

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 386 OF 2023

Chandrakant Dattu Mhatre & Ors.

.. Petitioners

Versus

Nandkumar Moreshwar Patil & Ors.

.. Respondents

.....

- Mr. Ghanshyam Upadhyay a/w Mr. Mubarakka Lokhandwala, Mr. Mohsin Khan, Mr. Umair Ansari and Mr. Vijay Jha for Petitioners
- Mr. A.R. Gole for Respondent No. 1

.....

CORAM : MILIND N. JADHAV, J.

DATE : FEBRUARY 27, 2024

ORAL JUDGMENT:

1. Heard Mr. Upadhyay, learned Advocate for Petitioners and Mr. Gole, learned Advocate for Respondent No. 1.

2. Report dated 26.02.2024 filed by the Assistant Registrar, Civil Writ Petition Department states that the present Writ Petition is maintainable and rejects the contention raised by Respondents that the impugned order is to be challenged in Appeal from Order only. Hence it is taken up for hearing and disposal.

3. Present Writ Petition takes exception to the judgment & order dated 21.07.2015 passed by the learned Appellate Court in Civil Misc. Application (MCA) No. 28/2014 dismissing Application for condonation of delay of 2 years and 2 months in filing Application for restoration of Appeal. Admittedly both parties agree that delay is of 2

years and 2 months. Present Petition is filed on 07.12.2022. There is a little history as to why the Writ Petition is filed so late which needs to be delineated before I advert to the submissions made by Mr. Upadhyay and Mr. Gole.

4. RCS No. 1049/1995 is filed by Petitioners seeking declaration in respect of the suit property. After the trial, Suit was dismissed on merits on 28.07.2003. Plaintiffs being aggrieved filed statutory Appeal No. 134/2003. That Appeal was dismissed for want of prosecution and in default on 14.10.2011. Petitioners / Appellants filed MCA No. 28/2014 for restoration of the Appeal. That Application below Exh. 41 was dismissed by the impugned judgment delivered on 21.07.2015 which is the subject matter of the present Writ Petition.

5. Mr. Gole in his usual fairness has informed the Court that in the interregnum the Petitioners / Appellants filed two substantive proceedings i.e. Writ Petition (St) No. 12983/2016 and Second Appeal (St) No. 30013/2016 to challenge the judgment dated 21.07.2015 and withdrew both the proceedings on 26.09.2016 and 04.09.2022 as they were not maintainable. Thereafter Petitioners / Appellants filed the present Writ Petition in 2022.

6. Mr. Upadhyay would restrict his case to the grounds for condonation of delay. As observed, there is delay of 2 years and

2 months. He would draw my attention to the averments made in paragraph Nos. 2 and 3 of the Application and would submit that admittedly there is delay and as an officer of the Court he cannot plead any reason other than that mentioned in the Application. He would submit that when the dismissal occurred due to non-appearance of Advocate, Petitioners / Appellants requisitioned services of another Advocate and filed the aforementioned two proceedings as advised to them which are delineated by me herein above. He would submit that when it was realized that the aforementioned proceedings were not the correct proceedings, they were withdrawn resultantly leading to the delay. He has also drawn my attention to the grounds mentioned in paragraph Nos. 6 and 7 and would only make one submission i.e. Petitioners / Appellants be not penalized for the delay and be allowed to prosecute the Appeal which was filed by Petitioners / Appellants within time, but was not prosecuted. He would submit that Appeal No. 134/2003 was in fact filed by Petitioners within time to challenge dismissal of the suit proceedings. All that he would submit is that the statutory right of Appeal of the Petitioners / Appellants be protected by this Court by putting the Petitioners / Appellants to terms as deemed fit.

7. Mr. Gole raises a preliminary objection with respect to the maintainability of the present Writ Petition challenging the judgment

dated 21.07.2015. He would submit that the judgment dated 21.07.2015 is required to be challenged by filing an Appeal from Order in view of the specific provisions of O. XLIII, Rule 1(1) read with O. XLI, R. 17 and R. 19 of the CPC. Considering his submissions, the said provisions are delineated herein under:-

“O. XLIII, R. 1(1) of CPC:

1: Appeals from orders— *An appeal shall lie from the following orders under the provisions of Section 104, namely:—*

(a) an order under Rule 10 of Order VII returning a plaint to be presented to the proper Court except where the procedure specified in Rule 10-A of Order VII has been followed;

(c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte;

(f) an order under Rule 21 of Order XI;

(i) an order under Rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;

(j) an order under Rule 72 or Rule 92 of Order XXI setting aside or refusing to set aside a sale;

(ja) an order rejecting an application made under sub-rule (1) of Rule 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of Rule 105 of that Order is appealable;

(k) an order under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

(l) an order under Rule 10 of Order XXII giving or refusing to give leave;

(n) an order under Rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(na) an order under Rule 5 or Rule 7 of Order XXXIII rejecting an application for permission to sue as an indigent person;

(p) orders in interpleader-suit under Rule 3, Rule 4 or Rule 6 of Order XXXV;

(q) an order under Rule 2, Rule 3 or Rule 6 of Order XXXVIII;

(r) an order under Rule 1, Rule 2, Rule 2-A, Rule 4 or Rule 10 of Order XXXIX;

- (s) an order under Rule 1 or Rule 4 of Order XL;*
- (t) an order of refusal under Rule 19 of Order XLI to readmit, or under Rule 21 of Order XLI to rehear, an appeal;*
- (u) an order under Rule 23 or Rule 23-A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;*
- (w) an order under Rule 4 of Order XLVII granting an application for review.*

1-A: Right to challenge non-appealable orders in appeal against decrees—

(1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded."

"O. XLI, R. 17 of CPC:-

17. Dismissal of appeal for appellant" default :- (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(2) Hearing appeal ex parte. - Where the appellant appears and the respondent does not appear, the appeal shall be heard ex parte."

"O. XLI, R. 19 of CPC:-

19. Re-admission of appeal dismissed for default.- Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

8. Mr. Gole would submit that under O. XLI, R. 19 of the CPC, where an Appeal is dismissed under Rule 11, Sub-rule(2) or Rule 17, the Appellant may apply to the Appellate Court for readmission of the Appeal and in that regard when read with the provisions of O. XLIII,

Rule 1(t), the Appellant would be required to file Appeal from order only. He would therefore submit that the Writ Petition filed by the Petitioners be returned and Petitioners be directed by this Court to file appropriate Appeal from Order to challenge the judgment dated 21.07.2015.

9. On the basis of the aforesaid provisions, I see reason and substance in the submissions advanced by Mr. Gole. This would necessarily entail a third round of proceedings filed by the Petitioners over a period of 12 years, only because they are guided so. He would support his aforesaid submissions by referring to following two decisions of this Court:-

- (i) ***Chandrakant Govind Sutar Vs. M.K. Associates & Anr.***¹;
- (ii) ***Maurice Cilanova Domingos Baptista Pinto Antonio Baptista Pinto (deceased) & Ors. Vs. Ashley Developers Pvt. Ltd.***²

10. He would draw my attention to paragraph No. 5 in the decision in the case of Chandrakant G. Sutar (*first supra*) and would contend that in view of the decision of the Supreme Court reported in AIR 1982 SC 1397 in the case of ***Rani Choudhary Vs. Lt. Col. Suraj Jit Choudhury***, our Court has held that the order passed on an Application for condonation of delay in filing Appeal is to be construed as one passed in the Appeal itself and therefore by the same analogy,

1 2003(1) Mh.L.J. 1011

2 2018 SCC OnLine Bom 511

in the present case the judgment dated 21.07.2015 ought to be considered as an order passed in Appeal and not in the Misc. Application. Similar is the proposition in the case of Maurice Cilanova (*second supra*) There is one fundamental question that arises for consideration when the aforementioned proposition laid down by our Court is read by me. It is seen that in the present case, Suit stands dismissed by judgment dated 28.07.2003 whereas the Appeal also stands dismissed though in default by order dated 14.10.2011. Due to this, the Registry has opined that Appeal from Order would not lie as the order impugned is not any interlocutory order, either passed in the Suit or the Appeal. I agree with the same. Mr. Gole while making his submissions may be right that the judgment dated 21.07.2015 be considered as an interlocutory order and therefore Petitioners should be relegated to the remedy of filing Appeal from Order but this Petition is filed under Article 227 of the Constitution of India concerning the supervisory jurisdiction of this Court and the Court needs to therefore do substantive justice. In the present case, it is seen that Petitioners / Appellants have in the past filed two proceedings in the interregnum and without any order have withdrawn the same. Those proceedings are delineated herein above. What is seen by this Court is that substantial time has already been lost and spent by the Petitioners / Appellants. All that time has been spent merely for

seeking condonation of delay which resultantly has stretched to more than 10 years. Court of law is required to do substantial justice, the delay of two years and two months deserves to be condoned in the above facts and observations made by me. Power of superintendence under Article 227 of the Constitution of India of this Court is extremely wide and also ingrains the attributes of Article 226 to do substantive justice. The delay is in respect of filing the Misc. Application seeking restoration of the dismissed Appeal. That Misc. Application for restoration is yet to be heard on merits. Appeal being a substantive right of the party, if denied would completely non-suit the party. I refrain myself from delineating any submissions on the merits of the matter though during the course of submissions, Mr. Gole has but advanced a few submissions thereon. I do not consider them necessary at all since for a decision on the issue before me.

11. The jurisdiction under Article 227 of the Constitution of India is neither Original nor Appellate, but is for both administrative and judicial superintendence. Exercise of its jurisdiction under Article 227 is entirely discretionary at the instance of the Court and can be exercised by the Court even *suo motu*. In exercise of supervisory jurisdiction under Article 227, the High Court may not only quash or set aside the impugned judgment and order, but it may also make such directions as the facts and circumstances of the case may warrant, may

be by way of guiding the inferior Court or Tribunal as to the manner in which it would now proceed further or afresh as commended to or guided by the High Court and in an appropriate case, the High Court while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision as the inferior Court or Tribunal should have made. The power under Article 227 enables the High Courts to exercise issuance of further directions which may not be available in the proceedings under Article 226 of the Constitution of India.

12. In the facts and circumstances of the present case, I am of the opinion that this Court in a Writ Petition under Article 227, Court can pass the order determining the issue raised by the Petitioners / Appellants seeking permission and leave of this Court for condonation of delay and more specifically so in the peculiar and specific facts of the present case which are delineated herein above. The timeline enumerated above speaks for itself and relegating the Petitioners to once again withdraw the present Writ Petition and file a fresh proceedings i.e. Appeal from Order as contended by Mr. Gole would not be in the interest of justice only because it will also lead to substantial delay that has already happened. However allowing the Writ Petition by condoning the delay of two years and two months, and that too in the facts of the present case cannot be unconditional.

Petitioners as seen above have protracted the matter, but one thing needs to be understood that no person or litigant will repeatedly approach the Court of law time and again and withdraw the proceedings unless the said litigant is guided by the Advocate. In that view of the matter and in the interest of justice, the judgment dated 21.07.2015 is quashed and set aside. The Application filed below Exh. 41 seeking condonation of delay of two years and two months is allowed in the facts and circumstances of the present case. The said delay of 2 years and 2 months is condoned in the interest of justice subject to Petitioners paying costs of Rs. 25000/- to the Respondents which in my opinion is an adequate compensatory relief to balance the convenience of both the parties. Once the costs are paid to the Respondents, the learned Trial Court shall ascertain the same and hear Misc. Application No. 28/2014 for restoration of Appeal strictly on its own merits without being influenced by any of the observations and findings returned by the learned Appellate Court in the judgment dated 21.07.2015 as also this order. It is clarified that all contentions of both the parties are expressly kept open.

13. Writ Petition is allowed and disposed in the above terms.

[MILIND N. JADHAV, J.]

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