

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.299 OF 2017
IN
CROSS OBJECTION (ST). NO. 30731 OF 2017
IN
FIRST APPEAL NO.1192 OF 2015**

Prop. Shri Sanjay Sakharam Kamble .. Applicant

AND

Smt.Krishnabai Rajaram Lonkar and Ors. .. Appellants

vs.

Prop. Shri Sanjay Sakharam Kamble and Anr. .. Respondents

Mr.Girish S. Godbole i/b Purshottam G. Chavan for the applicant /
respondent no.1

Mr.Balasaheb Deshmukh for the appellants

Mr.Rajesh Jadhav for the respondent no.2

**CORAM : K. K. TATED &
SARANG V. KOTWAL, JJ.
DATE : FEBRUARY 1, 2018**

P.C.:

1. Heard the learned counsel for the parties.
2. This application is preferred by original defendant for

condonation of 62 days delay in filing the cross objection in First Appeal No.1192 of 2015.

3. In the present proceedings, the plaintiff filed Special Civil Suit No.1461 of 2011 before 2nd Joint Civil Judge, Senior Division at Pune for cancellation of sale deed under section 31(1) of the Specific Relief Act, for declaration that sale deed dated 16.9.2010 executed by the plaintiffs in favour of defendants was illegal, void ab-initio and not binding upon the plaintiffs and for permanent injunction restraining the defendants from disturbing peaceful possession of the plaintiffs over the suit property i.e. Survey No.55A/3E CTS 1840 admeasuring 3202.07 sq.mtr. situated at Mundhava, Tahasil Haveli, District Pune and also from creating any third party interest in the suit property. That suit was partly decreed by the 2nd Joint, Civil Judge, Senior Division, Pune on 5.10.2013. Operative part reads thus:

“ORDER

1. *Plaintiffs' suit is partly decreed.*
2. *The plaintiffs' suit for declaration and cancellation of sale deed is dismissed.*
3. *However, defendants are restrained from creating third party interest in the suit property till the plaintiffs receive their balance consideration.*
4. *Both plaintiffs and defendants shall bear their own costs.*
5. *Decree be drawn up accordingly.”*

4. Being aggrieved by the the Judgment and Decree passed by Trial Court, plaintiff filed First Appeal No.1192 of 2015. Appeal was admitted by this court on 5.6.2017 after hearing both the sides.

Thereafter, the defendant no.1 filed Cross-Objection on 6.11.2017. As there was delay on their part to file Cross-Objection, they preferred the present Civil Application for condonation of 62 days delay.

5. The learned Counsel for the applicant submits that though the Advocate for applicant filed his Vakalatnama in First Appeal before admission, limitation for cross-objection starts from the date of admission of First Appeal as per Order XLI Rule 22 of the Civil Procedure Code, 1908. He submits that appeal was filed by the Appellant on 17.01.2014. He submits that the Appeal stood dismissed for non-removal of office objections on 24.7.2014. Thereafter the plaintiffs preferred Civil Application No.2796 of 2015 for restoration. He submits that in Civil Application No.2796 of 2015 advocate for defendant no.1 appeared. After hearing both the sides, this court by order dated 28.8.2015 allowed Civil Application No.2796 of 2015 and restored First Appeal on file. At that time, this court specifically passed order directing Registry to issue notice for admission in First Appeal, returnable on 25.9.2015. Thereafter, First Appeal admitted after hearing both the sides on 5.6.2017. Hence, limitation for filing cross-objection starts from the date of admission i.e. 5.6.2017 as per Order XLI Rule 22 of the Civil Procedure Code, 1908. In support of this contention, he relies on the Apex Court judgment in the matter of ***Mahadev Govind Gharge & Ors. vs. Special Land Acquisition Officer, 2011 AIR SC 2439***. He relies on paragraph 55 of the said judgment which reads thus:

“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 caveat or otherwise and argues the appeal on merits 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 provision 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 follow:

(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 caveat 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/caveat or, 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.”

6. The learned Counsel for the applicant original defendant no.1 submits that there is 62 days delay in filing cross-objection. He submits that there was communication gap between the applicant and his advocate. He submits that applicant was out of India with his family members and relatives during last week of July-August, 2017. Hence, it remained on the part of his Managing Clerk Laxman Bandgar to inform the applicant about the admission of the First Appeal. Therefore, it remained on the part of applicant to give instruction to his advocate to file cross-objection. Hence, there was delay in filing cross-objection. In support of this contention, he relies on paragraph 6 of Civil Application. He submits that in the interest of Justice, this Hon'ble Court be pleased to condone the delay of 62 days in preferring cross-objection. He submits that if delay is not condoned, irreparable loss will be caused to the applicant. He submits that applicant has good chance of success in the present proceeding.

7. On the other hand, the learned Counsel for the appellant original plaintiff vehemently opposed the present Civil Application. He filed affidavit-in-reply dated 13.12.2017. The learned Counsel for the

plaintiff submits that actually there is a delay of more than 1368 days in filing cross-objection and not 62 days as claimed by the defendant no.1. He submits that in the present proceeding, advocate for defendant no.1 filed his Vakalatnama on 6.2.2014. Hence, it is to be treated that applicant waives service in First Appeal on 6.2.2014 when he filed Vakalatnama. This itself shows that they he had knowledge about the filing of First Appeal against the impugned the Judgment and Decree passed by the Trial Court. Hence, limitation for filing the cross-objection starts from the date of knowledge as per Order XLI Rule 22 of the Civil Procedure Code, 1908. He submits that defendant no.1 failed and neglected to disclose sufficient cause for condonation of 1368 days delay in filing cross-objection. Hence, there is no substance in the present Civil Application and same be dismissed with costs.

8. The learned Counsel for the applicant in support of his contention stated that the limitation for filing cross-objection starts from the date of knowledge and relies on the judgement of the Division Bench of this court in the matter of ***Oil and Natural Gas Corporation vs. Punjsons Pvt.Ltd., 2008(6) BCR 641***. He submits that the Division Bench of this court categorically held that limitation for filing the cross-objection starts from the date of knowledge / notice and not from the date of admission of First Appeal. On the basis of these submissions and the authority of the Division Bench, the learned Counsel for the plaintiff submits that there is no substance in the present Civil Application and same be dismissed with costs.

9. We have heard both the sides. It is to be noted that the question

arises in the present Civil Application is whether the limitation starts from the date of admission or from the date of filing of Vakalatnama if filed before admission of the First Appeal. Order XLI Rule 22 of the Civil Procedure Code, 1908 reads thus:

“22. Upon hearing, respondent may object to decree as if he had preferred 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 Appellate Court within one months 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:

(2) Form of objection and provisions applicable thereto—

Such cross objection shall be in the form of the memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Omitted

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or Is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the court thinks fit,

(5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule.”

10. Bare reading of Order XLI Rule 22 of the Civil Procedure Code, 1908 shows limitation for filing cross-objection starts from the date of notice of hearing. Even the Apex Court in the matter of ***Mahadev Govind Gharge & Ors. vs. Special Land Acquisition Officer*** (Supra) categorically held that limitation for filing cross-objection will commence from the date of admission if the respondents appeared due to earlier notice. Apart from that, even the authority cited by the advocate for plaintiff also supports the fact that limitation for filing cross-objection starts from the date of admission and or the date of notice of hearing served on the other side. Paragraph 12 of the judgment in the matter of ***Oil and Natural Gas Corporation vs. Punjsons Pvt.Ltd.*** (Supra) reads thus:

“12. What is relevant in terms of Order 41, Rule 22 read with Rules 12 and 14 is that the respondent should have knowledge about the admission of the appeal for final hearing. Undisputedly it is the practice of the Court when an appeal is heard at the admission stage, normally the Advocate for the respondent, having already notice of the hearing of the matter, waives service on behalf of the respondent and consequent to such waiver the appellant is not required to serve the respondent afresh with the notice of appeal for the final hearing. Once the Advocate for the respondent waives the service of notice on admission of the appeal, it is always considered as the notice to the respondent for final hearing of the appeal and on such waiver of notice, no further notice is issued to the respondent. The appeal is straightaway taken up for final hearing on the board and after hearing the Advocates

for the parties, it is disposed of. That being normal practise followed by the Court and the same being to the knowledge of the Advocates and litigants and there is no dispute raised in that regard by the respondent-applicant herein, once the Advocate for the respondent had waived the notice to appear before the Court on 16th February, 1999, the respondent now cannot be heard to contend that there was no service of notice to the respondent about the hearing of the appeal. Exhibit 'B' to the Notice of Motion is a copy of order dated 16th February, 1999 in Appeal No. 114 of 1999. It specifically records appearance of the Advocate for the respondents. It further states that the Advocate appearing for the respondent had waived service on behalf of the respondents. The order reads thus:

“Admit. Filing of paper book dispensed with. Mr. Doctor on behalf of respondent waives service.”

Obviously, therefore the respondent had sufficient notice of hearing of the appeal on 16th February, 1999 itself, hence for all purposes the period of limitation for the purpose of cross objection on behalf of the respondent had commenced on 16th February, 1999 itself.”

11. The Apex Court in the matter of ***Municipal Corporation of Delhi and Others vs. International Security & Intelligence Agency Ltd., (2004) 3 SCC 250*** held that Cross-Objection is available to be heard only if original appeal is available for hearing on merits. Cross-Objection would also be dismissed as not maintainable where appeal is found incompetent and not maintainable. This shows that if First Appeal is not maintainable then there is no question of entertaining the cross-objection subject to such exceptions as stated in paragraph 22 of this judgement. If First Appeal is dismissed at the stage of admission itself, then there is no question of entertaining cross-objection in that

Appeal. Therefore, case in hand applicant original defendant no.1 would have filed cross-objection only if First Appeal is admitted and First Appeal was admitted by this court on 5.6.2017.

12. It is to be noted that even Orissa High Court in the matter of *Senior Divisional Manager, New India Assurance Co.Ltd. vs. Umabati Naik and Ors. (Smt.) 2003(95) CLT 700* held that if appeal is not admitted, cross-objection cannot be entertained in that appeal.

13. In the present proceeding, there was delay of 62 days on the part of applicant original defendant no.1 to file cross-objection. It is to be noted that the Apex Court in the matter of *N.Balkrishnan Vs. M. Krishnamurthy (1998) 7 SCC 123* held that the object of fixing the time limit is not meant to destroy the rights. The law of limitation fixes a lifespan for such legal remedy for the general welfare.

14. Considering the above mentioned facts and the law declared by the Apex Court we are of the opinion that applicant has made out a case for allowing the Civil Application. Hence, following order is passed:

(A) Civil Application is allowed in terms of prayer clause (a) which reads thus:

“(a) This Hon'ble Court kindly be pleased to allow the present Civil Application of and further be pleased to condone the delay of 62 days in filing the present Cross Objections.”

- (B) Civil Application is disposed of accordingly.
- (C) No order as to costs.

(SARANG V. KOTWAL, J.)

(K.K.TATED, J.)