

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

P.C. :

2. This Petition takes exception to the judgment and order dated 29.11.2017 passed by the learned Ad-hoc District Judge-1, Pune in Miscellaneous Civil Appeal No.949 of 2015. By that order, the learned District Judge-1, Pune in Civil Miscellaneous Application No.945 of 2016. By that order, the learned District Judge rejected the application filed by the petitioner, hereinafter referred to as 'defendant', for condoning the delay of more than 17 months.

- a. he can file application under Order IX, Rule 13 of C.P.C.;
- b. he can file substantive appeal under Section 96 read with Order XLI, Rule 1 of C.P.C.;
- c. he can file petition seeking review of order decreeing the Suit ex-parte;

d. he can also file Suit alleging that plaintiffs obtained the decree by practising fraud upon the Court.

4. Mr. Shastry submitted that all these remedies are consecutive and not simultaneous. In any case, if remedies are not consecutive, he may be permitted to withdraw substantive appeal filed under Section 96 read with Order XLI so as to prosecute the remedy of Order IX, Rule 13 of C.P.C.

5. On the other hand, Mr. Wakankar supported the impugned order and submitted that against the ex-parte decree though defendant has several options, he has to avail those remedies simultaneously and not consecutively. He submitted that once the application for condonation of delay in filing substantive appeal is dismissed by the learned District Judge, the appeal stands dismissed. In view thereof, it will not be permissible for the defendant to withdraw the appeal.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that defendant had filed application under Order IX, Rule 13 of C.P.C. for setting aside ex-parte decree. That application was dismissed by the Courts below. Pending that proceedings, defendant filed substantive appeal under Section 96 read with Order XLI, Rule 1 of C.P.C. As there was delay of more than 17 months in filing the appeal, he took out application for condonation of delay, which was rejected by the impugned order. In the case of ***Amratlal Dhirajlal & Co. Vs. Kamelsingh Harnamsingh Chowhan, Writ Petition No.8502 of 2016*** decided by me on **08.08.2016**, I have held that these proceedings are not consecutive and are simultaneous. In view thereof, the time spent by the defendant in prosecuting proceedings under Order IX, Rule 13 cannot be excluded while computing the delay

in filing the substantive appeal under Section 96. The learned District Judge was, therefore, justified in rejecting the application.

7. As far as submission of Mr. Shastry as regards withdrawal of the substantive appeal in a case where the Suit is dismissed by Courts below, plaintiffs can always apply for withdrawal of the Suit even in the Second Appeal is concerned, I do not find any merit in this submission. Order IX, Rule 13 of C.P.C. reads thus,

“13. Setting aside decree ex-parte against defendant : In any case in which a decree is passed ex-parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex-parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient to appear and answer the plaintiff's claim.

Explanation - Where there has been an appeal against a decree passed ex-parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex-parte decree."

8. In view of the explanation to Order IX, Rule 13, once the appeal is dismissed other than its withdrawal, proceedings under Order IX, Rule 13 cannot continue. In view thereof, if at this stage, defendant is permitted to withdraw the appeal, it will take away right accrued in

favour of the plaintiffs. Hence, the request made by Mr. Shastry for withdrawal of the substantive appeal under Section 96 cannot be conceded. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

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