

CASE NO.:
Appeal (civil) 5550 of 2004

PETITIONER:
SHYAM SUNDAR SARMA

RESPONDENT:
PANNALAL JAISWAL AND OTHERS

DATE OF JUDGMENT: 04/11/2004

BENCH:
C.J.I.R.C. LAHOTI, G.P. MATHUR & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T

P.K. BALASUBRAMANYAN, J.

Respondent No.1 herein filed Title Suit No.89 of 1992 on the file of the Munsif's Court at Howrah against the appellant and others for a declaration of his title as a Thika Tenant in respect of the plaint A schedule property and for other consequential reliefs. The appellant herein- defendant No.1 in the suit, entered appearance and contested the suit and the application for interim injunction filed by the plaintiff. The application for interim injunction was heard and the same was dismissed by the trial court. The plaintiff filed an appeal against that order under Order XLIII Rule 1 of the Code of Civil Procedure, 1908 (for short "the Code") and that appeal was also dismissed by the District Judge on 16.3.1994.

2. The suit itself stood posted to 8.10.1996. The appellant \026 the first defendant, did not appear. The evidence of the plaintiff was recorded. On 9.10.1996 the plaintiff filed two applications \026 one for an amendment of the plaint and the other for certain corrections in the plaint. Those applications were allowed the same day in the absence of any opposition. In view of his absence, the first defendant, the appellant, was set ex parte and on 11.10.1996, the suit was decreed ex parte.

3. On 16.11.1996, the first defendant, the appellant, filed a petition under Order IX Rule 13 of the Code accompanied by an application under Section 5 of the Limitation Act for condoning the delay in filing the petition for setting aside the ex parte decree. Both the applications were opposed by the plaintiff. On 21.11.1996, the first defendant \026 the appellant, also filed an appeal, Title Appeal No.157 of 1996, against the ex parte decree along with an application for condoning the delay in filing that appeal as enjoined by Order XLI Rule 3A of the Code and invoking Section 5 of the Limitation Act. On 17.9.1998, the trial court allowed the application filed by the first defendant under Section 5 of the Limitation Act and condoned the delay in filing the petition under Order IX Rule 13 of the Code. The plaintiff challenged that order in the District Court in revision, but the revision was dismissed on 11.8.2000. There was a further revision to the High Court which was dismissed on 14.9.2000.

4. On 21.1.2000, since the first defendant \026 the appellant, did not appear to prosecute his application under Section 5 of the Limitation Act in Title Appeal No. 157 of 1996, his appeal against the ex parte decree, the District Court dismissed that application for non taking of steps, resulting in default. On 6.3.2000, in view of the non appearance of the first defendant \026 the appellant, Title Appeal No.157 of 1996 against the ex parte decree itself was dismissed for default. In

other words, both the application under Section 5 of the Act for condoning the delay in filing that appeal and the appeal against the ex parte decree filed by the first defendant stood dismissed for default.

5. In the trial court, the petition for setting aside the ex parte decree filed under Order IX Rule 13 of the Code came up for hearing. On behalf of the plaintiff, an objection was raised that in view of the filing of Title Appeal No. 157 of 1996 by the first defendant against the ex parte decree and in view of the explanation to Order IX Rule 13 of the Code, the application under Order IX Rule 13 of the Code could not be entertained by the court which had passed the ex parte decree. On behalf of the first defendant \026 the appellant, it was contended that since the appeal filed by the appellant against the ex parte decree was dismissed for default as a consequence of the dismissal of the application for condoning the delay in filing that appeal being dismissed for default, the explanation created no bar to the entertaining of the petition under Order IX Rule 13 of the Code, especially in the context of the fact that the delay in filing that petition had already been condoned by the trial court and affirmed up to the High Court. But, the trial court took the view that since the appeal against the ex parte decree filed by the first defendant was not withdrawn, the petition under Order IX Rule 13 of the Code could not be entertained or relief granted to the first defendant in view of the explanation to Order IX Rule 13 of the Code. Thus, the petition for setting aside the ex parte decree was dismissed. The first defendant challenged that decision in an appeal under Order XLIII Rule 1 of the Code. The lower appellate court agreed with the conclusion of the trial court that the explanation to Order IX Rule 13 of the Code precluded the court from exercising its power to set aside the ex parte decree. Thus, the appeal was dismissed. The first defendant challenged the same in a proceeding before the High Court under Article 227 of the Constitution of India. The High Court held that the question posed for decision was covered by decisions of this Court referred to by it in its order and in the light of those decisions the order of the trial court as affirmed by the District Court, could not be interfered with. The High Court, thus, dismissed the petition filed by the first defendant under Article 227 of the Constitution of India. The first defendant has challenged this order of the High Court in this appeal.

6. On the facts, it is thus clear, that the first defendant filed a petition for setting aside the ex parte decree under Order IX Rule 13 of the Code accompanied by an application for condoning the delay in filing that petition, and subsequently he also filed an appeal against that ex parte decree, again accompanied by an application for condoning the delay in filing that appeal. That application for condoning the delay in filing the appeal against the ex parte decree and the appeal against ex parte decree were both dismissed for default. The petition for setting aside the ex parte decree under Order IX Rule 13 of the Code was filed first and the appeal was filed while that petition was pending. But before the petition under Order IX Rule 13 of the Code could be disposed of, the appeal had been dismissed for default. Thus, on the day the petition under Order IX Rule 13 of the Code was taken up for disposal, no appeal against the decree was pending.

7. The explanation to Order IX Rule 13 of the Code added by the Code of Civil Procedure (Amendment) Act, (Act No.104 of 1976), which came into force with effect from 1.2.1977, reads as under:
"Explanation \026 Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree."

It is argued on behalf of the appellant that on the day the petition

under Order IX Rule 13 of the Code was filed, no appeal against the decree had been filed or was in existence and consequently, the bar created by the explanation did not apply since it only provided that a petition under Order IX Rule 13 of the Code could not be entertained only in a case where the ex parte decree was already subjected to an appeal. To add emphasis to this argument, he also submitted that on the day the trial court took up the petition under Order IX Rule 13 of the Code for consideration, the appeal against the decree itself had been dismissed for default and hence no appeal was in existence. There was no decision on merits in the appeal so as to bring about a merger of the decree of the trial court in that of the appellate court. It was further submitted that since the appeal itself could not be entertained in view of the dismissal of the application for condoning the delay in filing the appeal filed in terms of Order XLI Rule 3A of the Code read with Section 5 of the Limitation Act, it had to be taken that there came into existence no appeal in the eye of law and consequently, the bar created by the explanation did not apply. He ultimately submitted that the dismissal of an appeal for non prosecution amounts to a withdrawal of the appeal by the appellant and consequently it cannot stand in the way of the petition filed under Order IX Rule 13 of the Code being heard and disposed of on merits. On behalf of the plaintiff-respondent it is submitted that the arguments raised could not be accepted in the light of the decisions of this Court referred to and followed by the High Court and there was also no occasion for reconsidering the correctness of those decisions since the law has been correctly laid down in those decisions. It is submitted that the dismissal of an appeal for default or on the ground that it was barred by limitation cannot be considered as a withdrawal of the appeal excluding the operation of the explanation to Order IX Rule 13 of the Code. Nor can it be contended that an appeal filed with a petition for condoning the delay in filing that appeal is not an appeal and the dismissal of the application for condoning the delay and the consequent dismissal of the appeal, is not a dismissal of the appeal as contemplated by the Code.

8. The first question to be considered is whether an appeal accompanied by an application for condoning the delay in filing the appeal is an appeal in the eye of law, when the application for condoning the delay in filing the appeal is dismissed and consequently the appeal is dismissed as being time barred by limitation, in view of Section 3 of the Limitation Act. There was conflict of views on this question before the High Courts. But the Privy Council in *Nagendra Nath Dey vs. Suresh Chandra Dey* (59 Indian Appeals 283) held, "there is no definition of appeal in the Civil Procedure Code, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate court, is an appeal within the ordinary acceptation of the term and that it is no less an appeal because it is irregular or incompetent."

These observations were referred to with approval by this Court in

Raja Kulkarni and others vs. The State of Bombay (1954 SCR 384).

9. The specific question involved, came to be considered by this Court in *Messrs Mela Ram and Sons vs. The Commissioner of Income Tax, Punjab* (1956 SCR 166). This Court held that an appeal presented out of time is an appeal and an order dismissing it as time barred is one passed in an appeal. This Court referred to and followed the view taken by the Privy Council and by this Court in the two respective decisions above referred to. This Court quoted with approval the observations of Chagla C.J. in *K.K. Porbunderwalla vs.*

Commissioner of Income Tax (1952) 21 ITR 63) to the following effect:

"\005\005.. although the Appellate Assistant Commissioner did not hear the appeal on merits and held that the appeal was barred by limitation his order was under Section 31 and the effect of that order was to confirm the assessment which had been made by the Income-tax Officer."

In Sheodan Singh vs. Daryao Kunwar (AIR 1966 SC 1332) rendered by four learned Judges of this Court, one of the questions that arose was whether the dismissal of an appeal from a decree on the ground that the appeal was barred by limitation was a decision in the appeal. This Court held:

"We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits, itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal."

In Board of Revenue vs. M/s Raj Brothers Agencies Etc. (1973 (3) SCR 492), this Court approved the decision of the Madras High Court which had applied the principle stated in Messrs Mela Ram and sons (supra).

10. The question was considered in extenso by a Full Bench of the Kerala High Court in Thambi vs. Mathew (1987 (2) KLT 848). Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3A of Order XLI introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order XLI of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal.

11. Learned counsel for the appellant relied on the Full Bench decision of the Calcutta High Court in Mamuda Khateen and others vs. Beniyan Bibi and others (AIR 1976 Calcutta 415) to contend that an order rejecting a time barred memorandum of appeal consequent upon refusal to condone the delay in filing that appeal was neither a decree nor an appellable order. On going through the said decision it is seen that though the Full Bench referred to the divergent views on that question in the Calcutta High Court prior to the rendering of the decision of this Court in Messrs Mela Ram and Sons (supra) had not considered the decisions of this Court in Raja Kulkarni (supra) and in Messrs Mela Ram and Sons (supra), in coming to that conclusion. In fact it is seen that there was no discussion on that aspect as such, though there was a reference to the conflict of views in the decisions earlier rendered by the Calcutta High Court. Since the ratio of that decision runs counter to the principle laid down by this Court in

Messrs Mela Ram and Sons (supra), obviously the same could not be accepted as laying down a correct law.

12. Learned counsel placed reliance on the decision in *Ratansingh vs. Vijaysingh and others* [(2001) 1 SCC 469] rendered by two learned Judges of this Court and pointed out that it was held therein that dismissal of an application for condonation of delay would not amount to a decree and, therefore, dismissal of an appeal as time barred was also not a decree. That decision was rendered in the context of Article 136 of the Limitation Act, 1963 and in the light of the departure made from the previous position obtaining under Article 182 of the Limitation Act, 1908. But we must point out with respect that the decisions of this Court in *Messrs Mela Ram and Sons* and *Sheodan Singh (supra)* were not brought to the notice of their Lordships. The principle laid down by a three Judge Bench of this Court in *M/s Mela Ram and Sons (supra)* and that stated in *Sheodan Singh (supra)* was, thus, not noticed and the view expressed by the two Judge Bench, cannot be accepted as laying down the correct law on the question. Of course, their Lordships have stated that they were aware that some decisions of the High Courts have taken the view that even rejecting an appeal on the ground that it was presented out of time is a decree within the definition of a decree obtaining in the Code. Thereafter noticing the decision of the Calcutta High Court above referred to, their Lordships in conclusion apparently agree with the decision of the Calcutta High Court. Though the decision of the Privy Council in *Nagendra Nath Dey vs. Suresh Chandra Dey (supra)* was referred to, it was not applied on the ground that it was based on Article 182 of the Limitation Act, 1908, and there was a departure in the legal position in view of Article 136 of the Limitation Act, 1963. But with respect, we must point out that the decision really conflicts with the ratio of the decision in *Messrs Mela Ram and Sons* and *Sheodan Singh (supra)* and another decision of this Court rendered by two learned Judges in *Rani Choudhury Vs. Lt.-Col. Suraj Jit Choudhury* [(1982) 2 SCC 596]. In *Essar Constructions vs. N.P. Rama Krishna Reddy* [(2000) 6 SCC 94] brought to our notice two other learned Judges of this Court, left open the question. Hence, reliance placed on that decision is of no avail to the appellant.

13. In the context of the explanation to Order IX Rule 13 of the Code, the question was squarely considered by this Court in *Rani Choudhury's case (supra)*. The High Court, in our view, has rightly held that the decision of this case is directly covered by that decision. Therein, the plaintiff, the wife, obtained an ex parte decree for divorce against the husband, the defendant. The husband preferred an appeal in the High Court against the decree and also made an application under Section 5 of the Limitation Act for condoning the delay in filing that appeal. The High Court dismissed the appeal as being time barred. The husband, the defendant, then filed a petition under Order IX Rule 13 of the Code for setting aside the ex parte decree along with an application under Section 5 of the Limitation Act. The trial court dismissed the application holding that no sufficient cause was made out for condoning the delay in filing the petition under Order IX Rule 13 of the Code. The husband filed a Civil Miscellaneous Appeal in the High Court challenging the said order of the trial court. The High Court took the view that the explanation to Order IX Rule 13 of the Code did not create a bar to the maintainability of the petition under that Rule as the appeal against the ex parte decree had been dismissed not on merits but on the ground of limitation by not accepting the application for condonation of delay which meant that no appeal was preferred in the eye of law. This view of the High Court was challenged in appeal before this Court. It was argued that the High Court has misunderstood the scope and ambit of the explanation to Order IX Rule 13 of the Code and that in the circumstances, the High Court should have held that the petition under Order IX Rule 13 of the Code would not lie. This Court accepted that contention. This Court held that where there has

been an appeal against an ex parte decree and the appeal has not been withdrawn by the appellant and had been disposed of on any ground, the application under Order IX Rule 13 of the Code would not lie and should not be entertained. Hence, even though the appeal against the ex parte decree was disposed of on the ground of limitation and not on merits, the explanation to Order IX Rule 13 of the Code was attracted and hence no petition under Order IX Rule 13 of the Code would lie. On the scope of the explanation, it was stated that the disposal of the appeal as contemplated in the explanation was not intended to mean or imply a disposal on merits resulting in the merger of the decree of the trial court with a decree, if any, of the appellate court on the disposal of the appeal. The disposal of the appeal may be on any ground and though the withdrawal of an appeal by an appellant is also to be considered a disposal of the appeal, the same has been expressly exempted by the explanation. It was also observed that the legislative intent incorporated in the explanation to Order IX Rule 13 of the Code was to confine the defendant to a single course of action and to discourage the prolonging of the litigation on the ex parte decree, namely, by preferring an application to the trial court under Order IX Rule 13 of the Code for setting aside the decree and by filing an appeal to a superior court against it. If he did not withdraw the appeal filed by him or allowed the appeal to be disposed of on any other ground, he was denied the right to apply under Order IX Rule 13 of the Code. The Court also clarified that by the introduction of the explanation, the area of operation of the doctrine of merger was enormously extended. By virtue of the explanation, the disposal of the appeal on any ground whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation. In the light of this, it was held that though in that case the appeal filed by the husband against the ex parte decree was dismissed on the ground of it being barred by limitation, it was a disposal of the appeal and the petition under Order IX Rule 13 of the Code was hit by the explanation. In *P. Kiran Kumar vs. A.S. Khadar and others* [(2002) 5 SCC 161] this Court followed the decision in *Rani Choudhury* (supra) and held that the dismissal of the appeal against an ex parte decree as barred by limitation, prevented the trial court which passed the ex parte decree, from exercising its power under Order IX Rule 13 of the Code in view of the explanation.

14. It was sought to be argued on behalf of the appellant that the above decisions were distinguishable in view of the fact that in those cases, the appeals against the decrees were filed first, followed by the petitions under Order IX Rule 13 of the Code, whereas in the present case the petition under Order IX Rule 13 of the Code was filed first and only during its pendency, an appeal against the decree was filed, with an application for condoning the delay in filing it. In our view, this would not make any difference to the principle enunciated by this Court in *Rani Choudhury's* case (supra). Moreover, on the day the trial court was called upon to consider and dispose of the petition under Order IX Rule 13 of the Code, an appeal, though belated, had been filed against the decree by the appellant and the same had been dismissed as barred by limitation and had not been withdrawn. It is not possible to accept the argument that the application of the explanation should be confined to cases where an appeal had already been filed against the ex parte decree and it should be held not to apply to cases where an appeal is subsequently filed. The acceptance of such an argument, in our view, would tend to defeat the legislative scheme as noticed in *Rani Choudhury's* case (supra). In the light of the object sought to be achieved by the introduction of the explanation to Order IX Rule 13, such an argument cannot also be accepted.

15. We are not impressed by the argument of learned counsel for the appellant that the decision in *Rani Choudhury's* case (supra) requires reconsideration. On going through the said decision in the light of the objects and reasons for the introduction of the explanation to Order IX Rule 13 and the concept of an appeal as indicated by the

Privy Council and this Court in the decisions already cited, the argument that an appeal which is dismissed for default or as barred by limitation because of the dismissal of the application for condoning the delay in filing the same, should be treated on a par with the non-filing of an appeal or the withdrawal of an appeal, cannot be accepted. The argument that since there is no merger of the decree of the trial court in that of the appellate court in a case of this nature and consequently the explanation should not be applied, cannot also be accepted in the context of what this Court has earlier stated and what we have noticed above.

16. Thus, in the case on hand we find that the trial court, the appellate court and the High Court have rightly held that the petition under Order IX Rule 13 of the Code would not lie in view of the filing of an appeal against the decree by the appellant and the dismissal of the appeal though for default, since a dismissal for default or on the ground of it being barred by limitation cannot be equated with a withdrawal of the appeal. Consequently, the decision of the High Court is affirmed and this appeal is dismissed. In the circumstances of the case we make no order as to costs.