

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

**BEFORE
HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL**

SECOND APPEAL NO. 743 of 2000

BETWEEN

- 1. KUMARI MANGLA DESHORE, AGED ABOUT 42 YEARS, D/O. UMAKANT DESHORE, OCCUPATION-SERVICE AND RESIDENT OF RAMESHWAR ROAD, KHANDWA, TEHSIL KHANDWA, DISTRICT EAST NIMAR (MADHYA PRADESH)**

APPELLANT

(BY SHRI ASHOK KUMAR JAIN-ADVOCATE)

AND

- 1. MST. KRISHNA BAI (DEAD) BY LRs :**
 - A. MADHUSUDAN, S/O RAMESH , AGED ABOUT 73 YEARS, R/O. SAHEJALA, TEHSIL & DISTRICT KHANDWA (MADHYA PRADESH)**
 - B. SAVITRI, D/O RAMESH , AGED ABOUT 58 YEARS, R/O. SOMGAONKALA, TEHSIL KHIRKIYA, DISTRICT (MADHYA PRADESH)**
 - C. SITA, D/O RAMESH , AGED ABOUT 71 YEARS, R/O. EMPIRE RESIDENCY, INDORE (MADHYA PRADESH)**

2. **GOPAL KRISHNA, S/O RAMESH CHANDRA ,
AGED ABOUT 43 YEARS, R/O. VILL.
SAHEJALA, POST-SAHEJALA MP (MADHYA
PRADESH)**
3. **GOVIND, S/O RAMESH CHANDRA , AGED
ABOUT 40 YEARS, OCCUPATION
CULTIVATOR, R/O. MOHALLA SHIVPURI,
MUNDI, TAHSIL KHANDWA, DISTRICT EAST
NIMAR (MADHYA PRADESH)**
4. **STATE OF MADHYA PRADESH, THROUGH
COLLECTOR, EAST NIMAR (MADHYA
PRADESH)**

RESPONDENTS

(SHRI AVINASH ZARGAR- ADVOCATE FOR RESPONDENT NO.2)

Reserved on : **07.07.2022**

Delivered on : **14-07-2022**

This appeal coming on for hearing this day, the court passed the following:

J U D G M E N T

This Second Appeal has been filed by the appellant/plaintiff challenging the judgment and decree dated 18.02.2000 passed by First Additional District Judge, East Nimar, Khandwa in Civil Appeal No.19-A/1999, whereby reversing the *ex parte* judgment and decree dated 23.07.1993 passed by First Civil Judge Class-II Khandwa, in Civil Suit

No.25-A/1985, whereby suit filed for declaration of title and restoration of possession was decreed *ex parte*.

2. Short facts of the case are that the plaintiff/appellant instituted a suit for declaration of title, declaring the will dated 22.04.1982 to be null and void and for restoration of possession of suit property against the respondents/defendants 1-3 impleading the State of Madhya Pradesh as party/defendant 4 with the allegations that property in question came to Radha Krishna in partition and the plaintiff being his niece is entitled to succeed the property in question. It is also alleged that the defendants with an intention to grab the property got fabricated the will dated 22.04.1982 (registered on 23.06.1984) and on that basis got their name mutated and are getting the benefits being in illegal possession of the suit property. Hence prayed for decree.

3. After service of summons, defendants 1-3 appeared and filed written statement on 12.10.1987 denying the plaint allegations. It is contended that the defendant 1-Krishnabai is sister of Radha Krishna and the defendants 2-3 are sons of Krishna Bai, who since their childhood had been residing with Radha Krishna who executed will in their favour on 22.04.1982, on that basis the defendants are in possession, as owner. It is contended that in presence of defendant 1, the plaintiff does not get any right

over the property left by Radha Krishna. Accordingly prayed for dismissal of the suit.

4. Upon service of summons the defendants appeared on 10.04.1985 and filed written statement on 12.10.1987, thereafter they continued to appear upto 25.06.1993, prior to which on 09.11.1992 learned trial court ordered for production of original will dated 22.04.1982 on record, for which they took time upto 25.06.1993, but they did not produce. At this stage the defendants disappeared from the court and were proceeded *ex parte*. Resultantly, learned trial court on the basis of *ex parte* evidence decreed the suit vide *ex parte* judgment and decree dated 23.07.1993.

5. Thereafter the defendants 1-3 decided to file an application under Order 9 Rule 13 CPC on 16.08.1994 which upon due consideration was dismissed vide order dated 29.09.1994. Upon Misc. Appeal, the order dated 29.09.1994 was affirmed by Ist Additional District Judge, Khandwa on 17.04.1995 and was further affirmed by this Court in Civil Revision vide order dated 10.05.1995.

6. Thereafter the defendants 1-3 thought fit to file a civil suit No.15-A/1995 on 19.06.1995 before First Civil Judge Class-I Khandwa seeking declaration to the effect that *ex parte* judgment and decree dated 23.07.1993

passed in Civil Suit No.25-A/1985 is not binding on them. In this Civil Suit an application for temporary injunction was filed, which was dismissed vide order dated 14.01.1998, which was affirmed in Misc. Appeal No.1/1998 vide order dated 10.03.1998 and the civil revision No.648/1998 filed against which was also dismissed vide order dated 04.08.1998 passed by this Court making following observation :

“In this case, the ex parte decree passed against the applicants was not obtained by fraud or is otherwise vitiated. The remedy of the applicants is to file an appeal because the trial court has made an error in granting the decree to the non-applicant No.1. That error cannot be corrected in a civil suit.”

7. Taking the aforesaid observation as a fresh cause of action, the defendants 1-3 on 23.11.1998 preferred regular civil appeal No.19-A/1999 challenging the ex-parte judgment and decree dated 23.07.1993 passed in Civil Suit No.25-A/1985, along with an application under Section 5, 12 and 14 of the Limitation Act with the prayer to condone the delay in filing of the regular civil appeal. However, no averments were made in this application as to what happened in the civil suit no.15-A/1995 filed by the defendants 1-3

and why they did not take any action after 25.06.1993 till 16.08.1994 and then from 05.04.1997 to 23.11.1998.

8. Said application under Section 5, 12 and 14 was contested by appellant/plaintiff by filing written reply taking several objections including the objection of maintainability of the appeal, with the prayer of dismissal of the same.

9. Learned First Appellate Court listed the case for hearing arguments on the application under Section 5, 12 and 14 of the Limitation Act as well as for final arguments in civil appeal. Then after hearing arguments, considered rival submissions of the parties and vide paragraph 13 of its judgment clearly held that the time spent in filing and decision of the application under Order 9 Rule 13 CPC, so also the time spent in Civil Suit No.15-A/1995, cannot be excluded from the period of limitation and the defendants 1-3 are not entitled to the benefit of provision contained in Section 14 of the Limitation Act. However, in the later part i.e. in paragraph 14 to 19 of the impugned judgment, learned first appellate court placing reliance on the judgment in the case of **M/s. Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi AIR 1979 SC 1666** held that the defendants are entitled for condonation of delay because they were wrongly advised by the counsel, and condoned the delay as a matter of grace. At the same time

learned first Appellate Court in the later part started writing final judgment from para 20 and set aside the ex parte judgment and decree vide impugned judgment and decree dated 18.02.2000.

10. Against the aforesaid judgment and decree, the plaintiff/appellant preferred Second Appeal which was admitted by this Court on 22.04.2002 on the following substantial questions of law :

“1. Whether the Court below has erred in condoning the delay in filing the appeal without proper application under Section 5, 12 and 14 of the Limitation Act, 1963 ?

2. Whether the finding of lower appellate court that the plaintiff inherits the estate upon death of Radhakrishna to the exclusion of Krishnabai is perverse ?”

11. Learned counsel for the appellant/plaintiff submits that according to the decisions in the case of **Mahesh Yadav and another vs. Rajeshwar Singh and others (2009) 2 SCC 205** and **Bhanu Kumar Jain vs. Archana Kumar and another (2005) 1 SCC 787**, the defendants were having four remedies against the ex-parte judgment and decree. As per the legal advice given to them the defendants after a period of more than 13 months, firstly availed remedy of filing application under Order 9 Rule 13 CPC and after its

dismissal/finalization upto this Court, they instituted civil suit No.15-A/1995 challenging the ex parte judgment and decree, which according to the judgment of **Mahesh Yadav** (supra) was maintainable, but even without seeking liberty to withdraw the civil suit No.15-A/1995 and to file regular appeal against the ex parte judgment and decree, the defendants preferred regular civil appeal in question, which in the existing circumstances was not entertainable and the judgment and decree in question whereby delay in filing of the civil appeal was condoned on the ground of wrong advice by the counsel, is not sustainable and the defendants cannot take benefit of observations made by this Court in the order dated 04.08.1998 (supra) because of availability of remedy of civil suit also to the defendants. In support of his submissions he relied upon the decisions in the case of **(i) P.K. Ramachandran Vs. State of Kerala and another AIR 1998 SC 2276; (ii) Popat Bahiru Govardhane Etc. Vs. Special Land Acquisition Officer and another 2013 AIR (SCW) 6550; (iii) Aarifaben Yunusbhai Patel and Ors. Vs. Mukul Thakorebhai Amin and Ors. AIR 2020 SC 2344; (iv) Prakash s/o Shyamlal Khatik Vs. Uma Chaturvedi and Others 2016 (1) MPLJ 222; (v) Kishori Bai and Ors. Vs. Ravi @ Sanjay Pandey and Ors. 2018 (1) MPLJ 210 and (vi) Jagraj Singh Vs. Hariom 2019 (1) MPWN 89** and argued that the court has no power to extend the period of limitation on equitable grounds or to condone the delay on vague reasons. He further

submits that till today there is nothing on record to show the result of the civil Suit No.15-A/1995 filed by the defendants 1-3. He further submits that the plaintiff being niece i.e daughter of predeceased son of original owner Harishankar, namely Umakant, and the property in the hands of Radha Krishna being ancestral in nature, the learned first Appellate Court has erred in reversing the same even without reversing the findings recorded by learned trial court on issue No.1 regarding the nature of property to be ancestral property. Accordingly he prays for allowing the second appeal.

12. Learned counsel for the defendants/respondents 1-3 submits that defendants 1-3 were prosecuting their case as per legal advice given to them by the counsel and lastly as per the observations made by this Court in Civil Revision No.648/1998 they were given advice to file regular civil appeal before the First Additional District Judge, East Nimar, Khandwa, in which the learned appellate court has rightly allowed the application under Section 5 of the Limitation Act, which is not liable to be interfered with in the present second appeal. In support of his arguments he relied upon the decisions in the case of **(i) State of Nagaland Vs. Lipok Ao and Ors. AIR 2005 SC 2191; (ii) Rafiq & Anr. Vs. Munshilal & Anr. AIR 1981 SC 1400; (iii) Collector, Land Acquisition, Anantnag And Anr. Vs. Mst Katiji and Ors. (1987) 2 SCC 103; (iv) Municipal Corporation Gwalior Vs.**

Ramcharan (Dead) by LRs and Ors. (2002) 4 SCC 458; (v) Ummer Vs. Pottengal Subida and Ors. (2018) 15 SCC 127 and (vi) State (NCT of Delhi) Vs. Ahmed Jaan (2008) 14 SCC 582. He further submits that the findings recorded by learned first Appellate Court in para 13 of the judgment, regarding Section 14 of the Limitation Act, are liable to be set aside/ignored. He further submits that in the light of undisputed pleadings made in the plaint and as per Section 8 of the Hindu Succession Act, the plaintiff is not entitled for any relief, because the defendants are the only successors of Radha Krishna and owner of the property in question. Accordingly, he prays for dismissal of the second appeal.

13. During the course of arguments, learned counsel for the respondents/defendants have placed a photocopy of order dated 05.04.1997 passed in civil suit No.15-A/1995 on record, which shows that the said civil suit was returned to the defendants for filing in the competent court. However, the counsel has not been able to demonstrate as to whether such civil suit was filed before competent court or not.

14. Heard learned counsel for the parties and perused the record.

Substantial Question of Law 1

15. Undisputedly the defendants firstly challenged the ex parte judgment and decree dated 23.07.1993 by filing application on 16.08.1994 under Order 9 Rule 13 CPC which was dismissed upto this Court by dismissal of Civil Revision on 10.05.1995. It is also undisputed position available on record that after dismissal of Civil Revision, i.e. after finalization of proceedings under Order 9 Rule 13 CPC, the defendants chose to file Civil Suit No.15-A/1995 on 19.06.1995 challenging the ex parte judgment and decree dated 23.07.1993 passed in Civil Suit No.25-A/1985, in which the application under Order 39 Rule 1 & 2 CPC was dismissed vide order dated 14.01.1998, which was upheld in Misc. Appeal on 10.03.1998, so also in Civil Revision No.648/1998, dismissed on 04.08.1998. The first question arises in the present appeal is as to whether the defendants can be given benefit of the observations made by this Court in civil revision on 04.08.1998 even without withdrawing the Civil Suit or even without getting any liberty from the concerned Court to file regular Civil Appeal in question. Certainly this aspect has neither been mentioned in the application filed under Section 5, 12 and 14 of the Limitation Act nor has been considered by learned first appellate court.

16. Secondly, if the said order dated 05.04.1997 (of returning plaint) is taken into consideration, then it reveals that on the date of passing of order

dated 04.08.1998 in CR No.648/98 or even on the date of its filing i.e. on 17.03.1998, no civil suit was pending, which in effect rendered the civil revision infructuous, hence the observation made in the order dated 04.08.1998 is of no significance.

17. Further the order passed by First Appellate Court appears to be self contradictory with regard to condonation of delay because in para 13 of the impugned judgment, the learned appellate court has on the same set of facts declined to extend the period of limitation under Section 14 of the Limitation Act, but in the later part i.e. vide para 19, on the same set of facts condoned the delay, as a matter of grace, in filing of the appeal and at the same time from para 20 passed the impugned judgment on merits also.

18. In the present case civil appeal was filed on 23.11.1998 taking benefit of observations made in the order dated 04.08.1998 but the fact of pendency/dismissal/withdrawal of civil suit No.15-A/1995 was suppressed, which shows malafides and negligent conduct of the defendants/respondents. As has been held by Hon'ble Apex Court in the case of **Ramji Pandey and Ors. vs. Swaran Kali AIR 2011 SC 489**, as the conduct of respondents throughout lacks due diligence and was also negligent, they would not be entitled to benefit of condonation of delay under section 5 of the Limitation Act and time spent in wrong forum cannot be excluded and delay cannot be

condoned. In the application under Section 5 of the Limitation Act, nothing has been mentioned regarding non-compliance of order dated 09.11.1992 passed by trial court under Order 11 Rule 12 CPC directing the defendants to produce the original will. Further no date of filing application under Order 9 Rule 13 CPC was mentioned in the application under Section 5 of the Limitation Act. Fact remains that the application under Order 9 Rule 13 CPC was filed on 16.08.1994 i.e. after more than 13 months, which is clear negligence on part of defendants because they were served with summons and appeared in civil suit till 25.06.1993. No explanation is available on record for the period from 25.06.1993 to 16.08.1994 and then from 05.04.1997 to 23.11.1998, which was necessary.

19. It is well settled that unless the delay in filing of appeal is condoned, there is no appeal in the eyes of law. If the matter is considered from this angle, then on the date of passing of the impugned judgment dated 18.02.2000, there was no appeal in the eyes of law. In my considered opinion after condoning the delay of a long period under Order 41 Rule 3A CPC, it was the duty of first appellate court to admit the appeal as provided under Rule 11 and then to hear the final arguments as provided under Rule 12 of Order 41 CPC, but nothing was followed by learned first appellate court and on the same date appeal was allowed just contrary to law settled by Full

Bench of this Court in the case of **Maniram and ors. v. Mst. Fuleshwar and ors. 1996 MPLJ 764 (FB)**.

20. However, after recording negative findings on the same set of facts with regard to Section 14 of the Limitation Act there was no occasion available with the first appellate court to consider the question of condonation of delay again on same set of facts in view of Section 5 of the Limitation Act. As the delay in filing the first appeal was not condonable, therefore there was no question of deciding the appeal on merits. Accordingly, the impugned judgment and decree deserves to be and is hereby set aside and the judgment and decree passed by learned trial court is restored. Accordingly, the substantial question of law no.1 is decided in favour of appellant/plaintiff and against the defendants/respondents.

Substantial Question of Law 2

21. In view of decision on substantial question of law No.1, there is no need to decide the substantial question No.2.

22. It is pertinent to mention here that as the confusion arose in the mind of defendants 1-3 because of making observations by this court in the order dated **04.08.1998** in **Civil Revision No.648/1998**, therefore, in the interest of justice it is ordered that the defendants 1-3 shall be at liberty to

get revived their **Civil Suit No.15-A/1995** in accordance with the law, if it was got dismissed due to observations made by this Court in CR No.648/1998, by moving appropriate application before the concerned court.

23. With the aforesaid observations, the appeal stands allowed and disposed off. No order as to costs.

(DWARKA DHISH BANSAL)
JUDGE

SS