

Naeem Hasan Karnalkar	...	Petitioner
Vs.		
Vinod Purshottam Jawajiwar (decd) through heirs Usha Vinod Jawajiwar and others	...	Respondents

Mr. Venkatesh A. Shastry for Petitioner.
Mr. S. C. Wakankar for Respondents No.1(a) to 1(c) and 2.

CORAM : R. G. KETKAR, J.
DATE : APRIL 19, 2018

P.C. :

Not on Board. By consent of the parties, taken up for admission.

2. This Petition takes exception to the judgment and order dated 29.09.2016 passed by the learned 6th Additional Judge, Small Causes Court, Pune in Miscellaneous Application No.45 of 2015 as also the judgment and order dated 29.11.2017 passed by the learned Ad-hoc District Judge-1, Pune in Miscellaneous Civil Appeal No.426 of 2016. By these orders, the Courts below rejected the application made by the petitioner, hereinafter referred to as 'defendant', for condonation of delay in filing restoration application for setting aside ex-parte decree. Respondents had filed Suit against the petitioner / defendant, which was decreed on 20.03.2015. The defendant filed application under Order IX, Rule 13 for setting aside ex-parte decree. In the process, there was a delay of 11 days. Defendant took out Miscellaneous Application No.42 of 2015 for condoning the delay of 11 days. By the impugned orders, the Courts below rejected the application.

3. Mr. Wakankar raised preliminary objection on the ground of maintainability of proceedings under Order IX, Rule 13 of C.P.C. and

resultantly, maintainability of this Petition. He submitted that against the ex-parte decree dated 20.03.2015, defendant instituted substantive appeal under Section 96 of C.P.C. Pending the Appeal, they took out application for condonation of delay, which was dismissed on 29.11.2017. In view of explanation to Order IX, Rule 13 of C.P.C., if the Appeal is dismissed on the ground other than withdrawal of appeal, application under Order IX, Rule 13 is not maintainable. I find merit in the submission of Mr. Wakankar.

4. In view thereof, once the substantive appeal under Section 96 against the ex-parte decree is dismissed, defendant cannot maintain application under Order IX, Rule 13 of C.P.C. I am fortified in taking this view in view of the decision in ***Bhanu Kumar Jain Vs. Archana Kumar*, (2005) 1 SCC 787**, where in paragraph 26, 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.

(emphasis supplied)”

5. For the reasons stated hereinabove, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)