

CASE NO.:
Appeal (civil) 3285-86 of 2002

PETITIONER:
P KIRAN KUMAR

Vs.

RESPONDENT:
A.S. KHADAR & ORS.

DATE OF JUDGMENT: 03/05/2002

BENCH:
V.N. Khare & Ashok Bhan

JUDGMENT:

Bhan, J.

Delay condoned.

Leave granted.

The short point involved in these appeals is as to whether "the dismissal of an appeal against an ex-parte decree on the ground that the same is barred by limitation attracts the provisions of explanation to Order IX Rule 13 of the Code of Civil Procedure and creates a bar to the maintainability of an application under Order IX Rule 13, CPC for setting aside an ex-parte decree.

Appellant, (then a minor), while going from School to his house at Lakshmi Talkies, Andersonpet, KGF, Bangalore met with an accident at about 1.30 p.m. on 30th November, 1988 with a motorcycle bearing Registration No.MEB 910. Respondent No.1, AS Khadar was driving the motorcycle which is owned by respondent No.2 (respondent No.1 is the son of respondent No.2). Appellant, through his father, filed a claim petition under Section 110A of the Motor Vehicles Act on 28th March, 1989 for a total sum of Rs.1,50,000/- as compensation. Respondent Nos.1 and 2 appeared through a common advocate who filed his vakalatnama on their behalf before the Motor Accident Claims Tribunal, Kolar (for short 'the Tribunal'). On 3rd December, 1991 the counsel appearing for the respondents filed a memo before the Tribunal seeking to withdraw from the case for want of instructions. Thereafter respondents neither put an appearance in person nor through a counsel. Tribunal set the respondents ex-parte. After taking evidence of the appellant, Tribunal allowed the claim in part and awarded a sum of Rs.1,00,000/- as compensation, out of which Rs.75,000/- was directed to be kept in an fixed deposit till the appellant attained majority and the balance amount of Rs.25,000/- was directed to be paid to the appellant's father for meeting the treatment and other incidental expenses.

Since the order was not complied with, execution petition No.6/1996 was filed before the Principal District Judge, Kolar. Respondent No.1 was served and he put in his appearance

before the executing court on 1st January, 1996 through a counsel. On 22nd November, 1996 at the request of the appellant, the execution petition was transferred to Bangalore. Respondent No.2 was thereafter served and he also put in his appearance.

On 15th September, 1998, respondent No.2 filed an appeal being M.F.A. No.4166 of 1998 in the High Court of Karnataka against the order of the Tribunal dated 28th September, 1995. The appeal was filed along with an application under section 5 of the Limitation Act to condone the delay of 994 days in filing the appeal. An application for stay of the execution proceedings was also filed. Both the applications were dismissed by the High Court by its order dated 14th October, 1998. A clear finding was recorded by the High Court that the respondents were duly served and even had engaged a counsel in the Tribunal, and as such, the explanation given for condoning the delay was not only unsatisfactory but completely false as well. As a consequence thereof the appeal was dismissed as barred by limitation.

Thereafter respondents filed Mis. No.54 of 1998 on 14th December, 1998 before the Tribunal under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure for setting aside the ex-parte Award dated 28th September, 1995 and permit them to file their written statement and lead evidence. The Tribunal vide its order dated 15th December, 1999 set aside the ex-parte proceedings and the award dated 28th September, 1995, with the result the M.V.C. No.152 of 1989 was restored back to the file for fresh disposal in accordance with law. One of the points raised before the Tribunal by the appellant was that the appeal filed by respondent No.2 having been dismissed by the High Court and the order of the Tribunal having merged with the order of the High Court made in the appeal, an application under Order IX Rule 13 for setting aside the ex-parte award was not maintainable. The Tribunal correctly noted the principle of law to the effect that the appeal filed against the ex-parte order having been dismissed, an application under Order IX Rule 13 to set aside the award would not be maintainable but rejected the plea for want of particulars of the appeal (its number etc.).

Aggrieved by the order of the Tribunal the appellant filed Civil Revision Petition No.1345 of 2000 which was dismissed (on 11th December, 2000), even without noticing the plea raised by the appellant that the application under Order IX Rule 13 was not maintainable in view of the dismissal of the appeal by the High Court against the order of the Tribunal in MFA No.4166 of 1998. Thereafter the appellant filed a review petition No.104 of 2001 which was also dismissed on 3rd April, 2001 without noticing the point that the application under Order IX Rule 13, CPC was not maintainable in view of the dismissal of the earlier appeal filed by respondent No.2.

Aggrieved by the order passed by the High Court in Civil Revision No.1345 of 2000 and Review Petition No.104 of 2001 the present appeals by special leave have been filed.

The only contention raised on behalf of the appellant is that on a true interpretation of the explanation to Order IX Rule 13, CPC the application for setting aside the ex-parte decree must be held to be incompetent in view of the dismissal of the appeal filed by respondent No.2. It was urged that even if the appeal was dismissed on the ground of limitation, the application under Order IX Rule 13 for setting aside the ex

parte award would not be maintainable. Order IX Rule 13, CPC reads as under:

ORDER IX RULE 13, CPC

"Setting Aside decree ex parte against defendant : In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient to appear and answer the plaintiff's claim.]

[Explanation 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 that ex parte decree]."

Explanation was added to Order IX Rule 13 with effect from February 1, 1977 by the Code of Civil Procedure (Amendment Act, 1976). Prior to its enactment a defendant burdened by an ex parte decree could apply under Order IX Rule 13 for setting aside the ex parte decree. He could also file an appeal under Section 96 against the ex parte decree. The mere fact of filing the appeal did not take away the jurisdiction to entertain and dispose of an application for setting aside an ex parte decree. Only in the cases in which the trial court decree merged with the order of the appellant court by reversal, confirmation or varying it, the trial court was precluded from setting aside the ex parte decree. Where the trial court decree did not merge with the appellate court order the trial court was at liberty to proceed with the application for setting aside the ex-parte decree. Such instances arose when the appeal was dismissed in default or where it was dismissed as having abated by reasons of omission by the appellant to implead the legal representatives of a deceased respondent or where it was dismissed as barred by limitation. Explanation was added to discourage the two pronged attacks on the decree i.e. by preferring an application to the trial court under Order IX Rule 13 for setting aside the decree and by filing an appeal to the superior court against it. The legislative attempt incorporating the Explanation to Order IX Rule 13 is to confine the

defendant, to either one of the remedies made available to him and not both. Dismissal of the appeal on any ground, apart from its withdrawal constituted a bar on the jurisdiction of the trial court to set aside the ex-parte decree. With the introduction of the explanation, no application to set aside the ex-parte decree would be maintainable where the defendant filed an appeal and the appeal was disposed of on any ground, other than the ground that the appeal have been withdrawn by the appellant.

The scope of explanation to Order IX Rule 13 was considered by this Court in Rani Choudhury vs. Lt. Col. Suraj Jit Choudhury [1982 (2) SCC 596]. In the said case, the wife who had filed the appeal in this court had obtained an ex-parte decree of divorce against her husband in the matrimonial court. Husband had preferred an appeal in the high court alongwith an application under section 5 of the Limitation Act for condonation of delay in filing the appeal. The High Court dismissed the appeal as time barred. Respondent then moved an application under Order IX Rule 13, CPC for setting aside the ex parte decree. The matrimonial court dismissed the application on the ground that sufficient cause was not shown for condoning the delay. In appeal, however, the High Court took the view that explanation to Order IX Rule 13, CPC did not create any bar to the maintainability of the application under that rule as the appeal against the ex parte decree had not been dismissed on merits, but on the ground of delay. By not accepting the application for condonation of delay meant as if no appeal had been preferred. This Court allowed the appeal and set aside the judgment and order of the High Court. The main judgment was written by R.S.Pathak, J. It was held:

"The Code of Civil Procedure (Amendment) Act, 1976 was enacted with the avowed purpose of abridging and simplifying the procedural law. By enacting the Explanation, Parliament left it open to the defendant to apply under Rule 13 of Order 9 for setting aside an ex parte decree or, in the case where he had preferred an appeal, the appeal had been withdrawn by him. The withdrawal of the appeal was tantamount to effacing it. It obliged the defendant to decide whether he would prefer or have the decree set aside by the trial court under Rule 13 of Order 9. The legislative attempt incorporated in the Explanation was to discourage a two-pronged attack on the decree and to confine the defendant to a single course of action. If he did not withdraw the appeal filed by him, but allowed the appeal to be disposed of on any other ground, he was denied the right to apply under Rule 13 of Order 9. The disposal of the appeal on any ground, whatever, apart from its withdrawal, constituted sufficient reason for bringing the ban into operation."

The other Hon'ble Judge (Amarendra Nath Sen, J.) took the same view but recorded his separate reasons for coming to the same conclusion.

In the present case, as well we find that respondent No.2,

the father of respondent No.1 preferred an appeal which had been dismissed as barred by limitation. Reading of the explanation to Order IX Rule 13 clearly indicates that if any appeal against an ex-parte decree had been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application for setting aside the ex parte decree under Order IX Rule 13, CPC would be entertained.. The words of the explanation are clear and unambiguous. It clearly indicate and suggest that if an appeal has been preferred and the same had been dismissed on any ground other than the withdrawal of the appeal, the same would cause a bar to the filing of the application under Order IX Rule 13, CPC for setting aside the ex parte decree. The position of law on this point is discussed in paragraph 15 of the Judgment in Rani Choudhury's case (supra). It has been observed that on a proper interpretation of the explanation, if an appeal against an ex parte decree has been filed and the appeal has been dismissed on any ground other than the dismissed as withdrawn, then the application under Order IX Rule 13, CPC would not be maintainable and cannot be entertained.

In the present case, admittedly an appeal MFA No.4166 of 1998 had been preferred by respondent No.2 and the same was dismissed as barred by limitation. In view of the dismissal of the earlier appeal, the application under Order IX Rule 13, CPC for setting aside an ex parte decree/award was not maintainable and the Tribunal erred in setting aside the ex parte decree/award made against the respondents. The High Court failed to notice this point in spite of the fact that the same had been specifically raised.

Counsel for the respondents placed reliance on two Judgments of this Court in Kewal Ram vs. Smt. Ram Lubhai and others [AIR 1987 SC 1304] and Kunhayammed and others vs. State of Kerala and others [2000 (6) SCC 359] to contend that the order of the ex parte award made by the Tribunal did not merge with the order of the High Court passed in MFA No.4166 of 1998. Neither of these two Judgments are relevant to the point in issue. The earlier case relates to the period before the introduction of Explanation to Order IX Rule 13 in the Code of Civil Procedure; the scope of explanation to Order IX Rule 13 was not considered in that Judgment and the latter Judgment is totally on a different point and has no application to the facts of the present case or the point involved in this case.

For the reasons stated above we find substance in the contention raised by the counsel for the appellant and accept the same. The impugned order of the High Court and that of the Tribunal setting aside the ex parte award are set aside. It is held that in view of the dismissal of the appeal MFA No.4166 of 1998 by the High Court, the application under Order IX rule 13 filed by the respondents was not maintainable. Consequently these appeals are allowed. The executing court shall now give effect to the ex parte award in accordance with law. There shall be no order as to costs.

J.
(V.N. Khare)

.J.
(Ashok Bhan)

May 03, 2002

JUDIS