



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 19963 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE DEVAN M. DESAI

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Approved for Reporting	Yes	No
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RATHVA MEENABEN PAHADSINH & ANR.
 Versus
 SOLANKI KARANSINH GEMALSINH & ORS.

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Appearance:

MR AV NAIR(5602) for the Petitioner(s) No. 1,2
 MR DHRUV K DAVE(6928) for the Respondent(s) No. 1,2,3,4,5,6,7

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CORAM: HONOURABLE MR. JUSTICE DEVAN M. DESAI

Date : 02/02/2026

ORAL JUDGMENT

1. The present petition is filed under Articles 226 and 227 of the Constitution of India, 1950 by the petitioners-original plaintiffs-appellants. The petitioners have prayed for following prayers :-

“A. This Hon'ble High Court may be pleased to admit and allow the present petition;

B. This Hon'ble High Court may be pleased to quash and set aside the order dated 30/06/2022 in Misc. Civil



Appeal no. 05 of 2021, passed by the Learned Additional District Judge, Chhotaudepur at Bodeli (At Annexure-A), and consequentially be pleased to set aside the order dated 22/09/2021 in Civil Misc. Application no. 16 of 2019, passed by the Learned Principal Senior Civil Judge, Bodeli (At Annexure-D), by allowing the prayers sought therein to condone the delay in preferring the application for setting aside the order of dismissal dated 14/11/2017 in Regular Civil Suit no. 227 of 2016 (At Annexure-C), in the Interest of justice;

C. This Hon'ble High Court may be pleased to pass such and further orders as the nature and circumstances of the case may require, in the interest of justice.”

2. Heard learned advocate Mr. A.V Nair appearing for the petitioners and learned advocate Mr. Dhruv K. Dave for the respondents.

3. Learned advocate for the petitioners-plaintiff submitted that the suit bearing Regular Civil Suit No. 227 of 2016, originally, was filed before learned Pavi, Jetpur Court, thereafter the Suit proceedings came to be transferred to Principal Senior Civil Judge, Vadodara and from there was



transferred to learned Civil Judge, Baroda. In the year 2016, the suit proceedings were transferred from Civil Judge Baroda to learned Civil Judge at Bodeli. It is submitted that the petitioners did not remain present resultantly, on 14.11.2017, the Suit came to be dismissed under the provisions of Order IX Rule 8 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the Code”). The petitioner No.1 got to know from the correspondence ensued with the Police Commissioner, Chhota Udepur on 08.08.2019, that the suit has been dismissed for default on 14.11.2017. Thereafter, an application being Civil Misc. Application No. 16 of 2019, came to be filed by the plaintiff under Order IX Rule 9 of the Code for setting aside the dismissal of the Suit. The said application came to be dismissed on 22.09.2021 against which the petitioners filed Civil Misc. Appeal No. 5 of 2021 with an application for condonation of delay. The application for condonation of delay came to be rejected by the learned trial Court and the said order came to be assailed by the petitioners before learned District Court with an application for condonation



of delay. The learned District Court while deciding the application under Section 5 of the Limitation Act, 1963 observed that the Civil Misc. Appeal is not maintainable and the same came to be dismissed against which the present petitioners are before this Court.

4. Learned advocate for the petitioner further submitted that the challenge in the Misc. Civil Appeal was against the rejection of an application for condonation of delay for setting aside the order of dismissal of the suit for default. The order passed by the learned Trial Court is under Order IX Rule 9 of the Code. Learned advocate for the appellant has relied upon Order XLIII Rule 1(c) of the Code. It is submitted that an appeal shall lie from an order passed under Rule 9 of Order IX rejecting an application for an order to set aside the dismissal of the suit. It is submitted that while rejecting the application for condonation of delay by the learned Trial Court, the application under Order IX Rule 9 is dismissed and therefore, the challenge by way of a Civil Misc. Appeal is maintainable. The application under



Section 5 of the Limitation Act is not a stand alone application as the main application was under Order IX Rule 9 of the Code. In support of his contention learned advocate for the petitioner has relied upon a decision in the case of (i) **Jaswant Singh and Ors Vs. Parkash Kaur and anr reported in (2018) 12 SCC 249** and (ii) **Shyam Sundar Sarma Vs. Pannalal Jaiswal and Ors., reported in (2005) 1 SCC 436**. It is pointed out by learned advocate for the petitioner that an application under Order IX Rule 13 of the Code is akin to that of an application for restoration of the suit under Order IX Rule 9 read with Section 141 of the Code. It is contended that, when the application for restoration of the suit is dismissed by not condoning delay, it would be an appealable order and therefore, the Civil Misc. Appeal is maintainable as held in the case of **Jaswant Singh and Ors. (supra)**. Except above, no other submission are canvassed by learned advocate for the petitioner.

5. Per contra, learned advocate for the opponent has supported the order and contended that the petition under



Articles 226 and 227 of the Constitution of India is not maintainable as the order under challenge is passed in Misc. Civil Appeal filed by the petitioners under Order XLIII (1)(r) of the Code. Learned advocate for the respondent has also relied upon the contention raised in affidavit-in-reply. Except above, no other submissions are canvassed by learned advocate for the respondent.

6. Having considered the submissions canvassed by learned advocate for the parties and on perusal of the order impugned it appears that the petitioners' suit came to be dismissed by the learned Trial Court by resorting to the provisions of the Order IX Rule 8 of the Code. Upon receiving the knowledge that the suit has been dismissed for default, an application for restoration of the suit with an application for condonation of delay came to be filed being Civil Misc. Application No. 16 of 2019 before the learned Trial Court. The learned Trial Court found that the reasons assigned in the application are not sufficient and rejected the application for condonation of delay. The said order of



rejection was assailed by the petitioners by way of Civil Misc. Appeal before the learned District Court at Bodeli with an application for condonation of delay under Section 5 of the Limitation Act. The learned Addl. District and Sessions Court while rejecting the application for condonation of delay observed that the Civil Misc. Appeal is not maintainable. It is also observed that the application under order IX Rule 9 for setting aside the dismissal of the suit is not an appealable order.

7. At this stage, it would be apposite to refer to the provisions of Order under XLIII Rule (1)(c) of the Code .

Order XLIII Rule (1) (c) is as under :-

ORDER XLIII

Appeals from Orders

1. (c)-*“an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;*

8. The said provision mandates that an appeal shall lie under Rule 9 of Order IX rejecting an application for an



order to set aside the dismissal of the suit. Order IX Rule 9 of the Code mandates that where the suit is dismissed under Rule 8 of Order 9, the plaintiff may apply for an order to set aside the dismissal.

9. The question involved in the present petition is whether Civil Misc. appeal is maintainable in cases where an application for condonation of delay for setting aside the dismissal of the suit is rejected. By rejecting an application under Section 5 of the Limitation Act, virtually the application under Order 9 Rule 9 is dismissed. Therefore, Order XLIII Rule 1 (c) of the Code would come to the rescue of the petitioners and when an order is passed under Rule 9 of Order IX, an appeal would lie from such order.

10. In the case of **Jaswant Singh** (supra), the suit was decreed ex-parte. The defendant filed an application under Order IX Rule 13 of the Code for setting aside the decree. The application under Order IX Rule 13 came to be dismissed for default and thereafter, the heirs of the



deceased defendant filed an application praying restoration of an application under Order IX Rule 13 of the Code. The application was dismissed on merits by the learned Trial Court holding that there were no sufficient cause for restoration of the application. An appeal was filed before the learned District Judge. The learned Appellate Court set aside the order passed by the Trial Court and found that the application was not beyond the period of limitation. The matter was remitted back. The plaintiff being aggrieved by the order of the learned District Court filed revision under Article 227 of the Constitution of India, raising a question of maintainability of the appeal filed before the learned District Court. It was the contention of the appellant that when an application under Order IX Rule 13 was dismissed for non-appearance of defendant, such order is not an appealable order and provisions of Order XLIII Rule (1) (c) or 1(d) are not applicable. The High Court held that the appeal before the District Judge was not maintainable and the application for restoration was held to be barred by law of limitation against which the aggrieved heirs of defendants



approached the Hon'ble Apex Court. While addressing the question the Hon'ble Apex Court in paragraph No. 19 has observed as under :-

"19. We may first examine, as to whether, the order dated 19-10-2001 by which the application filed by Ranjit Singh, the defendant was dismissed in was appealable or not? Order 43 Rule 1(d) permits appeal from "an order under Rule 13 of Order 9 rejecting an application". There cannot be any dispute that ex parte decree passed by the Civil Judge dated 6-12-1997 was appealable and Ranjit Singh, the defendant chose to file an application under Order 9 Rule 13 praying for setting aside the ex parte decree dated 6-12-1997, opportunity to the appellant Ranjit Singh.

20. The statutory provision of Order 43 Rules 1(c) and 1 (d) CPC uses the Words "rejecting an application". When the appeal is provided on rejection of an application we need not read any further precondition in the word "rejecting". When the right of appeal has been given on "rejecting" an application the said" right cannot be read to limit the right of appeal only when the application is rejected on merit. Taking any such interpretation will be nothing but adding words to the statute which is clearly impermissible."



11. The Hon'ble Apex Court observed that when the application is rejected in default under Order IX Rule 13 of the Code, the right of Appeal would have been exercised under Order XLIII Rule (1)(b) of the Code. In paragraph Nos. 58 and 62, the Apex Court has observed as under :-

58. There cannot be any dispute to the view taken by the different High Courts in various judgments as noticed above, that an appeal is a substantive right and not a mere matter of procedure and unless the right to appeal is Specifically conferred it cannot be inferred under Section 141 CPC. The present is not a case where we are reading the right of appeal from Section 141 CPC. Section 141 now expressly provides that Order 9 is applicable to all proceedings in civil jurisdiction When Order 9 is made applicable to the proceedings in the nature of application seeking recall of the order dismissing the application under Order 9 Rule 13 CPC the order passed by the civil court rejecting such application is clearly referable to Order 9 Rule 9 CPC and an order which is clearly referable to Order 9 Rule 9 CPC shall also be appealable by virtue of Order 43 Rule (c) CPC. Rejection of application for restoration which is referable to Order 9, we cannot refuse to treat an order rejecting the application under Order 9 Rule 9 CPC for the purposes of Order 43 Rule 1(c) CPC. The Full Bench judgment of the Madhya Pradesh High



Court insofar as answered Question I as framed in para I of the judgment lays down the correct law. However, the view of the Full Bench that when the application under Order 9 Rule 9 CPC for restoration of suit is rejected, the second application for restoration of the original application although falls under the purview of Order 9 Rule 9 CPC read with Section 141, rejection of the application does not fall under Order 43 Rule (2) CPC, to the above extent, the view of the Full Bench cannot be approved. When the second application as held by the Full Bench falls under Order 9 Rule 9 CPC, hence the right of appeal shall also accrue when such application is rejected. In view of the above discussion, we are of the considered opinion that the appeal filed by the appellants against the order dated 23-12-2005 was clearly maintainable and the High Court erred in holding that such appeal was not maintainable.

62. Section 5 of the Limitation Act was attracted in the application filed for restoration. The appellate court having found sufficient cause for restoration, it is just and equitable to conclude that there was sufficient cause for condonation of delay, if any. Thus, the rejection of the application of the appellants on the above ground also cannot be sustained.

12. In the case of **Shyam Sundar Sarma (supra)**, the defendant remained absent and on the basis of the



evidence of the plaintiff an ex-parte decree came to be passed against defendant. The defendant filed an application under Order IX Rule 13 for setting aside the ex parte decree with an application for condonation of delay. The application for condonation of delay came to be allowed. The said order came to be challenged before the District Court by way of a revision. The revision came to be dismissed against which a further revision was filed before the High Court which also came to be dismissed. While considering the decision of the Full Bench of Kerala High Court in the case of **Thambi Vs. Mathew**, in paragraph No. 10, the Hon'ble the Apex Court observed as under :-

"10. The question was considered in extenso by a Full Bench of the Kerala High Court in Thambi v. Mathew: 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 the 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 3-A of Order 41 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 41 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.”

13. In paragraph 14 the Hon’ble Apex Court has observed as under :-

“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 9 Rule 13 of the Code, whereas in the present case the petition under Order 9 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 Choudhary Case. Moreover, on the day the trial court was called upon to consider and dispose of the petition under Order 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 Choudhary Case. In the light of the object sought to be achieved by the introduction of the Explanation to Order 9 Rule 13, such an argument cannot be accepted.”

14. Coming back to the facts of the case and more particularly the reasons assigned in the application for condonation of delay, the petitioners'-plaintiffs have stated that petitioner No. 2 is serving as a Mamlatdar in the Revenue Department of the State of Gujarat and during the year of 2017, the petitioner No. 2 was entrusted to perform duty in Assembly elections. He was holding the post of Mamlatdar at Karchan during the period of 01.08.2017. He was also entrusted Additional Charge of Sinod Mamlatdar in August 2018. On 02.06.2017, he was also performing duty as Vadodara Mamlatdar. For the aforesaid reasons along with reasons of his illness during 19.07.2018, he could not



remain present before the learned trial Court, resultantly the Suit came to be dismissed for default. Be that as it may, in the present petition the only question remains to be answered is whether a Civil Misc. Appeal is maintainable against an order of rejection of condonation of delay. In my opinion, considering the specific provisions of Order XLIII Rule 1(c), the order under challenge before the learned District Court was though an order under Section 5 of the Limitation Act but virtually by rejection of the application, the application under Order IX Rule 9 is dismissed. When an order is passed rejecting an application under Order IX Rule 9 of the Code, the remedy is an appeal before the learned District Court. The order IX Rule 13 as held by the Hon'ble Apex Court in the case of **(Jaswant Singh and Ors. (supra))**, has held that an application for restoration of suit under Order IX Rule 13 is an appealable order which is akin to the provisions under Order 9 Rule 9 of the Code. The only difference between the aforesaid two provisions is that Order 9 Rule 9 operates where the

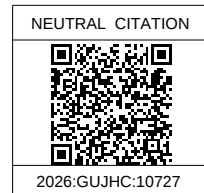


defendant appears and the plaintiff does not appear when the suit is called on for hearing, the dismissal of the suit in absence of plaintiff, the plaintiff has a remedy under Rule 9 of Order IX for a restoration of the suit. Whereas Order IX Rule 13 operates in cases in which decree is passed ex -parte in absene of defendant, such defendant may apply to the Court for setting aside the decree passed ex-parte by showing sufficient cause which prevented the defendant from appearing in the suit. An order passed under Rule 13 of Order 9 rejecting the application for an order to set aside a decree passed ex parte, appeal would lie under Order XLIII Rule 1 (d) of Code. Similarly, any order passed under Rule 9 of Order IX, rejecting an application for an order to set aside the dismissal of the suit, an appeal would lie under Order XLIII Rule 1 (c) of the Code. In both the above eventualities, the remedy is prescribed for the aggrieved party by way of an appeal. As discussed above, any order rejecting an application under Section 5 of the Limitation Act would certainly mean that the Court has



rejected the application under Rule 9 of Order IX of Code. There is no other remedy available under the Civil Procedure Code when the application under Order IX of Rule 9 is rejected except an appeal.

15. In the aforesaid context and considering the provisions as well as the law laid down by the Hon'ble Apex Court, I am of the view that the learned Additional District and Sessions Judge, Chhota Udepur, at Bodeli has committed a jurisdictional error by rejecting the application on the ground of non-maintainability of the Civil Misc. Appeal. Resultantly, the impugned order dated 30.06.2022 passed by the learned Additional District and Sessions Judge is hereby quashed and set aside. The learned Additional District and Sessions Judge is directed to decide the Civil Misc. Appeal for condonation of delay filed under Section 5 of the Limitation Act on merits and strictly as per the provisions of law. While deciding the Civil Misc. Appeal, the learned District Court shall not be influenced by any



of the observations made hereinabove.

16. With the above observations made herein
above the petition is allowed accordingly.

MARY VADAKKAN

(D. M. DESAI,J)