should not be prevented from raising the cross objections. He also argued that if the cross objections are rejected, the Second Appeal would become infructuous and the decree passed against him would become binding on him and would operate as res judicata. He submitted that dismissal of his suit cannot be any obstacle in raising the issue of his title by way of cross objections.

7. Per contra, learned Advocate Mr. S.S. Choudhari for the appellant and Advocate Mr. Subodh Shah for the respondents submitted that there is inordinate delay of 8 to 9 years in preferring cross objections in both the appeals and it is deliberate and intentional. The discretion to enlarge the time should not be exercised against the appellant as the delay is

deliberate and intentional. The respondent No. 3 Chhagan has no case. The cross objection filed by one respondent against the other respondent is not maintainable. Mr. S.S. Choudhari has also challenged exercise of discretion for enlarging scope of appeal.

8. At the time of argument, learned advocate Mr. Subodh Shah for the original plaintiff has submitted that Chhagan had filed Regular Civil Suit No. 72/1992 for declaration and perpetual injunction and his claim for his ownership and possession over the suit property was dismissed by Judgment dated 08.02.2006. The said judgment has not been challenged and has attained finality.

9. Mr. Subodh Shah relied on ***Panna Lal Vs. State of Bombay AIR 1963 SC 1516*** to submit that normally, the cross objection must be against the appellant only. In exceptional circumstances as shown in para 17 only cross objection by one respondent against the other respondent would be maintainable. Besides, Mr. Shah learned Advocate for the original plaintiff argued that defendant No. 3 Chhagan is not concerned with the main dispute between the parties. He was not party to agreement for specific performance. The suit has been decreed. The issue of title of respondent No.3 Chhagan has attained

finality. It cannot be permitted to be reopened at this stage.

10. The points for my consideration with my findings are as follows :-

- (i) Whether the cross objection preferred by respondent No. 3 Chhagan in both the cross objections are maintainable ?
- (ii) If maintainable, whether the discretion to enlarge the time limit needs to be granted in such case ?

11. My findings to the above points are as under :-

- (i) Not maintainable
- (ii) It does not survive. If survived, in the negative.

12. Order 41 Rule 22(1) reads as under :-

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 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 Appellate 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.

13. As per the provisions, it is apparent that if any person is aggrieved, he has to prefer appeal, but if he has not preferred appeal and his opponent files an appeal against a partial decree, he can file cross objections within 30 days from the date of intimation of final hearing and can challenge the part of the decree that is against him. It is apparent that in normal circumstances, the cross objection must be against the appellant and not against the respondent.

In **Panna Lal Vs. State of Bombay AIR 1963 SC 15**, it is observed -

(A) *Whatever may have been the position under the old S. 561, the use of the word "cross-objection" in O.41 R.22 expresses unmistakably the intention of the legislature that the objection has to be directed against the appellant. As Rajamannar, C.J. said in ILR 1950 Mad 874:(AIR Mad 379) (FB):*

The legislature by describing the objections which could be taken by the respondent as a "cross-objection" must have deliberately adopted the view of the other High Courts. One cannot treat an objection by a respondent in which the appellant has no interest as a cross-objection. The appeal is by the appellant against a respondent. The cross-

objection must be an objection by a respondent against the appellant."

We think, with respect, that these observations put the matter clearly and correctly. That the legislature also wanted to give effect to the views held by the different High Courts that in exceptional cases as mentioned above an objection can be preferred by a respondent against a co-respondent is indicated by the substitution of the word "appellant" in the third paragraph by the words "the party who may be affected by such objection."

In para 17, the exception has been carved out when cross objection shall be filed by one respondent against other respondent in following words :-

(B) Ultimately in 1950 a Full Bench of the Madras High Court in Venkateshwarlu Vs. Ramamma ILR (1950) Mad 874 considered the question again and decided overruling all previous decisions that on a proper construction of the language, O.41 R.22 confers only a restricted right on the respondent to prefer objection to the decree without filing a separate appeal: that such objection should, as a general rule, be primarily against the appellant, though in exceptional cases it may incidentally be also directed against the other respondents. The Lahore High Court which had earlier followed the former view of the Madras High Court also decided in Jan Mohamed v. P.M. Razdon, AIR 1944

Lah 433 to adopt the other view held by the High Courts of Allahabad, Bombay, Calcutta and Patna. The Nagpur High Court has also adopted the same view. (Vide Chandi Prasad v. Jugal Kishore, AIR 1948 Nag 377.)

The Apex Court observed -

(C) In our opinion, the view that has now been accepted by all the High Courts that O.41 R. 22 permits as a general rule, a respondent to prefer an objection directed only against the appellant and it is only in exceptional cases, such as where the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being re-opened between the objecting respondent and other respondents, that an objection under O.41 R. 22 can be directed against the other respondents, is correct.

14. Here, the main suit was filed by Subhash, respondent No.1 against Kashinath, the appellant for specific performance of the contract. Kashinath had some disputes with his brother Chhagan, and therefore, perpetual injunction was claimed and Chhagan was also made a party, but there was no specific prayer against Chhagan nor any judgment was passed against Mr. Chhagan, the applicant herein. The judgment and decree in Special Civil Suit No.142/1992 directed only defendant No.1 to execute the sale deed. Defendant No.2 Dattatraya, who was subsequent purchaser is somewhat affected as the sale deed in

his favour dated 01.09.1992 has been declared as null and void. The order is totally silent about the grant of relief against the defendant No.3 Chhagan. Even the issues framed, do not disclose any findings against defendant No.3 Chhagan. The three defendants had preferred three different appeals before the District Court, Dhule. Chhagan had preferred Civil Appeal No. 65/2004, while defendant No. 2 Dattatraya and defendant No.1 Kashinath had preferred Civil Appeal Nos. 37/2001 and 38/2001. All the three appeals were dismissed on 03.08.2007. Defendant No.3 Chhagan did not prefer any appeal against the dismissal of his first appeal No. 65/2004.

15. It is no doubt true that in *Mahant Dhangir Vs. Madan Mohan*, it is laid down that cross objection by one respondent against other respondent is maintainable. In this case, the Apex Court relied on its earlier Judgment in *Panna Lal Vs. State of Bombay*, relied by Advocate Mr. Subodh Shah and has followed the same. The only difference is that the circumstances in that case were bringing the case under the exception. Hence, the cross-objections were held maintainable.

16. In Mahant Dhangir's case, Lalgiri Maharaj, a previous Mahant of the Math has mismanaged property of Math and

recklessly disposed of the properties. He had given a land to Madan Mohan on lease of 99 years. He has also sold one land to Madan Mohan which was part of the lease land. Madan Mohan constructed shops on the land purchased. He also rented the shops to Jankidas and Mohan Lal and then sold it to them. Thereafter, Math and Mahant Dhangir filed suit No. 28/1971 challenging the allegations made by Lalgiri for declaration that alienations were without authority and not binding and for possession of the property. The trial court granted declaration that lease deed was null and void, but the relief for possession of the leased premises was rejected. The Math and Madan Mohan preferred separate appeals challenging the said Judgment. Learned Judge of High Court allowed the appeal of Math in part. Decree that sale was void was granted, but possession decree was not passed. Appeal by Madan Mohan was also allowed and it was held that suit for leased premises was barred by limitation. Against this decision, no appeal was preferred. Respondent Nos. 2 and 3 namely, Jankidas and Mohan Lal, the purchasers from Madan Mohan, preferred Appeal No. 20/1975. Madan Mohan was impleaded as third person and Math as first respondent. Math preferred cross objection, but Madan Mohan did not. The Division Bench dismissed the appeal on merits and dismissed the cross objections on the ground of maintainability. The dismissal of

cross-objection was challenged before the Apex Court. The Apex Court quoted with approval the Judgment in *Panna Lal's* case, which was existing and followed for several years. The Apex Court observed that the cross-objection related to the right of Madan Mohan to retain the property under the sale deed. The appellants were second purchasers. It was held that the Math could urge the objection that the appellants and Madan Mohan have no right to retain the property after the sale deed was declared null and void, but the same is not the case with respect to the challenge to the said lease deed. The validity of lease was to be determined only against Madan Mohan. It was not intermixed with the right of the appellants. It has no relevance to the question raised in the appeal. The High Court was therefore right in holding that the cross objection was actually not maintainable against Madan Mohan. It was further observed that the Math could not be left without remedy. Even if the cross objection was not maintainable, the Court could consider it under Order 41 Rule 33. Rule 22 and 33 of Order 41 are not mutually exclusive. They are closely related with each other. If objections cannot be urged under Rule 22 against respondents, Rule 33 could take over at the risks of the validity. The Appellate Court could exercise the power under Rule 33 even if appeal was only against decree of the lower court.

17. As held in *Panna Lal's* case, the cross objection by one co-respondent against other co-respondent would be maintainable, when the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents so that the relief against appellant cannot be granted without the question being reopened between the objecting respondents and other respondents.

18. In the present case, I find that the suit was filed by Subhash against Kashinath for specific performance of the contract. There was challenge to the rights of defendant No.2 Dattatraya, who subsequent to the agreement to sell in favour of the plaintiff had purchased the suit property by way of registered sale deed. Defendant No.3 Chhagan, the present applicant was not at all a necessary party to the suit for specific performance. In the suit, he claimed that he is exclusive owner and defendant No.1 Kashinath is not the exclusive owner under partition of 1975. If Chhagan had any grievance that his civil rights were in dispute, it was open for him to file a suit for prosecution of his civil rights. It is reported that he had accordingly filed such suit, which came to be dismissed on merits. The said Judgment and decree were not challenged and has attained finality.

19. In the present proceedings, no issue regarding the title of Kashinath or Chhagan was raised and no order was passed against Chhagan. Chhagan has failed to prove his title or any right to obstruct the sale transaction between the plaintiff Subhash and defendant No.1 Kashinath. The claim raised by Chhagan in the suit was not at all intermixed with the rights claimed by plaintiff Subhash against Kashinath defendant No.1 and Dattatraya defendant No.2 or the defences raised by defendant Nos.1 and 2. The dispute between the plaintiff and defendant Nos. 1 and 2 related to right of the plaintiff to obtain specific performance of the contract. It has no relevance with the dispute raised by Chhagan regarding his ownership to the suit property. In such suit, the issue of ownership can't be gone into. In the circumstances, the cross objection itself is not maintainable.

20. Therefore, whether the cross objections filed after 3000 days should be entertained or not by exercising the discretion granted under Order 41 Rule 22 does not survive.

21. Since the arguments were advanced on condonation of delay, liberally I proceed to decide it assuming that it survives. Advocate Mr. Warma relied on -

State of Maharashtra Vs. Kalu Ladku 2012 (1) Bom.C.R. 193 wherein it is held as under :-

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 cross-objection is sought to be filed before the appeal is heard for final hearing.*

In Para Nos. 8 and 9 of this Judgment, the facts

relating to filing of several appeals in respect of acquisitions arising out of same notification were considered and it was also observed that the Government had accepted the decision of High Court. In the light of the said facts, it was observed that it was fit case where time to file cross objections needs to be extended.

(i) In ***Mahadeo Gharge Vs. Special Land Acquisition Officer, AIR 2011 SC 2439***, while interpreting the scope of the Order Order XLI, Rule 22, it is observed as under :-

55. If we examine the provisions of Order XLI, Rule 22 of the Code in its correct perspective and in light of the above stated principles then the period of limitation of one month stated therein would commence from the service of notice of the day of hearing of appeal on the respondent in that appeal. The hearing contemplated under Order XLI, Rule 22 of the Code normally is the final hearing of the appeal but this rule is not without any exception. The exception could be where a party respondent appears at the time of admission of the appeal, as a caveator or otherwise and argues the appeal on merit as well as while passing of interim orders and the Court has admitted the appeal in the presence of that party and directs the appeal to be heard finally on a future date actual or otherwise, then it has to be taken as complete compliance of the provisions of Order XLI, Rule 22 of the Code and thereafter, the appellant who has appeared himself or through his pleader cannot claim

that period mentioned under the said provisions of the Code would commence only when the respondent is served with a fresh notice of hearing of the appeal in the required format. If this argument is accepted it would amount to travesty of justice and inevitably result in delay while causing serious prejudice to the interest of the parties and administration of justice. Such interpretation would run contra to the legislative intent behind the provisions of Order XLI, Rule 11 of the Code which explicitly contemplate that an appeal shall be heard expeditiously and disposed of as far as possible within 60 days at the admission stage. All the provisions of Order XLI of the Code have to be read conjunctively to give Order XLI, Rule 22 its true and purposive meaning. Having analytically examined the provisions of Order XLI, Rule 22, we may now state the principles for its applications as follows :

(a) Respondent in an appeal is entitled to receive a notice of hearing of the appeal as contemplated under Order XLI, Rule 22 of the Code;

(b) The limitation of one month for filing the cross-objection as provided under Order XLI, Rule 22 of the Code shall commence from the date of service of notice on him or his pleader of the day fixed for hearing the appeal.

(c) Where a respondent in the appeal is a caveator or otherwise puts in appearance himself and argues the appeal on merits including for the purposes of

interim order and the appeal is ordered to be heard finally on a date fixed subsequently or otherwise, in presence of the said respondent/caveator, it shall be deemed to be service of notice within the meaning of Order XLI, Rule 22. In other words the limitation of one month shall start from that date.

57. 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.

(ii) In ***Municipal Corporation of Delhi Vs. Intl. Security and Intelligence Agency Ltd. AIR 2003 SC 1515***, it is held as under :-

18. We have, therefore, no doubt in our mind that right to take a cross-objection is the exercise of substantive right of appeal conferred by a statute. hold that by taking cross objection what is being exer Available grounds of challenge against the judgment, decree or order impugned remain the same whether it is an appeal or a cross-objection. The difference lies in the form and manner of exercising the right; the terminus a quo (the starting point) of limitation also differs.

20. Once we hold that by taking cross objection what is being exercised is the right of appeal itself, it follows that the subject-matter of cross objection and the relief sought therein must conform to the requirement of Section 39 (1). In other words, a cross-objection can be preferred if the applicant could have sought for the same relief by filing an appeal in conformity with the provisions of Section 39(1) of the Act. If the subject-matter of the cross objection is to impugn such an order which does not fall within the purview of any of the categories contemplated by clauses (i) to (vi) of sub-section (1) of Section 39 of the Act, the cross-objection shall not be maintainable. Effect on cross objection if the appeal itself is held not competent or not maintainable.

22. These judgments are squarely applicable to the present case. Underlined portion makes it clear that the cross-objection stands at par with cross appeal and cross-objector can file cross-objections within 30 days and if there is delay, he must furnish reasonable or sufficient cause for preferring cross objections after statutory period of one month.

23. I have already held in **Shivaji Chaval vs. Spl. Land Acquisition Officer** (CA 8413/2017 in FA (St) No. 12774/2017, dt. 10.08.2018, that parameters of condonation of delay in land acquisition matters stand on different footings from condonation

of delay in other matters. The Judgment in Apex Court in ***Dhirij Singh (D) Vs. Haryana State (2015 (1) SCC (Civil) 236)*** and ***Imrat Lal Vs. Land Acquisition Collector 2012 (2) R.C.R. (Civil) 437)*** proceed on the principles of parity that the persons whose land is acquired under one notification should get compensation at equal rate. Besides, it is duty of the State to pay reasonable compensation. In the light of these principles, the Apex Court has condoned huge delays subject to denial of statutory benefits for intermediate periods for the lands acquired against the wishes of the owners. The Apex Court has gone to the extent of extending the benefits of enhancement in appeals before it, even to those persons whose lands were acquired, but had not preferred appeals from the judgments of reference courts.

24. In the light of these facts, I hold that the view expressed in Kalu Ladku's case, will have to be held applicable to the cross objections raised by land owners in appeals preferred by State in land acquisition matters only. In case of other appeals, the delay will have to be explained with sufficient and reasonable cause.

25. In the present case, the delay of 3015 & 3166 days are huge, and there is no sufficient cause. Thus, apart from the

cross objection, is not maintainable, even on merits, such huge delay of 3015 days could not have been condoned.

26. The cross-objections fails on following two grounds :-

(i) Cross-objections raised by one respondent against other respondents is not maintainable in the present case as case of the applicant does not fall under the exception.

(ii) There is huge and unexplained delay without any reasonable and sufficient cause Hence, the order :-

ORDER

The Civil Application is dismissed as not maintainable. It stands disposed.

(A.M. DHAVAL)
JUDGE

mta/Punde