

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.61 OF 2019**

1. Mr. Carlton Fortes
Son of Mr. Gilbert Fortes,
Major of Age, And his wife,

2. Noella Fortes,
Major of age,
Both r/o of T-6 Excel Residency,
Kerant, Caranzalem,
Near SBI Branch Panaji,
Ilhas, Goa.

.... Appellants

V/s

1. Smt. Sonhia Lobo,
Wife of Shri John M. Lobo,
Aged 59 years, And her husband,

2. Shri John M. Lobo,
s/o Jose Sebastiao Xavier Lobo,
aged 75 years,
both r/o of Luisa House,
5th Cross Road,
I.C. I Colony, Borivali (W),
Mumbai 400 103.

3. Lina Maria Luisa Catarin Alvares
Major of age,
and her husband

4. Julius Soares
C/o. Sonia Lobo,
both r/o of Luisa House,
5th Cross Road,
I.C. I Colony, Borivali (W),
Mumbai 400 103.

5. Mr. Gilbert Fortes,
And his wife,

6. Mrs. Martha Fortes, (deceased)

Both r/o Flat No. 8
3rd Floor, Lily Rose,
36, Mogul Lane,
Mahim, Mumbai 400 016.

7. Mr. Peter Fortes,
And his wife,

8. Mrs. Jeanette Fortes,
Both r/o of Fortes Villa,
Deolali, Nasik District, Maharashtra.

9. Mr. Mario Fortes,
Alias Mr. Chaucer Forts,
And his wife,

10. Mrs. Jessy Fortes,
Both residents of 13, Cauvery,
Chembur Rupkala Co-op.
Housing Society,
Chedda Nagar, Mumbai.

11. Mrs. Bebvinda Games,
r/o 19508, Nancy Circle, Cerritos,
CA 90703, USA.

12. Mr. Shane Games,
r/o 4772, Larwin Avenue,
Cypress, CA 90630, USA.

13. Charlene Gomes,
r/o 5479, Centralia Unit, # 7,
Long Beach, CA 90808, USA.

14. Yurikco Gomes, r/o 1500,
Sherwood Village Circle,
Placentia, CA 92870, USA.

15. Mrs. Yvonne Carvalho,
And her husband,

16. Mr. Joe Carvalho,
both r/o 21144, Jasmine Way,
Lake Forrest, CA 92630, USA.

17. Mr. Wenzil Fortes,
Resident of 13129,
Edwards Roads,
La Mirada CA-90663 8, USA.

18. Clayton Fortes
s/o Gilbert Fortes.
Major of age
and his wife,

19. Mary Ann Fortes,
Major of age,
Both r/o. 12 Sunrise Drive,
Parsippany, NJ,
07054-4367, USA.

20. Vanessa Nea Fortes,
Major of age.

21. Fiona Fortes,
Major of age,

All residents of F flat No. 8,
3rd Floor, Lily Rose,
36 Mogul Lane,
Mahim, Mumbai 400 016.

... Respondents

Shri J.A. Lobo, Advocate for the Appellants.
Shri C.A. Coutinho, Advocate for the Respondents No.1 & 2.

Coram: - DAMA SESHADRI NAIDU, J.

Date: - 3rd March 2020

ORAL JUDGMENT:

The appellants were the defendants 15 & 16 in Regular Civil Suit No.50/2005/A before the Civil Judge, Senior Division, Vasco. The respondents 1 to 4 were the plaintiffs in that suit. They sued 20 defendants. In the suit, they sought a declaration that they were the co-owners along with the defendants. They have also sought an injunction.

2. Of all the 20 defendants, the 13th defendant alone was served. As a matter of irony, all the unserved defendants live in India, whereas the 13th defendant lives in the USA. Eventually, save the defendants 15 and 16, the rest were served, and the trial went on. In November 2012, the Trial Court partly decreed the suit. Aggrieved, the plaintiffs filed Regular Civil Appeal No.2/2013 before the Ad hoc District Judge 1, South Goa. There, the defendants 15 and 16 are the respondents 14 and 15. Again, these respondents have remained ex parte. Then, on 30.09.2013, the appellate Court allowed the appeal in its entirety. Aggrieved, the defendants 15 and 16 have filed this Second Appeal.

3. For convenience, we will refer to the appellants in this Second Appeal as they were originally arrayed in the suit: Defendants 15 and 16. Better still, as they alone challenged the ex parte decrees, let us call them the contesting defendants. Similarly, we will refer to the respondents 1 to 4 as they were before the trial Court: the Plaintiffs.

4. In December 2014, after suffering a decree from the Appellate Court, the contesting defendants claimed that they had been served with summonses or notices neither in the suit nor in the First Appeal. Accordingly, they have applied to the first appellate Court to have the ex-parte judgment and decree set aside. Besides that, to have the delay condoned, they have filed a delay condonation application as well.

5. Then, on the merits, the First Appellate Court condoned the delay, set aside the ex parte decree in appeal, and restored the first appeal.

It was on 22.03.2018.

6. Later, on 26.06.2018, the defendants filed their cross-objections. But the first appellate Court rejected them on two grounds. Aggrieved, the contesting defendants have filed this Second Appeal.

7. Heard Shri J. A. Lobo, the learned counsel for the appellants and Shri C.A. Coutinho, the learned counsel for the respondents no.1 & 2.

8. The contesting defendants have filed the Second Appeal with these substantial questions of law (summarized):

(i) (a) Has the learned District Judge erred in reckoning the limitation for cross-objections from 22.03.2018, though the appellants had never been served with any notice in Regular Civil Appeal No.2/2013.

(i) (b) Besides, when the provision itself allows for the extension of time, should the District Judge have taken a technical approach in not condoning the delay and in rejecting the cross-objections?

(ii) Has not the learned District Judge disregarded the fact that the limitation ought to have run from 12.11.2014 when the appellants came to know about the impugned judgment and decree, as is evident from order dated 10.07.2017 in CMA 149/2014 and order dated 22.03.2018 in CMA No.108/2017?

(iii) (a) Does the legislative mandate of Section 96 prevent the appellants from raising any plea about the non-service of notice or the deficiency in the service of notice resulting in the ex parte decree?

(iii) (b) In other words, should the appeal under Section 96 confine itself only to the merits of the case?

9. Both the learned counsel have advanced their elaborate arguments, but the issue lies in a narrow conspectus. So I need not advert to the entire gamut of the rival submissions. In fact, I confine myself to

the substantial questions of law and answer them in the light of their arguments. Thus, the Second Appeal stood admitted. Shri C.A. Coutinho, the learned counsel, waived notice to respondents 1 & 2.

Discussion:

Though the appellants have presented a host of substantial questions of law, the counsel on both sides have focused on two questions. And they are, to my mind, the substantial questions of law in terms of Section 100 of CPC. So let us set them out, before we indulge in some discussion.

Substantial Questions of Law:

1. Does Section 96 restrict the scope of cross-objections under Order 41, Rule 22 to only questions of merit, thus, excluding any aspect of procedural lapses?
2. Is it mandatory for a petitioner to seek the condonation of delay under Section 5 of the Limitation Act only through a formal application?

I. In re the First Substantial Question of Law:

(a) What has the First Appellate Court held?

10. The First Appellate Court has rejected the cross-objections on two grounds. The first ground is that the contesting defendants as the appellants in the First Appeal cannot raise the plea of non-service of summonses in the suit, for an appeal under Section 96 of CPC must be only on merits. The second ground is that the cross-objections in terms of Order 41 Rule 22 were barred by limitation as they were filed beyond 30 days.

(b) *Have the First Appellate Court's conclusions justified?*

11. The first appellate Court has heavily relied on the case holding of *Bhanu Kumar Jain v Archana Kumar*.¹ Then, it has held that the judicial dictum of *Bhanu Kumar Jain* is unmistakable and that an appeal under Section 96 of CPC cannot accommodate the grounds available for the appellants under Order 9 Rule 13 of CPC. Therefore, it has concluded that instead of filing the cross-objections, the contesting defendants could have invoked Order 9 Rule 13 CPC.

12. In this context, we may straight away refer to para 24 of *Bhanu Kumar Jain*. It declares that an appeal under Section 96(2) of CPC against an ex parte decree could be filed on two grounds: (i) that the materials brought on record [the merits] in the ex parte suit proceedings by the plaintiff would not entail a decree in his favour, and (ii) that the suit could not have been posted for ex parte hearing. Thus, the procedural lapse that has led to the ex parte decree can be very much a ground of appeal under Section 96. It is under the rubric “that the suit could not have been posted for ex parte hearing.”

13. Now, let us contrast, if ever possible, *Bhanu Kumar Jain's* dictum in para 24 with its observations in paras 37 and 38. It holds in para 37 that when an application under Order 9, Rule 13 of the Code is dismissed, the defendant can only appeal under Order 43, Rule 1 of the Code. If that appeal is dismissed, the appellant cannot raise the same contention in a

¹ (2005) 1 SCC 787

First Appeal. That is, if the same issue—say, about how the defendants were set ex parte—was to be raised both in the First Appeal and also in the proceedings under Order 9, Rule 13, it may lead to conflicting decisions. That approach is impermissible.

14. In the very next paragraph, *Bhanu Kumar Jain* resolves this dichotomy. In para 38, it further holds that if the defendant has ultimately failed to sustain his plea under Order 9, Rule 13 why he should not have been set ex parte in the suit, that issue stands concluded. But his right to assail the decree on the merits remains unimpaired. It is entirely open for him

“to argue in the First Appeal filed by him against Section 96(2) of the Code on the merit of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal.”

15. From *Bhanu Kumar Jain*, to my mind, two things emerge. Against an ex parte decree, the defendant has his remedy in the alternative. The first option for him is a comprehensive appeal under Section 96 of the Code. In that first appeal, he can assail the decree on the merits as well as on the grounds why the trial court should not have set him ex parte. The defendant’s second remedy is an application under Order 9, Rule 13 of the Code.

16. Let us take the first remedy: appeal under Section 96 of the Code. If the defendant has lost the first appeal, he may file a second appeal

on any substantial question of law available. But he cannot turn back and take recourse to Order 9, Rule 13 proceedings.

17. Let us take the second remedy: application under Order 9, Rule 13. If the defendant has lost that application, he can appeal under Order 43, Rule 1 (d) of the Code. Let us assume that eventually the defendant exhausts all his remedies under Order 9, Rule 13—that is, his appellate remedy under Order 43, Rule 1(d) and revisional remedy, say, under Article 227 of the Constitution—he still can file the first appeal under Section 96 of the Code. But he is estopped from raising any grounds he has raised in his application under Order 9, Rule 13. His attack, then, in the first appeal must be on the merits—only on the merits.

18. So I see no legal limitations—procedural or substantial—that affect the appellants. They have never invoked Order 9, Rule 13 of the Code. They have, first, suffered partially before the trial Court. Only with a partial success in the trial court, the plaintiffs filed the first appeal. That appeal was allowed. That means the plaintiffs had their decree as prayed for. Both before the trial Court and the First Appellate Court, the contesting defendants were set ex parte.

19. After suffering the decree in the first appeal, the contesting defendants had applied to the First Appellate Court to have that ‘the ex parte appellate decree’ set aside. Exercising its discretion, the Appellate Court, first, condoned the delay and, then, set aside the appellate decree.

20. The appeal restored on 22.03.2018, the contesting defendants

filed their cross-objections on 26.06.2018. As the First Appellate Court has observed, the contesting defendants have principally pleaded in those cross-objections that the plaintiffs had adopted devious tactics—by showing a wrong address—to ensure that these defendants remained ignorant about the suit. According to them, when pleaded as a justification for having the appellate decree and the appeal restored to file, this ground has merited the Appellate Court’s acceptance. And that resulted in the restoration of the First Appeal.

21. Though the Appellate Court has acknowledged the contesting defendants’ right to file cross-objections, it has concluded that under Section 96 of the Code, no plea about procedural lapses such as non-service of suit summons can be taken; it ought to be purely on the merits.

22. We have already examined *Bhanu Kumar Jain* but have found no such judicial dictum as suggested by the First Appellate Court. Even Section 96 of the Code imposes no such restriction. Section 96, in fact, allows the first appeal against “every decree passed by any Court exercising original jurisdiction.” Under sub-section (2), it explicitly mentions that “an appeal may lie from an original decree passed ex parte.”

23. If we consider the options available to the contesting defendants after the appeal was restored, we may notice their options are two-fold. They could have attacked the trial Court’s judgment and decree and exposed the inherent defects, if any, the plaintiffs’ case has suffered from. It amounts to passive defence. That is, without introducing any positive

evidence on his part, a defendant can always attack the plaintiff's case and expose the shortcomings in the case set up by the plaintiff.

24. Let us assume that the contesting defendants adopted this method. Let us further assume that they succeeded in the first appeal. What happens? The appellate decree goes, but the trial court's decree stays. Here, the plaintiffs partially succeeded in the suit; it is they that have appealed. So this passive resistance would have yielded nothing to the contesting defendants. They still had to suffer a partial decree. Thus, predictably, they have chosen the second alternative: filing an appeal on their own against the trial Court's decree. That is, cross-objections. It is nothing but a counter appeal. And procedural law permits it, as is evident from Order 41, Rule 22 of the Code.

25. The First Appellate Court has rejected those cross-objections on the premise Section 96 of the Code allows a challenge only on the merits, but not on procedural lapses. As we have already discussed, *Bhanu Kumar Jain's* dictum does not endorse this interpretation of Section 96, as the First Appellate Court has erroneously believed.

26. So, I am constrained to hold that the First Appellate Court has misread the case holding of *Bhanu Kumar Jain* and misapplied its judicial dictum. Pithily put, an appeal under Section 96 can contain pleas not only on the merits but also on questions like non-service of suit summons and the illegality of the order setting the defendant ex parte – procedural

lapses.

II. In re the Second Substantial Question of Law:

Is it mandatory for a petitioner to seek the condonation of delay under Section 5 of the Limitation Act only through a formal application?

27. Under Order 41, Rule 22 of the Code, even a respondent may object to a decree as if he had preferred a separate appeal. Thus, he may state that the finding against him in the Court below on any issue ought to have been in his favour. In this process, the respondent 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.

28. We cannot be oblivious of the fact that a cross-objection is like a cross-appeal. It is a substantive right. For all practical purposes, a cross-appeal is an independent appeal. The only distinction is that the cross-objection has a different time frame as to limitation.

29. On fact, we must accept that the contesting defendants did file their cross-objections beyond limitation. They could have filed the cross-objections within one month from the date of service on them. Here, the question of notice does not arise because it is they that came to the First Appellate Court and had the ex parte decree set aside. So we can take the appeal's restoration as the date of the notice. That was on 22.03.2018. But they filed the cross-objections on 26.06.2018. Thus, there is a delay of just over two months.

30. First, I see no delay condonation filed by the contesting respondents. Nor do I see, second, any discussion by the First Appellate Court whether the delay deserved to be condoned. Of course, the contesting respondents' failure to file the delay condonation petition may have obviated any discussion by the Appellate Court on that count. Strictly speaking, we cannot find fault with the Appellate Court's approach.

31. That said, justice is not a matter of technical tangles engendered by procedural polemics. Without getting stretched too far to the point of misuse, procedure, as is often judicially articulated, is the handmaiden of justice—"something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up."

32. Precedentially, we may note a few cases concerning the delay and the court's liberal approach in condoning the delay. Section 75 (1) of the Multi State Cooperative Societies Act 2002 prescribes the limitation of 30 days for a dispute to be referred to the Central Registrar. If the dispute is referred to him beyond the limitation, that authority, under Section 75 (3) of the Act, has the power to condone the delay and admit the dispute. In this context, the Supreme Court has held in *N. Balaji vs Virendra Singh*² thus: "Even without there being any application for condonation of delay, if the facts which emerge in the case are sufficient

² (2004) 8 SCC 312

to satisfy the Central Registrar of the reasonable cause for not referring the dispute within the period of limitation, the Central Registrar can condone the delay in exercise of the powers conferred on him under sub-s. (3) of Sec.75 of the Act.”

33. In *Mithailal Dalsangar Singh v. Annabai Devram Kini*³, the issue was about abatement of judicial proceedings. But the petitioner filed no separate application for setting aside the abatement, though he applied for bringing the legal representatives of the deceased on record. In that context, the Supreme Court has observed that abatement results in denial of hearing on the merits, so the provision of abatement has to be construed strictly. On the other hand, “the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally.”

34. To elaborate the proposition further, *Mithailal Dalsangar Singh* has held that simple prayer for bringing the legal representatives on record without specifically praying for setting aside of abatement may in substance be construed as a prayer for setting aside the abatement. In that context, it has observed that the courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a *lis* determined on merits unless he has, by gross negligence, deliberate inaction, or something akin to misconduct, disentitled himself from seeking the

3 (2003) 10 SCC 691

indulgence of the Court.

35. Section 5 of the Limitation Act 1963 allows a court to admit any appeal or any application, other than one under Order XXI of the Code, after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for the delay. The explanation brings into the fold of sufficient cause even a mistaken notion about any “order, practice or judgment of the High Court” in ascertaining or computing the prescribed period.

36. Interpreting the limitational latitude of Section 5, a three-Judge Bench of the Supreme Court in *Collector Land Acquisition v Mst. Katiji*⁴ has tellingly observed that the expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice—that being the existential justification for the Courts. Underlining its liberal approach towards the delay in matters instituted before it, the Supreme Court has, however, bemoaned that this “message does not appear to have percolated down to all the other Courts in the hierarchy.” Then, it has adjured the courts at all levels to realise that:

1. Ordinarily, a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that

4 AIR 1987 SC 1353

can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational, common-sensical, and pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

37. This Court, per S. A. Bobde J., (as his Lordship then was) has considered the question whether Section 5 of the Limitation Act compels a party to file a separate application for the delay condonation. In *Antonio Francisco De Silva v. Mrs. Beatriz Noronha Cabral*, this Court has held that the Section clearly provides that an appeal or application may be admitted after the prescribed period, if the party satisfies the Court that he had sufficient cause for not preferring the appeal or making an application within such period. The basic condition for admitting the delayed appeal or application is that the party must satisfy the Court that he had sufficient cause for not preferring the appeal or making an application

within the period of limitation. The basic requirement of the section is that the party seeking condonation of delay must satisfy the Court that there is sufficient cause for such condonation. It does not prescribe a separate application for condonation of delay.

38. Indeed, the learned counsel for the contesting defendants has contended, feebly though, that the defendants did orally apply for the delay condonation. But I find no reference to any in the impugned order.

39. Incidentally, the First Appellate Court has not rejected the cross-objections on the simple premise that they have been barred by time. It has, in fact, considered the question on the merits, too. That is, it has ruled what the cross-objections could contain. Here the circumstances are peculiar. Initially, the contesting defendants suffered *ex parte* decrees concurrently before both the trial Court and the First Appellate Court. Once the Appellate Court restored the appeal, by the second adjournment the contesting defendants filed their cross-objections. In the absence of a delay condonation petition, there had been no occasion for the Appellate Court to examine whether the defendants had shown sufficient cause for presenting the cross-objections belatedly. So it has simply ruled that the cross-objections were presented beyond 30 days. Nothing more.

40. Under these circumstances, instead of entirely non-suiting the contesting defendants on their cross-objections, we may provide them one chance—in the interest of justice—to apply for delay condonation and invite an order from the First Appellate Court on the merits. For that, the

impugned order needs to be set aside.

41. As a result, I set aside the impugned Order Below Exhibit D/23 in its entirety and remand the matter to the first appellate Court. On remand, the Appellants may apply for the condonation of delay, reckoning the period of delay up to the date the cross-objections were presented and invite an order on the merits. I reiterate that the Appellate Court's ruling on the scope of cross-objections under Order 41 Rule 22, read with Section 96 of CPC stand rejected.

42. Needless to observe that the First Appellate Court may exercise its discretion in considering the delay condonation petition, should it be filed.

The parties to appear before the first appellate Court on 10/07/2020 at 2.30 p.m. to enable the First Appellate Court to proceed further in the manner stated above.

DAMA SESHADRI NAIDU, J.

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