

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
APPEAL FROM ORDER NO.58 OF 2019
WITH
CIVIL APPLICATION NO.199 OF 2019

1. Ramakrishna Anand Raikar,
 major of age, residing at H.No.325,
 Posrem Bhat, St. Caitana Ward,
 Mercedes, Ilhas, Goa.

2. Smt. Mirabai Anand Raikar,
 since deceased through legal heirs.

(a) Smt. Neeta Arvind Verlekar,
 major married and her husband,

(b) Audhot Ganpat Verlekar,
 Major, married,
 Both residing at Guriyem,
 Nuvem, Salcete, Goa.

3. Smt. Shilpa Ramkrishna Raikar,
 major, residing at H.No.325,
 Posrem Bhat, St. Caitana Ward,
 Mercedes, Ilhas, Goa.

..... Appellants.

Versus

Bismark C. D'Souza,
 aged 50 years, sole proprietor of
 M/s. Mark Builders, with office
 at 202, Govinda Bldg., Panaji, Goa.

..... Respondent.

Mr. Joaquim Godinho, Advocate for the Appellants.

Mr. A. D. Bhobe, Advocate for the Respondent.

Coram : M.S. Sonak, J.

Dated : 16th June, 2021.

ORAL JUDGMENT :-

Heard the learned Counsel for the parties.

2. Admit. With the consent of and at the request of the learned Counsel for the parties, the Appeal is taken up for final disposal forthwith.

3. This Appeal is directed against the order dated 5th September, 2019, made by the District Judge-1, North Goa, Panaji (First Appellate Court) dismissing Civil Misc. Application No.144/2019, seeking setting aside of the ex parte Judgment and Decree dated 26th September, 2018, made by the First Appellate Court in Regular Civil Appeal No.60/2013.

4. The Appellants are the original Defendants and the Respondent is the original Plaintiff in Special Civil Suit No.45/2004 instituted before the Senior Civil Judge, Panaji (Trial Court).

5. By the Judgment and Decree dated 18th May, 2013, the Trial Court dismissed the Suit. The Respondent, thereupon instituted Regular Civil Appeal No.60/2013 before the First Appellate Court.

On the date fixed for hearing of the Appeal, neither the Appellant nor his Advocate remained present. Therefore, by the Judgment and Decree dated 26th September, 2018, the First Appellate Court allowed the Respondent's Appeal and decreed the suit in the absence of the Appellants or their Advocate.

6. The Appellants claim that they came to know about the aforesaid Judgment and Decree dated 26th September, 2018 after about 4 months and, therefore, they filed the following applications before the First Appellate Court :

(a) Civil Misc. Application No. 83/2019 praying for condonation of delay of 135 days in seeking rehearing of the Appeal under Order 41, Rule 21 of the CPC; and

(b) Civil Misc. Application No.144/2019 praying that the Judgment and Decree dated 26th September, 2018 be set aside and Regular Civil Appeal No.60/2013 be reheard in terms of Order 41, Rule 21 of the CPC.

7. By order dated 30th April, 2019, the First Appellate Court allowed Civil Misc. Application No.83/2019 by accepting that the cause shown by the Appellants, constituted sufficient cause. Impliedly, the First Appellate Court accepted the Appellants' case that they had engaged an Advocate to appear on their behalf in the Appeal and they relied upon the said Advocate to appear on the appointed date and argue the Appeal on their behalf. The First Appellate Court

expressly accepted the contention of the Appellants that since they had done everything that was expected of them and there was failure on the part of the Advocate to attend the matter on the appointed date and further to even inform the Appellants about the ex parte decree, the delay in instituting the application under Order 41, Rule 21 of the CPC deserved to be condoned. However, the First Appellate Court, vide Order dated 5th September, 2019 (impugned order) dismissed Civil Misc. Application No.144/2019 seeking rehearing of the Appeal in terms of Order 41, Rule 21 of the CPC. Hence the present Appeal.

8. Now, if the cause shown in Civil Misc. Application No.83/2019 and in Civil Misc. Application No.144/2019 is considered, then, it is apparent that the same is substantially similar to each other. The First Appellate Court, having accepted substantially similar cause in Civil Misc. Application No.83/2019, ought not to have declined to accept the substantially similar cause pleaded in Civil Misc. Application No.144/2019. As was rightly pointed out by Mr. Godinho, there is some element of contradiction in the reasoning reflected in the two orders since, the prior order dated 30th April, 2019 disposing of Civil Misc. Application No.83/2019 was not even challenged by the Respondent and the same has attained finality for want of such challenge. The First Appellate Court in such circumstances, ought to have allowed Civil Misc. Application No.144/2019 as well. On this short ground, the

impugned order dated 5th September, 2019 is required to be set aside and the Appellants' application under Order 41, Rule 21 of the CPC is liable to be allowed.

9. No doubt, this will occasion some prejudice to the Respondent. Just as it is true that the Appellants should not be made to suffer on account of some lapse on the part of their Advocate, so also the Respondent cannot be made to suffer on account of any lapse on the part of the Appellants' Advocate. Therefore, it is only appropriate that the Respondent is compensated by way of some substantial costs. One of the reasons for exercise of discretion in favour of the Appellants is that they had succeeded before the Trial Court and their success was not set at naught by the First Appellate Court vide ex parte judgment and decree dated 26th September, 2018. Now the Respondent had succeeded before the First Appellate Court and it is this success which is being set at naught by allowing the Appellants' application under Order 41, Rule 21 of the CPC. Therefore, substantial costs will have to be paid by the Appellants in this matter. Mr. Godinho, on instructions from the Appellants, states that the Appellants will pay costs of ₹ 50,000/- to the Respondent within a period of 3 weeks from today. This statement is accepted and the Appellants are directed to act accordingly.

10. Mr. Bhobe, the learned Counsel for the Respondent submits that some directions be issued for expeditious disposal of the

Appeal since, the suit was instituted by the Respondent some time in the year 2004. This request is quite reasonable and deserves acceptance.

11. Accordingly, this Appeal is disposed of by following order :

(a) The impugned order dated 5th September, 2019 is set aside and Civil Misc. Application No.144/2019 made under Order 41, Rule 21 of the CPC is, hereby, allowed.

(b) The aforesaid is subject to the Appellants' paying costs of ₹ 50,000/- to the Respondent on or before 7th July, 2021. In case there is any difficulty in making the payment, the Appellants can deposit the amount of costs before the First Appellate Court on or before 7th July, 2021.

(c) If the costs as aforesaid, are indeed paid or deposited before 7th July, 2021, the parties to appear before the First Appellate Court on 12th July, 2021 at 10.00 a.m. and file an authenticated copy of this order.

(d) The First Appellate Court to then permit the Respondent to withdraw the costs unconditionally and issue necessary directions for rehearing of Regular Civil Appeal No.60/2013, now that the ex parte Judgment and Decree dated 26th September, 2018 made therein stands set aside.

(e) If there is failure to pay or deposit the costs, then, this Appeal shall be deemed to have been dismissed with costs of ₹ 25,000/-, which can be recovered by the Respondent in execution.

(f) The First Appellate Court to dispose of the Regular Civil Appeal No.60/2013 as expeditiously as possible and in any case, within a period of 4 months from the date the parties file authenticated copy of this order.

12. Both the parties to cooperate with the First Appellate Court for expeditious disposal of the Regular Civil Appeal. In particular, the Appellants should not seek any undue adjournments now that they have succeeded in this Appeal.

13. All concerned to act on the basis of an authenticated copy of this order.

14. Civil Application No.199 of 2019 does not survive and is hereby disposed of.

M.S. Sonak, J.

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