
Lavuri Krishna Vs Budige Hussain and Others

CRP No. 6442 of 2005

Court: Andhra Pradesh High Court

Date of Decision: Dec. 20, 2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 9 Rule 13#Limitation (Amendment) Act, 1973 " Section 5#Limitation Act, 1908 " Article 164

Citation: (2006) 2 ALD 192 : (2006) 1 ALT 633

Hon'ble Judges: P.S. Narayana, J

Bench: Single Bench

Advocate: M.S. Prasad, for the Appellant; Kiran Palakurthi, for the Respondent

Final Decision: Allowed

Judgement

P.S. Narayana, J.

Heard Sri M.S. Prasad, learned Counsel representing the revision petitioner and Sri Kiran Palakurthi, learned Counsel

representing the first respondent/plaintiff.

2. The civil revision petition is filed as against an order made in I.A.No. 1009 of 2005 in O.S.No. 20 of 1998 on the file of Senior Civil Judge,

Nalgonda, dated 27-9-2005. The revision petitioner-7th defendant in the suit O.S. No. 20 of 1998 filed I.A.No. 1009 of 2005 u/s 5 of the Indian

Limitation Act, 1973 for condonation of delay of one day in setting aside the ex parts decree. The said application was filed on the ground that

there is a delay of only one day in filing an application to set aside the ex parte decree inasmuch as the period to be computed from the date of

knowledge. The same was resisted by filing a counter in detail. The learned Judge on appreciation of the rival stand taken by the parties arrived at

a conclusion that the petitioner had not approached the Court with Clean hands and with a view to delay the process of execution, this application

was thought of and ultimately, dismissed the same with costs. Aggrieved by the same, the present revision petition is filed.

3. Contentions of Sri M.S. Prasad :

Sri M.S. Prasad, learned Counsel representing the revision petitioner had taken this Court through the endorsement made by the Process Server

and the contents thereof and also the certified copy of the judgment, which was made in this regard. The learned Counsel would contend that

inasmuch as the endorsement made by the Process Server can taken to be an official act, which can be presumed to have been done in

accordance with law, it can be taken that there was no service of notice and hence, in the absence of service of notice, from the date of

knowledge, the period to be calculated and hence, there is a delay of one day and accordingly, the application was filed to condone the delay of

one day.

4. Contentions of Sri Kiran :

Per contra, Sri Kiran, learned Counsel representing the first respondent/plaintiff would contend that the application is not a bonafide one and from

the date of decree, if the period is calculated, the delay will be four years and the same had not been explained. The learned Counsel also would

submit that except filing the certified copy of the endorsement made by the Process Server, no further acceptable material is available on record to

arrive at a conclusion that the revision petitioner came to know about the passing of the decree on the day specified and hence, the time to be

calculated from the said date. The learned Counsel also had brought to the notice of this Court that in fact, a Commissioner was appointed in the

said suit O.S.No. 20 of 1998 in I.A.No. 2003 of 1998 for conducting auction and the said Commissioner also had taken notice to D-7 also by

certificate of posting and in the light of the same, it cannot be said that the revision petitioner/D-7 had no knowledge of the passing of the decree.

The learned Counsel also made certain submissions relating to the meaning of the expression ""knowledge of the decree"" under Article 164 of the

Limitation Act, 1908. The learned Counsel placed reliance on a decision of the Apex Court in Panna Lal v. Murari Lal (dead) by his Legal

Representatives AIR 1964 SC 1384.

5. Heard the learned Counsel on record.

6. The revision petitioner is the 7th defendant in the suit O.S. No. 20 of 1998 on the file of the Senior Civil Judge, Nalgonda. The judgment made

by the Court dated 26-6-2001 is as hereunder :

Defendant Nos. 5 and 6 are called absent. Hence, they are set ex parte. Heard arguments. As there is no cross-examination to PW1 his evidence

is recorded unchallenged since the evidence of PW1 is supporting the Plaintiffs Claim, same is accepted as true. Hence, the suit is decreed for a

sum of Rs. 5,00,000/- with costs.

7. The endorsement of the Process Server in relation to the 7th defendant is as hereunder :

Address not correct

sd/-

Sworn and signed before me.

sd/-15-4

Deputy Nazir.

8. The certified copy of the report of the Commissioner in LA. No. 2003 of 1998 in O.S. No. 20 of 1998 on the file of the Senior Civil Judge,

Nalgonda also is placed before this Court. It is no doubt true that the Commissioner recorded that he had taken out notice to D-7 also by

certificate of posting. But it is not clear from the record whether at any point of time there was actual service of notice on the 7th defendant or not,

especially in the light of the endorsement made by the Process Server referred to supra. In Mulraj Vs. Murti Raghonathji Maharaj, , the Apex

Court observed as hereunder :

Under Order 9 Rule 3 C.P.C., a decree passed ex parte against a defendant is liable to be set aside if the summons was not duly served or if the

defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. If the summons is not duly served, the

defendant suffers an injury and he is entitled ex debito justitiae to an order setting aside the ex parte decree provided he applies to the Court within

the prescribed period of limitation. Under Article 164 of the Indian Limitation Act 1908, the period of limitation for an application by a defendant

for an order to set aside the decree passed ex parte was 30 days from ""the date of the decree or when the summons was not duly served, when

the applicant had knowledge of the decree"". The onus is on the defendant to show that he had knowledge of the decree within 30 days of the

application. If the defendant produces some evidence to show that the application is within time, it is for the plaintiff to rebut this evidence and to

establish satisfactorily that the defendant had knowledge of the decree more than 30 days before the date of the application.

In Pundlick Rowji v. Vasantrao Madhavarao (1909) 11 Bom. LR 1296 Davar, J., held that the expression ""knowledge not a decree"" in Article

164 means knowledge not of a decree but of the particular decree which is sought to be set aside, a certain and clear perception of the fact that

the particular decree had been passed against him. On the facts of the case, Davar, J., held that a notice to the defendant that a decree had been

passed against him in the High Court Suit No. 411 of 1909 in favour of one Pundlick Rowji with whom he had no dealings was not sufficient to

impute to him clear knowledge of the decree in the absence of any information that the decree had been passed in favour of Pundlick Rowji as the

assignee of a promissory note which he had executed in favour of another party. This case was followed by the Calcutta High Court in Kumud

Nath Roy Chowdhury v. Jotindra Nath Chowdhury (1911) ILR 38 Cal . 394 at p.403. In Bapurao Sakharam Karmarkar Vs. Sadhu Bhivba

Gholap, the Bombay High Court held that the evidence of two persons who had been asked by the plaintiff to tell the defendant about the decree

and to settle the matter was not sufficient to impose knowledge of the decree on the defendant within the meaning of Article 164.

9. There cannot be any doubt or controversy relating to the proposition laid down by the Apex Court referred to supra while computing the period

of limitation and calculating the days of delay, especially when the stand taken is that "from the date of knowledge" the condonation of delay may

have to be calculated. It is always essential to place acceptable evidence before the Court. It is no doubt true that there is an endorsement of

Process Server, but for reasons best known, no steps had been taken by either of the party to see that the Process Server is examined. Though

some material is placed before the Court that the revision petitioner/7th defendant had knowledge about the proceedings and deliberately had not

contested, no effort had been taken in this regard to prove the same. In either way, both the contesting parties for reasons best known had not

placed the complete material before the Court.

10. In view of the same, this Court is of the considered opinion that the parties may have to be given opportunity to let in further evidence on the

aspect of the knowledge and also whether the delay of one day, which had been stated to be the delay is the correct calculation in the facts and

circumstances of the case.

11. Accordingly, the impugned order is hereby set aside the matter is remitted to the learned Senior Civil Judge, Nalgonda, for the purpose of

affording opportunity to both the parties to let in evidence on their respective stands and decide the matter afresh in accordance with law, within a

period of four weeks from today.

12. The revision petition is accordingly allowed to the extent indicated above. No order as to costs.