

(2007) 08 AP CK 0020

Andhra Pradesh High Court

Case No: Civil Revision Petition No. 1178 of 2007

K. Sudhakar Reddy

APPELLANT

Vs

Ind. Bank Housing Limited and
Others

RESPONDENT

Date of Decision: Aug. 24, 2007

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 4, Order 22 Rule 8, Order 22 Rule 9, Order 9 Rule 13, Order 9 Rule 2
- Constitution of India, 1950 - Article 227
- Limitation Act, 1963 - Article 120, 122, 137, 2, 5

Citation: (2007) 6 ALD 476 : (2008) 1 ALT 151

Hon'ble Judges: A. Gopal Reddy, J

Bench: Single Bench

Advocate: N. Pramod, for the Appellant; Amabadipudi Satyanarayana, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

A. Gopal Reddy, J.

PETITIONER/defendant No. 1 in O.S.No.4 of 2002 on the file of II Additional District Judge, Madanapalle calls in question the order dated 24-01- 2007 passed by the learned Judge in I.A. No. 646 of 2005 in I.A.No.437 of 2002 in the said suit, whereunder the I.A. filed by the 1st respondent/plaintiff under Order IX Rule 9 r/w 151 CPC for restoring the I.A.No.437 of 2004 against the proposed 4th respondent/4th defendant was allowed.

2. THE 1st respondent/plaintiff-bank filed the above suit for recovery of Rs. 1,00,69,351/- along with interest and costs against the petitioner/1st defendant and two others in which defendants filed I.A.No.437 of 2004 for rejection of the plaint.

When the same came up for trial, the 3rd defendant died on 25-02-2004 leaving behind him the proposed 4th respondent/4th defendant as his legal heir. Consequent to his death the plaintiff-bank filed I.A.No.437 of 2004 for impleading the proposed 4th defendant as legal heir of 3rd defendant and for making consequential amendment. When the plaintiff-bank failed to serve the notice on the proposed party substituted service was ordered by way of making paper publication in Praja Shakthi daily. Since the 1st respondent/plaintiff failed to comply the said order effecting substituted service I.A.No.437 of 2004 was dismissed against the proposed 4th respondent. For restoration of the same the present I.A. was filed.

3. PETITIONER/1st defendant and other defendants contested the same contending that along with the above I.A. plaintiff/bank filed I.A.No.163 of 2006 u/s 5 of the Limitation Act for condoning the delay in filing the legal representative petition and I.A.No.165 of 2006 under Order XXII Rule 9 CPC for setting aside the abatement. Petitioner herein carried the matter in revision-C.R.P.No.3861 of 2006 and this Court set aside the order dated 06-02- 2006 and remitted the matter for fresh consideration. On remand, notice was ordered to the proposed respondent.

4. CONTESTING the same defendants 1 and 2 filed a counter stating that the petition is barred by time and placed reliance on the judgments reported in Chinnappa Naidu v. Deenadayalu Naidu AIR 1948 Mad. 480 and [Radhanath Pathak and Another Vs. Bihar State Board of Religious Trusts](#) . The lower court after considering the submissions on either side allowed the I.A.No.646 of 2005 through the impugned order dated 24-01-2007. Against which the present revision under Article 227 has been filed.

5. LEARNED counsel for the petitioner vehemently argued that the 3rd defendant died on 25-02-2004; the same was informed through memo dated 05-10- 2004; to bring legal representatives of the 3rd defendant I.A.No.437 of 2004 was filed on 13-12-2004 under order XXII Rule 4 IPC in which paper publication was ordered on 06-04-2005; due to failure of taking steps the said I.A. was dismissed on 05-08-2005. Therefore, the present I.A.No.646 of 2005 was filed on 25-11-2005, which is barred by limitation. When the suit against defendant No. 3 abates it will be abated against the other defendants also and by allowing the I.A. the advantages enure to the benefit of the defendants are taken away and the I.A. is liable to be dismissed as barred by limitation, as the same has not been filed within 30 days from the date of dismissal of I.A.No.437 of 2004 as per Article 122 of the Limitation Act, 1963 (for short "the Act"). He relied upon the very same judgments, which are referred by the lower court in the impugned order.

6. LEARNED counsel for the 1st respondent/plaintiff while sustaining the order contends that Article 122 of the Act has no application to the petition filed under Order IX Rule 9 r/w 151 CPC by placing reliance on [Khoobchand Jain and Another Vs. Kashi Prasad and Others](#) . He further contends that since I.A.No.437 of 2004 has not been dismissed against defendants 1 and 2 and it is dismissed against 4th

defendant only who had not chosen to contest the matter. Therefore, petitioner cannot have any grievance.

7. IT is saddening to note except the above submissions both the counsel have not rendered any assistance to the Court for resolving the controversy effectively. In the process, this Court has to take onerous task by itself in its trust to do justice to the parties.

8. IN the light of the submissions, as referred to above, the only point that arises for consideration in this revision is:

What is the period of limitation for filing an application under Order IX Rule 9 r/w 151 CPC for restoration of petition dismissed for default filed under Order XXII Rule 4 CPC

9. THE facts, as referred to above, do not dispute that I.A.No.437 of 2004 filed for impleading the proposed 4th defendant as legal heir of deceased defendant No. 3 was dismissed for non-compliance of taking out notice by way of substituted service as ordered by the Court and for restoration of the same I.A.No.646 of 2005 was filed and also filing of I.A.Nos.163 and 165 of 2006.

10. IN view of Section 141 CPC the procedure contemplated under Order IX Rule 9 shall be made applicable to all proceeding in any Court of civil jurisdiction.

11. ORDER IX Rule 9 CPC empowers the Court to make an order setting aside the dismissal of a suit wholly or partly under Rule 8 upon such terms as to costs or otherwise the court thinks fit and shall appoint a day for proceeding with the suit. Sub-Rule (2) of Rule 9 prohibits passing an order without serving notice on the opposite party.

12. ORDER IX Rule 2 CPC envisages dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs, whereas under Rule 4 on dismissal of suit plaintiff can bring a fresh suit or can seek restoration of suit dismissed for non-compliance. On his satisfying, the court can set aside the dismissal and appoint a day for proceeding with the suit.

13. ARTICLE 122 of the Act prescribes 30 days period of limitation from the date of dismissal of application, which reads as follows:

122. To restore a suit or appeal or application for review or revision dismissed for default of appearance or for want of prosecution or for failure to pay costs or service of process or to furnish security for costs.

14. ARTICLE 120 of the Act provides for an application for the legal representatives of a deceased plaintiff or appellant or of a deceased defendant or respondent to be brought on record in a suit or appeal, the period of limitation is 90 days from the date of death of the deceased.

15. SECTION 2(b) of the Act defines "application" includes petition.

16. THE word "application" means an application on which the court has to perform some judicial act or to decide some point judicially.

17. IN *S.K. Sahgal v. Kishore Khanna* AIR 1959 SC 809 it was held that if the application for execution was made in a pending execution proceeding, no question of the application of Article 182 (present 136) arises. It has long been recognized by the courts in our country that a right to continue a proceeding which is pending is a right which arises from day to day and no question of any bar of limitation with regard to the enforcement of such a right arises.

18. IN [Somar Bhuiya and Others Vs. Kapil Kumar Gautam and Others](#), it was held where an application under Order 9, Rule 4 of the C.P. Code for restoration of a suit dismissed for default, was itself dismissed for default, and the plaintiff applied u/s 151 of the C.P. Code for restoration of the application neither Article 122 nor any other Article of the Limitation Act applies to the case. It was further held Article 122 manifests that an application u/s 151 of the CPC for setting aside an order of dismissal for default an application filed under Order IX Rule 9 for restoration of suit is not covered by Article 122 of the Limitation Act. The provisions of Article 122 being very specific, it cannot be construed to apply to an application filed u/s 151 of the Code for exercising the inherent jurisdiction of the Court for restoration of such an application.

19. IN [Shethia Mining and Manufacturing Corporation Ltd. Vs. Khas Dharmaband Colliery Company Pvt. Ltd.](#), when a suit was filed on the original side of the Calcutta High Court the defendant who entered appearance filed written statement and applied for discovery of documents by the plaintiff in which a conditional order has been passed directing the plaintiff to file the affidavit of documents within 10 days, in default the suit would stand dismissed. As the plaintiff failed to file the affidavit within the time stipulated but filed after expiry of time granted, the plaintiff was granted liberty to file the affidavit of documents for which the defendant consented in writing to file the affidavit of documents and later when the plaintiff gave a notice for mentioning of suit for hearing it was contended on behalf of defendant that the suit stood dismissed by virtue of non-compliance of conditional order. In view of the same, hearing of the suit was not fixed. Against which plaintiff filed an intra-court appeal wherein the learned Judges held that the provision of Article 122 does not in terms applied to an application of the nature referred to above, which is one for extension of time and/or for a direction for the hearing of the suit or condonation of the delay in filing the affidavit of documents. On facts the Division Bench after referring two judgments of the Apex Court in [Mahanth Ram Das Vs. Ganga Das](#), wherein it was held:

Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and

avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happened within the time fixed" and in [Chinnamarkathian alias Muthu Gounder and Others Vs. Ayyavoo alias Periana Gounder and others](#), wherein on an interpretation of Section 148 of the Civil P.C. it was observed:

...that the purport of conditional orders is that such orders merely create something like a guarantee or sanction for obedience of the court's order but would not take away the court's jurisdiction to act according to the mandate of the statute or on relevant equitable considerations if the statute does not deny such conditions

held that under Sec.148 of the Civil P.C. the Court has undoubtedly the power to grant extension of time even after the expiry of the period initially granted.

20. IN [Mst. Nurnahar Bewa and Another Vs. Rabindra Nath Dev and Others](#), the suit for specific performance of a contract was decreed and balance of sale consideration was deposited within the time prescribed to put the decree in execution and for obtaining possession of the premises in question the deed of conveyance was made, executed and registered. At that stage the defendant filed an application under Order IX Rule 13 r/w 151 CPC for recalling the ex-parte decree. The said application was dismissed for default. Therefore, another application under Order IX Rule 4 r/w 141 CPC and also u/s 5 of the Limitation Act was filed for recalling the order of dismissal. The learned Munsif dismissed the application on the ground that application for restoration under Order IX Rule 4 r/w Section 141 CPC was barred by limitation and the petitioners failed to prove any sufficient cause for which the delay should be condoned in presenting the application beyond the period of limitation. The defendant carried the matter in revision, which was referred to larger bench. Justice G.N.Ray (as he then was) speaking for the Special Bench held that the period of limitation for making an application for restoration of a suit dismissed for default under Order IX of the Code is 30 days from the date of dismissal, the application for restoration of miscellaneous case arising out of such application under Order IX, when such miscellaneous case is dismissed for default, is not governed by the provisions of Article 122 of the Limitation Act in view of the fact that expressly in terms of the said Article 122, the miscellaneous case arising out of an application under Order IX is not attracted and the period of limitation in such case should be governed by Article 137. When an application made under Order IX Rules 4, 9 or 13 of the Civil P.C. for setting aside a suit dismissed for default is itself dismissed for default and an application under Rule 4 or 9 of Order IX is made for restoration of the application, the period of limitation for making such application for restoration is governed by Article 137 of the Limitation, 1963 and the period of limitation is three years.

21. THE [The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma](#), after elaborately considering the scope of Article 137 of the Limitation Act, 1963 with that of Article 181 of the 1908 Act held that Section 2(b) of the Limitation Act defines

"application" to include a petition. This changed definition in the 1963 Act indicates the object of the Act to include petitions, original or otherwise under special laws to a civil court.

22. IN the case of Khoobchand Jain AIR 1948 Mad. 480 (supra) it was held that since the dismissal of the execution application was under inherent powers, the application for its restoration will be by invoking the inherent powers of the Court and in that event, no time limit is prescribed for invoking the inherent powers of the court.

23. RECENTLY the Supreme Court in [G. Christudas and Another Vs. Anbiah \(Dead\) and Others](#), held that dismissal of appeal on the ground that the persons interested to prosecute the appeal had not moved within time could only be u/s 151 CPC and not under any other provision of Order XLI CPC. If an appeal is dismissed u/s 151 CPC, Article 122 of the Limitation Act would have no application because when a court makes an order u/s 151 CPC, it is implicit that such a court has the power to entertain an application to set aside its order made u/s 151 CPC. The power exercised u/s 151 CPC is ex debito justitiae. An application invoking the inherent power of the court u/s 151 CPC is not one which a party is required to make under any provisions of the CPC for setting in motion the machinery of the court. Thus, Article 122 of the Limitation Act has no application to such an application. If that be the correct position, an application for restoration of the appeal would be not by a party to the proceedings and will not fall within the scope of Article 122 but under Article 137 of the Limitation Act. Therefore, the application for setting aside the order of dismissal of appeal and for impleadment is filed within three years from the date of order of dismissal for non-prosecution and is thus within time.

24. THE position that emerges from the judgments cited supra is Article 122 of the Act does not govern the present application. Admittedly I.A.No.437 of 2004 which was filed under Order XXII Rule 4 r/w 151 CPC for impleading 4th respondent/4th defendant as legal representative of deceased 3rd respondent/3rd defendant was dismissed for non-compliance of the order for taking out substituted service by way of making paper publication. The order of substituted service in the above I.A., if any, was in exercise of power u/s 151 CPC and even if the said I.A. was dismissed for non-compliance, the Court will have ample power to extend the period of limitation prescribed for taking out notice by way of substituted service even after the petition is dismissed by exercising power u/s 151 CPC. The limitation period of 30 days prescribed under Article 122 of the Act has no application to such petitions.

25. IN view of the same, the order so passed by the lower court, allowing I.A.No.646 of 2005 filed under Order IX Rule 9 r/w 151 CPC, does not suffer from any manifest illegality or incurable infirmities warranting interference in exercise of supervisory jurisdiction under Article 227 of the Constitution.

26. The C.R.P. fails and it is accordingly dismissed. No costs.