



2019 INSC 1270

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NO. 8898 OF 2019
[Arising out of SLP(C) No.20686 of 2018]

N. MOHAN

...Appellant

VERSUS

R. MADHU

...Respondent

J U D G M E N T

R. BANUMATHI, J.

Leave granted.

2. This appeal arises out of the impugned order dated 24.04.2018 passed by the High Court of Madras at Madurai Bench in CMP(MD) No.6566 of 2017 in AS(MD) SR No. 27805 of 2017 in and by which the High Court has refused to condone the delay of 546 days in filing the first appeal against the judgment and decree passed in OS No.76 of 2015 dated 09.10.2015.

3. Brief facts which led to filing of this appeal are as follows:-

The appellant-defendant is a businessman doing business of tea and real estate. Case of the respondent-plaintiff is that on 10.01.2015, the appellant approached the respondent-plaintiff for financial assistance for a sum of Rs.45,00,000/- for the purpose of

his business needs. The respondent lent him the sum of Rs.45,00,000/- and there was no documentation for the same. According to the respondent, it was agreed that the said amount will be returned to the respondent with an interest of 18% per annum. The appellant agreed to return the said amount within two months; but the appellant has not paid the amount. On the other hand, the appellant is said to have issued two post-dated cheques to the respondent, one for an amount of Rs.25,00,000/- and another for an amount of Rs.20,00,000/-. When the said cheques were presented for collection on 10.03.2015, the same were returned with the endorsement that "payments stopped by the drawer". The respondent-plaintiff filed a civil suit being OS No.76 of 2015 before the Additional District Judge, Tiruchirappalli. The said suit was decreed *ex-parte* on 09.10.2015.

4. **Order IX Rule 13 CPC Proceedings:-** The appellant-defendant filed IA No.327 of 2016 in OS No.76 of 2015 under Section 5 of the Limitation Act to condone the delay of 276 days in filing the petition under Order IX Rule 13 CPC to set aside the *ex-parte* decree. In the said application, the appellant has stated that summons was sent to the appellant's old address at Trichy and the same was returned unserved and the *ex-parte* decree was passed

on 09.10.2015. It was averred in the said application that the appellant is residing in Chennai since January, 2014. The appellant has alleged that when he went to attend a case in CC No.240/2016 at Karur Court on 29.07.2016, he came to know about the passing of the *ex-parte* decree in OS No.76 of 2015. Thereafter, the appellant has taken steps to set aside the *ex-parte* decree and filed application under Section 5 of the Limitation Act - IA No.327 of 2016 to condone the delay of 276 days in filing the petition under Order IX Rule 13 CPC to set aside the *ex-parte* decree. The said petition was dismissed by the Additional District Judge by order dated 04.01.2017. The appellant has challenged the said order by filing revision being CRP (MD) No.257 of 2017 (NPD) before the High Court. Rejecting the contention of the appellant that he has been residing in Chennai, the learned Single Judge dismissed the said revision being CRP (MD) No.257 of 2017 (NPD) by order dated 08.02.2017. The SLP(C) No.9829 of 2017 preferred against the said order also came to be dismissed by the Supreme Court by order dated 07.04.2017.

5. First appeal filed by the appellant in AS(MD) SR No. 27805 of 2017:- After the dismissal of the SLP by the Supreme Court, the appellant-defendant has filed the first appeal being AS(MD) SR No.

27805 of 2017 challenging the decree passed in OS No.76 of 2015 dated 09.10.2015 along with application being CMP(MD) No.6566 of 2017 praying to condone the delay of 546 days in filing the appeal. In the said application, the appellant raised the very same grounds that he is having residence at Chennai and that the summons was not served on him and that summons was taken to Trichy's address and thereafter, *ex-parte* decree was passed against him on 09.10.2015 and hence, prayed for condonation of delay. The High Court dismissed the application for condonation of delay on the ground that in the earlier proceedings under Order IX Rule 13 CPC, the appellant has stated the same reasons to set aside the *ex-parte* decree and that the reasons so stated by the appellant was not accepted by the trial court, High Court and the Supreme Court. Pointing out that the appellant has chosen belatedly to file the first appeal in time, the High Court has dismissed the application for condonation of delay of 546 days in filing the first appeal. Being aggrieved, the appellant has filed this appeal.

6. Mr. V. Singan along with Mr. S. Mahendran, learned counsel appearing for the appellant has submitted that the appellant has shown sufficient cause for the delay in filing the first appeal and that

the appellant has to be given an opportunity to contest the decree on merits. It was submitted that the appellant has adduced documentary evidence to show that he was not residing at the Trichy address where the substituted service was affected and while so, the High Court erred in dismissing the application for condonation of delay filed along with the first appeal. Contending that despite the fact that an application under Order IX Rule 13 CPC was dismissed, the first appeal under Section 96(2) CPC being a statutory right is still available, the learned counsel for the appellant placed reliance upon *Bhivchandra Shankar More v. Balu Gangaram More and others* **(2019) 6 SCC 387**.

7. Per contra, Mr. Jayanth Muthraj, learned Senior counsel for the respondent submitted that the appeal filed by the appellant was beyond the period of limitation and the delay was not satisfactorily explained. It was submitted that the earlier application for condonation of delay in filing the application for setting aside the *ex-parte* decree under Order IX Rule 13 CPC was not accepted by the trial court, High Court and the Supreme Court and the same has attained finality. It was submitted that the appellant cannot reagitate the very same question which has attained finality in the earlier proceedings.

8. We have carefully considered the submissions and perused the impugned judgment and materials on record. The following points arise for consideration in this appeal:-

- (i) After dismissal of the application filed under Order IX Rule 13 CPC for condonation of delay in filing the appeal, whether the appeal filed under Section 96(2) CPC against the *ex-parte* decree dated 09.10.2015 is maintainable?
- (ii) Whether the time spent in the proceedings to set aside the *ex-parte* decree be taken as “sufficient cause” within the meaning of Section 5 of the Limitation Act, 1908 so as to condone the delay in preferring the first appeal?

9. When an *ex-parte* decree is passed, the defendant has two remedies – (a) Either to file an application under Order IX Rule 13 CPC to set aside the *ex-parte* decree by satisfying the court that the summons was not served or if served, the defendant was prevented by “sufficient cause” from appearing in the court when the suit was called for hearing; (b) to file a regular appeal from the original decree to the first appellate court in terms of Section 96(2) CPC and challenge the *ex-parte* decree on merits.

10. Right to file an appeal under Section 96(2) CPC is a statutory remedy. The right to appeal is not a mere matter of procedure; but is a substantive right. Right to appeal under Section 96(2) CPC

challenging the original decree passed *ex-parte*, being a statutory right, the defendant cannot be deprived of the statutory right merely on the ground that the application filed under Order IX Rule 13 CPC was earlier dismissed.

11. In *Bhanu Kumar Jain v. Archana Kumar and another* (2005) 1 SCC 787, the Supreme Court considered the question whether the first appeal filed under Section 96(2) of the Code was maintainable despite the fact that an application under Order IX Rule 13 CPC was dismissed. Observing that the right to appeal is a statutory right and that the litigant cannot be deprived of such a right, the Supreme Court held as under:-

“36. ... A right to question the correctness of the decree in a first appeal is a statutory right. Such a right shall not be curtailed nor shall any embargo be fixed thereupon unless the statute expressly or by necessary implication says so. (See *Deepal Girishbhai Soni v. United India Insurance Co. Ltd.* (2004) 5 SCC 385 and *Chandravathi P.K. v. C.K. Saji* (2004) 3 SCC 734.)

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38. 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 under Section 96(2) of the Code on the merits 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 Chaudhari 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* (1982) 2 SCC 596, *P. Kiran Kumar* (2002) 5 SCC 161 and *Shyam Sundar Sarma v. Pannalal Jaiswal* (2005) 1 SCC 436.”

12. After referring to *Bhanu Kumar Jain* and other judgments and observing that the defendant can take recourse to both proceedings – Order IX Rule 13 CPC as well as the appeal under Section 96(2) CPC, in *Neerja Realtors (P) Ltd. v. Janglu (Dead) Through Legal Representative* (2018) 2 SCC 649, the Supreme Court held as under:-

“17. A defendant against whom an ex parte decree is passed has two options: the first is to file an appeal. The second is to file an application under Order 9 Rule 13. The defendant can take recourse to both the proceedings simultaneously. The right of appeal is not taken away by filing an application under Order 9 Rule 13. But if the appeal is dismissed as a result of which the ex parte decree merges with the order of the appellate court, a petition under Order 9 Rule 13 would not be maintainable. When an application under Order 9 Rule 13 is dismissed, the remedy of the defendant is under Order 43 Rule 1. However, once such an appeal is dismissed, the same contention cannot be raised in a first appeal under Section 96. The three-Judge Bench decision in *Bhanu Kumar Jain* (2005) 1 SCC 787 has been followed by another Bench of three Judges in *Rabindra Singh v. Financial Commr., Cooperation* (2008) 7 SCC 663, and by a two-Judge Bench in *Mahesh Yadav v. Rajeshwar Singh* (2009) 2 SCC 205.” [Underlining added]

13. Considering the scope of Order IX Rule 13 CPC and the statutory right to appeal under Section 96(2) CPC, after referring to *Bhanu Kumar Jain*, in *Bhivchandra Shankar More*, this Court held as under:-

“11. It is to be pointed out that the scope of Order 9 Rule 13 CPC and Section 96(2) CPC are entirely different. In an application filed under Order 9 Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any “sufficient cause” from appearing when the suit was called for hearing. If the Court is satisfied that the defendant was not duly served or that he was prevented for “sufficient cause”, the court may set aside the ex parte decree and restore the suit to its original position. In terms of Section 96(2) CPC, the appeal lies from an original decree passed ex parte. In the regular appeal filed under Section 96(2) CPC, the appellate court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different. Merely because the defendant pursued the remedy under Order 9 Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order 9 Rule 13 CPC is dismissed.”

12. The right of appeal under Section 96(2) CPC is a statutory right and the defendant cannot be deprived of the statutory right of appeal merely on the ground that the application filed by him under Order IX Rule 13 CPC has been dismissed. In *Bhanu Kumar Jain v. Archana Kumar and Another* (2005) 1 SCC 787, the Supreme Court considered the question whether the first appeal was maintainable despite the fact that an application under Order IX Rule 13 CPC was filed and dismissed. Observing that the right of appeal is a statutory right and that the litigant cannot be deprived of such right, in paras (36) and (38), it was held as under:-

36. ... A right to question the correctness of the decree in a first appeal is a statutory right. Such a right shall not be curtailed nor

shall any embargo be fixed thereupon unless the statute expressly or by necessary implication says so. (See *Deepal Girishbhai Soni v. United India Insurance Co. Ltd.* (2004) 5 SCC 385 and *Chandravathi P.K. v. C.K. Saji* (2004) 3 SCC 734.)

.....”

14. The defendant against whom an *ex-parte* decree is passed, has two options. First option is to file an application under Order IX Rule 13 CPC and second option is to file an appeal under Section 96(2) CPC. The question to be considered is whether the two options are to be exercised simultaneously or can also be exercised consecutively. An unscrupulous litigant may, of course, firstly file an application under Order IX Rule 13 CPC and carry the matter up to the highest forum; thereafter may opt to file appeal under Section 96(2) CPC challenging the *ex-parte* decree. In that event, considerable time would be lost for the plaintiff. The question falling for consideration is that whether the remedies provided as simultaneous can be converted into consecutive remedies.

15. An appeal under Section 96(2) CPC is a statutory right, the defendant cannot be deprived of the statutory right merely on the ground that earlier, the application filed under Order IX Rule 13 CPC was dismissed. Whether the defendant has adopted dilatory tactics or where there is a lack of *bona fide* in pursuing the remedy of appeal under Section 96(2) of the Code, has to be considered

depending upon the facts and circumstances of each case. In case the court is satisfied that the defendant has adopted dilatory tactics or where there is lack of *bona fide*, the court may decline to condone the delay in filing the first appeal under Section 96(2) CPC. But where the defendant has been pursuing the remedy *bona fide* under Order IX Rule 13 CPC, if the court refuses to condone the delay in the time spent in pursuing the remedy under Order IX Rule 13 CPC, the defendant would be deprived of the statutory right of appeal. Whether the defendant has adopted dilatory tactics or where there is lack of *bona fide* in pursuing the remedy of appeal under Section 96(2) of the code after the dismissal of the application under Order IX Rule 13 CPC, is a question of fact and the same has to be considered depending upon the facts and circumstances of each case.

16. When the defendant filed appeal under Section 96(2) CPC against an *ex-parte* decree and if the said appeal has been dismissed, thereafter, the defendant cannot file an application under Order IX Rule 13 CPC. This is because after the appeal filed under Section 96(2) of the Code has been dismissed, the original decree passed in the suit merges with the decree of the appellate court. Hence, after dismissal of the appeal filed under Section 96(2) CPC,

the appellant cannot fall back upon the remedy under Order IX Rule 13 CPC.

17. In the present case, the respondent has filed the Money Suit being OS No.76 of 2015 for recovery of Rs.46,98,500/- together with interest and the said suit was decreed *ex-parte* on 09.10.2015. Execution petition being EP No.95 of 2016 was also filed for execution of the decree. As pointed out earlier, the appellant has filed application being IA No.327 of 2016 to condone the delay of 276 days in filing the application to set aside the *ex-parte* decree. In the said application, the appellant has stated that he has been residing at Chennai; whereas the notice was served at Trichy and therefore, he did not have knowledge about the filing of the said suit in OS No.76 of 2015 before the ADJ Court at Tiruchirappalli and the *ex-parte* decree was passed on 09.10.2015. The appellant has further averred that he came to know about the *ex-parte* decree and the execution petition only at the time when he appeared in CC No.240 of 2016 at Karur on 29.07.2016. As discussed earlier, the said application filed by the appellant seeking condonation of delay of 276 days in filing the application to set aside the *ex-parte* decree was dismissed by the order dated 04.01.2017. The revision and the SLP preferred by the appellant also came to be dismissed.

18. Thereafter, the appellant has preferred the first appeal with the application to condone the delay of 546 days in filing the first appeal. As pointed out earlier, there was a delay of 276 days in filing the application to set aside the *ex-parte* decree. Pursuing the proceedings in the application filed under Order IX Rule 13 CPC has caused further delay of 270 days. Thus, there has been a total delay of about 546 days in filing the first appeal. In the application for condonation of delay, of course, the appellant has raised the very same ground which was taken in the application filed under Section 5 of the Limitation Act to set aside the *ex-parte* decree which was not accepted in the earlier proceedings.

19. The learned counsel for the appellant-defendant has submitted that a huge amount of Rs.45,00,000/- is said to have been paid by cash which according to the learned counsel raises serious doubts about the genuineness of such transaction. Per contra, the learned Senior counsel for the respondent-plaintiff has submitted that lending of Rs.45,00,000/- as hand loan is substantiated by issuance of two post-dated cheques in favour of the respondent by the appellant – one for the sum of Rs.25,00,000/- and another for the sum of Rs.20,00,000/-. We are not inclined to go into the merits of the contention of the parties. All that is to be

pointed out is that the appellant would have been well advised that if he had filed the first appeal simultaneously along with the application under Order IX Rule 13 CPC. The appellant has however shown his *bona fide* by depositing Rs.25,00,000/- in compliance with the orders of this Court dated 13.08.2018. The said amount of Rs.25,00,000/- was permitted to be withdrawn by the respondent-plaintiff. Considering the facts and circumstances of the case and in the interest of justice, in our view, the appellant deserves an opportunity to put forth his defence in the suit for recovery of money. But to avail this opportunity, he must deposit the balance amount of Rs.20,00,000/- as a condition precedent for condonation of delay. In these terms, the impugned judgment is accordingly liable to be set aside.

20. The delay of 546 days in filing the first appeal shall therefore be condoned with condition that the appellant should deposit Rs.20,00,000/- before the trial court-Principal District Judge, Tiruchirappalli, to the credit of OS No.76 of 2015 on or before 28.02.2020, failing which, the application for condonation of delay shall stand dismissed. On such deposit of Rs.20,00,000/- the same shall be invested in a nationalised bank for a period of six months with the provision of auto-renewal. The deposit of Rs.20,00,000/-

and also the earlier deposit of Rs.25,00,000/- would be subject to the outcome of the appeal. On deposit of Rs.20,00,000/-, the impugned judgment passed by the Madurai Bench of Madras High Court in CMP(MD) No.6566 of 2017 in AS(MD) SR No. 27805 of 2017 is set aside and this appeal is allowed. The delay in filing the appeal is condoned. The appeal shall be taken on file and the High Court shall proceed with the same in accordance with law. We make it clear that we have not expressed any opinion on the merits of the matter. It is also made clear that the criminal complaints filed under Section 138 of NI Act be proceeded on its own merits without being influenced by any of the views expressed by this Court or by the High Court.

.....J.
[R. BANUMATHI]

.....J.
[A.S. BOPANNA]

.....J.
[HRISHIKESH ROY]

**New Delhi;
November 21, 2019**