



IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR-800-2020 (O&M)

Reserved on:-06.09.2024

Pronounced on: 12.09.2024

UDAY SRIKANT GHATGE AND OTHERS

.... PETITIONERS

Vs.

RAJINDER SHARMA

.... RESPONDENT

CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

Present:- Mr. Akshay Bhan, Sr. Advocate, with
Mr. Santosh Kumar Sharma, Advocate, for the petitioners.

Mr. Sumeet Mahajan, Sr. Advocate, with
Mr. Saksham Mahajan and Mr. Shrey Sachdeva, Advocates,
for the respondent.

DEEPAK GUPTA, J.

Petitioners herein are the defendants before the Courts below. They are aggrieved by the order dated 18.09.2019 (*Annexure P1*) passed by the Appellate Court of *Ld. Additional District Judge, Gurugram*, whereby application for condonation of delay has been dismissed and resultantly, the appeal itself has been dismissed.

2.1 As the paper-book would reveal that plaintiff-Rajinder Sharma (respondent herein) wanted to secure a seat for his son in the session 2013 for MS Orthopedics in the Management Quota of D.Y. Patil Medical College of Pune and Kolhapur, which are private un-aided colleges. For this purpose, he approached the defendants-respondents and who assured to secure the seat for an amount of ₹1,10,0000/-. It is the allegation of the plaintiff that during December 2012 to 02.06.2013, he paid an amount of 1 crore to the defendants for admission of his son in the management quota with the aforesaid college. Later on defendant No.1 was arrested in some criminal case and sent to jail. Plaintiff was later on informed that process of admission in PG

College in D.Y. Patil Medical College had been completed and no seat was available for adjusting his son. Plaintiff demanded refund of his amount from the defendants but they did not pay except for a petty amount of 5 lakh in January 2014. Complaint was also made to the police by the plaintiff and after preliminary investigation, an FIR was registered against them.

2.2 Plaintiff then instituted a summary suit on 15.04.2014 under the provisions of Order 37 CPC for recovery of ₹1,13,0000/- by including the interest against the defendants before trial Court at Gurugram. Defendants No.1 to 4 petitioners were proceeded ex parte on 06.08.2014. On 20.09.2014, the claim against defendant No.5 was withdrawn. Vide an order dated 25.09.2014, it was observed by the trial Court that since the summons were not served as per the provisions of Order 37 Rule 2 CPC, therefore, the suit cannot proceed under the said Order 37 CPC, though the suit would proceed as a regular suit for recovery. Plaintiff was also directed to make good the deficiency in the Court fee. Thereafter, ex parte evidence produced by the plaintiff was taken and the suit was decreed ex parte on 03.04.2015.

2.3 The petitioners-defendants No.1 to 4 moved an application under Order 9 Rule 13 CPC on 11.02.2016, but the same was dismissed on 17.04.2017. An application under Section 151 CPC was moved to recall the above order on 31.5.2017, but the same was dismissed on 26.07.2017. They then filed appeal on 15.03.2018 against the judgment and decree before Id. First Appellate Court along with an application to condone the delay of 1050 days in filing the appeal. This application for condoning the delay of 1050 days was dismissed by the First Appellate Court by way of the impugned order dated 18.09.2019 and resultantly, the appeal itself was dismissed being barred by limitation, without touching upon the merits of the case.

3. Aforesaid order dated 18.09.2019, dismissing the application for condoning the delay of 1050 days in filing the appeal, is assailed before this court.

4. Submissions made by Id. Senior counsels for both the sides have been considered and record perused.

5.1 Assailing the aforesaid order, Ld. Senior counsel for the petitioners has referred to ***Rajni Kumar Vs. Suresh Kumar Malhotra, 2003(2) RCR (Civil) 776*** in order to contend that Court can set aside an *ex parte* decree under special circumstances under Order 37 Rule 4 CPC and that non service of summons is a special circumstance to set aside the decree.

5.2 I am afraid that the cited authority is not applicable to the facts of the present case, because the suit was decreed *ex parte* by the trial Court as an ordinary suit and not under the provisions of Order 37 CPC.

6.1 Ld. Senior counsel then refers to ***Santosh Vs. Jagat Ram, 2010(3) SCC 251*** in order to contend that a decree obtained by fraud can be set aside, when the fraud comes to the notice of the aggrieved party and that suit will not be barred by limitation.

6.2 I am afraid that again the cited authority is not applicable. Simply because it is contended by the petitioners that they were not served in accordance with law, it cannot be held that *ex parte* decree was obtained by way of fraud.

7. It has already been noticed that an application moved under Order 9 Rule 13 CPC by the petitioners has already been dismissed by the trial Court. Nothing has been brought on record to show that any appeal/revision was filed against that order and therefore, that order dismissing the application under Order 9 Rule 13 CPC has attained finality and petitioners are now estopped from raising this issue of non-service upon them.

8. However, the contention of Id. counsel for the petitioners has merit to the effect that even if the application for setting *ex parte* decree is dismissed, the Regular Appeal can still be filed to challenge the *ex parte* decree. Reliance can be placed upon ***Bhanu Kumar Jain Vs. Archana Kumar, 2005 (1) SCC 787***; and ***Bhivchandra Shankar More v. Balu Gangaram More and Others, 2020 (3) JCR 83***.

9. In ***Bhanu Kumar Jain's case (Supra)***, it was held by Hon'ble Supreme Court as under: -

"22. An appeal against an ex-parte decree in terms of Section 96(2) of the Code could be filed on the following grounds:

- (i) The materials on record brought on record in the ex-parte proceedings in the suit by the plaintiff would not entail a decree in his favour, and
- (ii) The suit could not have been posted for ex-parte hearing.

23. In an application under Order 9, Rule 13 of the Code, however, apart from questioning the correctness or otherwise of an order posting the case for ex-parte hearing, it is open to the defendant to contend that he had sufficient and cogent reasons for not being able to attend the hearing of the suit on the relevant date.

24. When an ex-parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex-parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex-parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

25 to 33 XXXXXX.....

34. We have, however, no doubt in our mind that when an application under Order 9, Rule 13 of the Code is dismissed, the defendant can only avail a remedy available there against, viz, to prefer an appeal in terms of Order 43, Rule 1 of the Code. Once such an appeal is dismissed, the Appellant cannot raise the same contention in the First Appeal. If it be held that such a contention can be raised both in the First Appeal as also in the proceedings arising from an application under Order 9, Rule 13, it may lead to conflict of decisions which is not contemplated in law.

35. The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex-parte hearing by the Trial Court and/ or existence of a sufficient case for non- appearance of the defendant before it, it would be open to 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. We, however, agree with Mr. Choudhari that the 'Explanation' appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this court *in Rani Choudhury (supra), P. Kiran Kumar (supra) and Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others [2004 (9) SCALE 270].*"

10. Similarly, in *Bhivchandra Shankar More's case (Supra)*, it was held by Hon'ble Supreme Court as under: -

"10. A conjoint reading of Order IX Rule 13 CPC and Section 96(2) CPC indicates that the defendant who suffered an ex-parte decree has two remedies:- (i) either to file an application under Order IX Rule 13 CPC to set aside the ex-parte decree to satisfy the court that summons were not duly served or those served, he was prevented by "sufficient cause" from appearing in the court when the suit was called for hearing; (ii) to file a regular appeal from the original decree to the first appellate court and challenge the ex-parte decree on merits."

11. It is thus clear from the aforesaid legal position that even if the application moved by the petitioners-defendants under Order 9 Rule 13 CPC has been dismissed, they are still within their rights to file regular appeal against ex parte judgment and decree. However, it is still required to be seen that said appeal is permissible under law. The issue of limitation can still be considered by the First Appellate Court.

12.1 In this regard, the contention of Id. senior counsel for the petitioners is that they were not served with the summons of the suit after converting the same as a regular suit; and that impugned order dismissing the application for condoning the delay is unsustainable as the petitioners are residents of Kolhapur in Maharashtra. It was specifically pleaded in the

application for condoning the delay that they were not sent the summons after converting the suit as a regular suit; that they have been pursuing the execution petition pending in the Court at Kolhapur, Maharashtra and that the distance and other circumstances prevented the petitioners from filing the appeal within time. It is further the contention that during September 2016 to 17.04.2017, the applicants were bonafidely pursuing the application under Order IX Rule 13 CPC and thereafter, they bonafidely pursued the application under Section 151 CPC from 18.04.2017 to 26.04.2017.

12.2 Ld. Senior counsel submits that applicant/petitioner Uday Shrikant Ghatge had even gone to High Court at Chandigarh to consult the lawyer to explore the possibility of remedy against ex parte judgment and decree dated 03.04.2015 and against the order dated 17.04.2017, but due to some medical emergency, he had to return to Kolhapur, Maharashtra and thus, could not file the appeal promptly. He is the sole care-taker of the family. He had been blessed with a baby girl, who had been admitted in the hospital. He also remained busy in attending the criminal proceedings at Pune and because of all these hardships, delay of 1050 days was caused in filing of the appeal and so, the same deserves to be condoned.

12.3 Ld. Sr. counsel contends further that since petitioners were proceeded ex-parte and their application under Order IX Rule 13 CPC has already been dismissed, so they will be allowed to file the written statement and that the only prayer made by them at this stage is to permit them to contest the appeal on merits on the basis of material available on the trial Court record.

13.1 Strongly refuting the above contentions, learned Sr. counsel for the respondent argues that since the very beginning, the petitioners were well aware of the proceedings. They were duly served of the summons of the suit sent through registered post, but still they failed to join the proceedings. Considering the huge amount involved in the suit, the trial Court ordered for the service of the publication as an additional measure. The issue of delay and laches has also been raised by senior counsel for the respondents by

pointing out that even if the time consumed for pursuing the proceedings under Order 9 Rule 13 CPC is taken out of consideration, still there is huge delay of almost 650 days in filing the appeal.

13.2 Learned Senior counsel has also drawn attention of the court towards the fact that in the application seeking anticipatory bail before the Court at Pune, one of the applicants even pleaded about the pendency of present summary in Gurgaon, which clearly indicates about his knowledge about the pendency of the suit and therefore, it cannot be pleaded on the part of the petitioners that they came to know about the *ex parte* decree only after getting the summons in the execution. Ld. Senior counsel further submits that simply because summary suit filed under Order 37 CPC was later on converted as regular suit, it was not required to send fresh summons to them after the said conversion.

13.3 Not only this, Regular Second Appeal No.4816 of 2019 filed against the judgment & decree passed by the First Appellate Court, has already been withdrawn, though with liberty to file this revision and so, appeal is not to be considered on merits. By drawing attention towards the conduct of the appellants, prayer is made for dismissal of the petition.

14. Perusal of the trial Court record would reveal that suit was filed on 15.04.2014 and notice to six defendants including the five petitioners herein was directed to be issued for 30.04.2014. It was noticed on 30.04.2014 that notice to defendants had not been issued and so, fresh notice was directed to be issued for 29.05.2014 on filing of the copy of the plaint and RC etc. The order dated 29.05.2014, passed by Id. Trial Court is relevant, which reads as under: -

“Learned counsel for the plaintiff has urged that the defendants were summoned through registered cover and all the summons have been received with the report that they were duly delivered to the concerned defendants on their proper address but none has appeared on their behalf. It is further urged that the defendants are already aware of the recovery proceedings pending against them and they had applied for bail in anticipation to their arrest in a

criminal proceedings filed by the complainant against the defendants for the commission of offences punishable under sections 420,504,506,507 read with section 34 of Indian Penal Code. Learned counsel for the plaintiff has placed on record the copy of the order of learned Addl. Sessions Judge, Pune dated 22.5.2014 and drawn the attention of the court towards para no, 8 of the said order specifying that the defendants (accused in the criminal case) had produced the copy of the summary suit pending against them in the criminal court and requested for time on the ground that matter between the parties is of civil nature. She has also placed on record the copy of order dated 9.5.2014 passed by Learned Addl. Sessions Judge, Pune whereby the defendants (accused in the criminal case) have granted ad interim bail and requested that defendant be proceeded against exparte. But keeping in view the fact that the instant suit has been filed for recovery of Rs. 1,13,00,000/- (Rs. One crore thirteen lacs only). which is a huge amount, it shall be in the interest of justice if the defendant are summoned through publication in News Paper "Times of India" for 6.8 2014 on filing of publication charges."

15. Not only this, perusal of the trial Court record would indicate that the summons to defendants were sent by speed post. The track result records regarding delivery of summons to the petitioners-defendants is available as issued by the Indian Post, clearly indicating that defendants No.1 to 4 and 6 (*petitioners herein*) had received the summons on 26.04.2014. Not only this, an order dated 22.05.2014 of Ld. Additional Sessions Judge, Pune available on the trial Court record and also referred in the order dated 29.05.2014 of the trial Court, which would reveal that one of the petitioners had pleaded about the summary suit pending against him at Gurgaon as a ground for seeking anticipatory bail, which again indicates about his knowledge about the pendency of the suit.

16. In the aforesaid circumstances, it does not lie in the mouth of the petitioners to plead that they were not aware about the pendency of the suit or that they came to know about the passing of the judgment and decree only after getting the summons in the execution.

17. It has been rightly contended by Id. Senior counsel for the respondent that simply because the summary suit was later on converted as

regular suit, it does not mean that fresh summons were required to be sent to the defendants-appellants.

18. The ex parte judgment and decree was passed on 03.04.2015 and therefore, and it is from this date that period of limitation will run to file the appeal, inasmuch as defendants-petitioners were duly served.

19. As rightly observed by the appellate Court in the impugned order that for the sake of arguments, even if it is assumed that period from 11.02.2016 to 17.04.2017 and from 30.05.2017 to 26.07.2017, during which the petitioners were pursuing the remedy under Order IX Rule 13 CPC or the application under Section 151 CPC for recalling of the order, is liable to be deducted, still there was considerable delay in filing of the appeal.

20. Not only this, even after dismissal of the application under Section 151 CPC for recalling the order dated 17.04.2017, the appeal before the First Appellate Court was filed on 21.03.2018 i.e. after a delay of 11 months. Thus, in no circumstances, the period from the date of decree till the date of moving of the application under Order IX Rule 13 CPC; and from the date of dismissal of the application under Section 151 CPC till the date of filing of the appeal, can be condoned. The petitioners have not been able to convince the Court regarding this intentional delay of more than 600 days in filing the appeal and if the total period is taken into consideration, that amounts to 1050 days. The appellants were well aware of all the proceedings as evident from the record and they were just watching the proceedings but did not take interest in filing the appeal.

21. In ***Sagufa Ahmed and others Vs. Upper Assam Polywood Products Private Limited and others, (2021) 2 Supreme Court Cases 317***, it has been observed by Hon'ble Supreme Court that law of limitation finds its root in two latin maxims, one of which is *vigilantibus et non dormientibus jura subveniunt*, which means that the law will assist only those who are vigilant about their rights and not those who sleep over them.

22.1 In ***Basawaraj and another Vs. Special Land Acquisition Officer, (2013) 14 Supreme Court Cases 81***, explaining the scope of the word ‘sufficient cause’, it has been held by Hon’ble Supreme Court as under:

“9. Sufficient cause is the cause for which defendant could not be blamed for his absence. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude, which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case, duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the Court that he was prevented by any “sufficient cause” from prosecuting his case, and unless a satisfactory explanation is furnished, the Court should not allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose. (***See: Manindra Land and Building Corporation Ltd. v. Bhootnath Banerjee & Ors., AIR 1964 SC 1336; Lala Matadin v. A. Narayanan, AIR 1970 SC 1953; Parimal v. Veena @ Bharti AIR 2011 SC 1150; and Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai AIR 2012 SC 1629.***)

10. In *Arjun Singh v. Mohindra Kumar*, AIR 1964 SC 993 this Court explained the difference between a “good cause” and a “sufficient cause” and observed that every “sufficient cause” is a good cause and vice versa. However, if any difference exists it can only be that the requirement of good cause is complied with on a lesser degree of proof than that of “sufficient cause”.

11. The expression “sufficient cause” should be given a liberal interpretation to ensure that substantial justice is done, but only so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned, whether or not sufficient cause has been furnished, can be decided on the facts of a particular

case and no straitjacket formula is possible. (*Vide: Madanlal v. Shyamlal, AIR 2002 SC 100; and Ram Nath Sao @ Ram Nath Sahu & Ors. v. Gobardhan Sao & Ors., AIR 2002 SC 1201.*)

12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the Court has no choice but to enforce it giving full effect to the same. The legal maxim "*dura lex sed lex*" which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

13. The Statute of Limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale. According to Halsbury's Laws of England, Vol. 24, p. 181:

"330. *Policy of Limitation Acts.* The courts have expressed at least three differing reasons supporting the existence of statutes of limitations namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence".

An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence' or laches. (*See: Popat and Kotecha Property v. State Bank of India Staff Assn. (2005) 7 SCC 510; Rajendar Singh & Ors. v. Santa Singh & Ors., AIR 1973 SC 2537; and Pundlik Jalam Patil v. Executive Engineer, Jalgaon Medium Project, (2008) 17 SCC 448.*)

14. In *P. Ramachandra Rao v. State of Karnataka*, AIR 2002 SC 1856, this Court held that judicially engrafting principles of limitation amounts to legislating and

would fly in the face of law laid down by the Constitution Bench in *A. R. Antulay v. R.S. Nayak*, AIR 1992 SC 1701.

22.2 Summarising the legal position, Hon'ble Supreme Court the held that where a case has been presented in the Court beyond limitation, the appellant has to explain to the Court, as to what was the *sufficient cause*, which means an adequate and enough reason, which prevented him to approach the Court within limitation. If a party is found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. It was also observed that no Court could be justified in condoning such an inordinate delay by imposing any condition whatsoever, as the application is to be decided only within the parameters laid down by the Court in regard to the condonation of delay.

23. In the case of ***B. Madhuri Goud Vs. B. Damodar Reddy (2012) 12 Supreme Court Cases 693***, almost similar were the facts as in the present case. In that case, a suit for eviction of the respondent was decreed *ex parte* on 18.08.2006. Respondent's application to set aside the *ex parte* decree moved after about 1 year was dismissed. Civil Miscellaneous Appeal against that order before the High Court was dismissed. After about 4 years of the passing of the *ex parte* decree, respondent filed an appeal under Section 96 CPC with an application for condonation of delay of 1236 days pleading that he had handed over the papers to his counsel on 10.01.2009 for preparing the grounds of appeal, but the certified copies of the documents were misplaced by the office of the Advocate and could not be traced despite efforts and later on, it was discovered that they have been tagged with record of another file. Neither the name of the counsel was disclosed nor any affidavit of the counsel was placed on record. Though the High condoned the delay, but Hon'ble Supreme Court in the appeal set aside the said order. It was observed by Hon'ble Supreme Court as under: -

"The Limitation Act, 1963 has not been enacted with the object of destroying the rights of the parties but to ensure that they approach the court for vindication of their rights without unreasonable delay. The idea underlying the

concept of limitation is that every remedy should remain alive only till the expiry of the period fixed by the legislature. At the same time, the courts are empowered to condone the delay provided that sufficient cause is shown by the applicant for not availing the remedy within the prescribed period of limitation.

The expression "sufficient cause" used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that substantive rights of the parties are not defeated only on the ground of delay."

In the aforesaid facts & circumstances and by referring to the aforesaid case law, Hon’ble Supreme Court allowed the appeal and dismissed the application to condone the delay of 1236 days delay in filing the appeal.

24. In the present case also, the petitioners have failed to satisfactorily explain the delay of 1050 days in filing the appeal. The projected cause pleaded by the petitioners to condone the delay is not found to be ‘sufficient’ within the scope of Section 5 of the Limitation Act. It is held that Id. First Appellate Court did not commit any error in dismissing the application under Section 5 of the Limitation Act to condone the delay of 1050 days in filing the appeal and eventually to dismiss the appeal on the ground of limitation. Upholding the said order passed by the Id. First Appellate Court and holding the present revision to be devoid of any merit, the same is hereby dismissed.

12.09.2024
Vivek

(DEEPAK GUPTA)
JUDGE

Whether speaking/reasoned?	Yes
Whether reportable?	Yes