

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

928 WRIT PETITION NO.8444 OF 2017

**M/S VENKATESH ENTERPRISES
THROUGH ITS PROPRIETOR J B SIRSALE
VERSUS
FOSTER INDIA LTD
THROUGH ITS GENERAL MANAGER AURANGABAD
AND OTHERS**

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Advocate for Petitioner : Mrs. P.V. Langhe
Advocate for Respondent No.1 : Mr. L.D. Vakil
Advocate for Respondent No.2 : Mr. S.W. Munde

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CORAM : SANDEEP V. MARNE, J.

DATE : 18-11-2022

PER COURT :

. By this petition, petitioner has assailed order dated 30.06.2016 passed by District Judge-9, Aurangabad below Exh.48 in RCA No.45 of 2007 rejecting petitioner's application for taking on record cross-objection to the findings recorded by the trial Court on additional issues framed by the Appellate Court. Petitioner has also challenged the order dated 21.06.2017 by which petitioner's application seeking condonation of delay in filing of objections to the finding of the trial court has also been turned down.

2. The learned Counsel for petitioner submits that

petitioner was prevented from filing objections to the findings recorded by the trial Court essentially on account of the appeal being transferred to various courts during the intervening period of 17.04.2013, when the appellate court had granted opportunity of filing such objections, till the objections were actually sought to be filed on 20.08.2015. She further submits that no specific period of limitation is specified under the provisions of Order 41, Rule 26 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') for filing of such objections. She further submits that the Appellate Court was required to be liberal in approach and ought to have taken objections of petitioner on record rather than making petitioner approach this Court. She relies upon judgment of the Apex Court in **Mahadev Govind Gharge and Ors vs. The Special Land Acquisition Officer**, AIR 2011 SC 2439 as well as the judgment of this Court in **State of Maharashtra vs. Kalu Ladku Mhatre**, 2011 (6) ALL MR 242.

3. Mr. Vakil, the learned counsel for respondent no.1 strenuously opposes the petition and supports the order passed by the District Court. He submits that under the provisions of Order-41, Rule-26 of the Code of Civil Procedure 1908, the objections are to be filed 'within a time to be fixed by the Appellate Court'. He submits

that the Appellate Court had directed by its order dated 17.04.2013 to file memorandum of objection to the findings recorded by the trial Court within one month. Despite noticing the order dated 17.04.2013, petitioners failed to file the memorandum of objection. He sought to file the same only after the appeal was taken up for final hearing. Referring to the application filed by petitioner, Mr. Vakil submits that petitioner did not even bother to seek condonation of delay in filing the memorandum of objection. He further submits that on account of the conduct of petitioner, respondent no.1 is made to suffer as hearing of the appeal was held up on account of *ad interim* relief granted by this court. He therefore prays for dismissal of the petition.

4. Mr. S.W. Munde, the learned Counsel for respondent no.2 supports the stand of respondent no.1 and adopts the submissions of Mr. Vakil.

5. After having heard the learned counsel for the parties, it is seen that after receipt of the finding of the trial Court on the additional issues framed by the Appellate Court, the Appellate Court had granted an opportunity to both the parties to present memorandum of objections by its order dated 17.04.2013. The same was to be filed within a period of one month. In this regard, it would

be appropriate to reproduce the provisions of Rule-26 of Order-41 which reads thus:

“26. Findings and evidence to be put on record – Objections to finding. - (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.

(2) **Determination of appeal.** - After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.”

6. Perusal of the provisions of Rule-26 of Order-41 would indicate that no specific time has been specified in that provision for filing of memorandum of objections. However, it does not mean that such objections can be filed at any point of time. On the other hand, the Rule 26 provides that such objections have to be filed ‘within the time limit fixed by the Appellate Court’. The Appellate Court had fixed time limit of one month by its order dated 17.04.2013 and petitioner ought to have filed the memorandum of objections within 90 days.

7. The only reason cited in the application dated 20.08.2015 for not filing of objections within time is the transfer of the appeal from two various District Courts. This reason cited by petitioner does not inspire confidence. Petitioner was aware that he

was required to file the memorandum of objection within one month from the date of passing of the order dated 17.04.2013. Mere transfer of appeal from one Court to another would not have prevented him from filing the same within the time limit specified.

8. Be that as it may. Since no specific period is specified in Rule-26, Order-41 of the CPC, the District Court could have adopted slightly liberal approach while dealing with petitioner's application for taking the memorandum of objections on record. The judgments cited by the learned counsel for petitioner relate to the issue of filing of cross-objections under the provisions of Order-41, Rule-22. However the spirit of those judgments is required to be borne in mind. In **Mahadev Govind Gharge** (*supra*) the Apex Court has held as under:

"16. In Shibu Ram Mittal (*supra*), the Division Bench of the Delhi High Court specifically held as follows:

"9. A bare perusal of the relevant provisions contained in Sub-Rule (1) of Rule 22 of Order XLI C.P.C makes it clear that the limitation would begin to run from the date of service of notice on the respondent or his pleader of the day fixed for hearing of the appeal. A notice informing the respondent that an appeal has been admitted against him and intimating a Farzi (tentative) date of hearing cannot be taken as the notice envisaged under this provision. The provision is specific- "notice of the date fixed for hearing the appeal". A Farzi date cannot be said to be the date fixed for hearing the appeal. Simply because a counsel appeared for the respondents does not displace the requirement of service of notice of actual date of hearing of appeal. The emphasis on the words "notice of date fixed for hearing an appeal" cannot be allowed to be diluted. The provision

ensures that the appellant has advance notice before the hearing of the appeal about the cross objections by the respondent."

9. In **Kalu Ladku Mhatre** (*supra*) this Court has held as under:

"6. Thus, under Sub Rule 1 of Rule 22 of Order XLI of the said Code, a power has been conferred upon the Appellate Court to extend the time to file Cross Objection. The Appellate Court can grant such further time as it may see fit to allow. The Sub-Rule 1 of Rule 22 does not lay down that sufficient cause is required to be shown by the respondent. As the said Code vests the power to extend the time to file Cross-Objection in the Appellate Court, it is not at all necessary for the respondent in Appeal to invoke Section 5 of the Limitation Act, 1963. Section 5 of the Limitation Act reads thus:

"Extension of prescribed period of certain cases - Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfied the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

7. The last part of Sub Rule 1 of Rule 22 of Order XLI deals with the grant of extension of time for filing of Cross Objection and Section 5 of the Limitation Act deals with the extension of time to prefer an Appeal. Section 5 of the Limitation Act incorporates a condition precedent of the appellant satisfying the Appellate Court that he had sufficient cause for not preferring the Appeal within the prescribed period of limitation. Sub Rule 1 of Rule 22 of Order XLI does not incorporate the stringent requirement of establishing a sufficient cause. Thus, a wide power to extend the time to file Cross-Objection has been vested in the Appellate Court. Though there is no requirement of establishing sufficient cause within the meaning of Section 5 of the Limitation Act, in the application for seeking extension of time to file Cross-Objection, brief reasons for delay will have to be set out. A wider discretion has been conferred on the Appellate Court under the Sub Rule 1 of

Rule 22 than what is conferred by Section 5 of the Limitation Act. The power to extend time under Sub Rule 1 of Rule 22 of Order XLI of the Code has to be liberally exercised in case where a Cross-Objection is sought to be filed before the Appeal is heard for final hearing.”

10. Petitioner failed to file the memorandum of objection for a considerable period of time and sought to file it only when the appeal was to be taken up for final hearing. One may draw an inference from such conduct of petitioner that the memorandum of objection was sought to be filed possibly to delay hearing of the appeal. Therefore, considering the conduct of petitioner, while allowing the present petition, costs are required to be saddled on petitioner.

11. In view of above, I pass the following order.

ORDER

(i) The order dated 30.06.2016 passed by District Judge-9, Aurangabad on application below Exh.48 as well as order dated 21.06.2017 on application below Exh.52 are set aside.

(ii) The memorandum of objection filed by petitioner be taken on record and decided while hearing the appeal.

(iii) Petitioner to pay costs of Rs.5,000/- to respondent no.1 within

a period of four weeks from today.

(iv) The hearing of the appeal is expedited and the District Judge shall make an endeavor to decide the appeal within a period of two months from today.

12. Writ petition is accordingly allowed. Rule is made absolute.

(SANDEEP V. MARNE, J.)