

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.04.2017

CORAM :

THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR

C.R.P. (NPD) No. 879 of 2016
and
CM.P No.4809 of 2016

Meera Balakrishnan

... Petitioner

VS.

Mr. R. Manju

...Respondent

This Civil Revision Petition is filed under Section 115 of Code of Civil Procedure to set aside the fair and decretal order dated 10.02.2016 passed by the learned Sub Judge, Tambaram in E.A. No.151 of 2015 in E.P No.127 of 2015, in O.S. NO.233 of 2014 and for further orders.

For Petitioner : Ms. T. Jayalakshmi
for M/s. Paul & Paul

For Respondent : Mr. G. Jermiah
for P. Chandrasekar

ORDER

This Civil Revision Petition arises against the order dated 10.02.2016 passed by the learned Sub Judge, Tambaram in E.A. No.151 of

2015 in E.P No.127 of 2015, in O.S. NO.233 of 2014, by allowing the application filed by the respondent herein, under Order XXI Rule 106 of CPC.

2. Learned counsel for the petitioner submitted that the petitioner filed O.S. No. 233 of 2014 before the Sub Court, Tambaram against the respondent, seeking eviction of the respondent and the occupants, from the suit subject property. The above suit was decreed ex-parte on 05.03.2015. Hence, the petitioner filed E.P. No.127 of 2015 seeking for execution of the said decree and the same was ordered on 25.09.2015, but the respondent failed to appear before the Court. Again the E.A. Nos. 139 and 140 of 2015 filed to break open, were allowed and it was ordered for delivery before 28.11.2015. Thereafter, the respondent filed E.A. Nos. 151 and 152 of 2015, under Section 5 of the Limitation Act to condone the delay of 30 days in filing the application to set aside the ex-parte order dated 25.09.2015, passed in the execution proceedings. The petitioner filed a detailed counter stating that an application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order XXI Rule 106 of CPC. However, the learned Sub Court, Tambaram vide its order dated 10.02.2016, allowed the Application.

Learned counsel for the petitioner further submits that the orders of the court below, in allowing the application is beyond its jurisdiction and also there is no provision to condone the delay, in filing the petition to set aside the exparte order. Hence, prays to set aside the order dated 10.02.2016 passed by the learned Sub Judge, Tambaram in E.A. No.151 of 2015 in E.P No.127 of 2015.

3. Learned counsel for the respondent would submit that the respondent filed an Application in E.A. No.151 of 2015 to condone the delay of 30 days, in filing an Application to set aside the ex-parte decree passed in E.P. No.127 of 2015. The Court below has rightly allowed the said application under Order XXI Rule 106 CPC. The Application can be filed after 30 days of the limitation period as prescribed in the above Act and the application can also be filed under Section 5 of the Limitation Act. In support of his contention, the respondent has relied upon the decision of this Court in the case of ***N. Rajendran Vs. Shriram Chits Tamil Nadu Pvt. Ltd., reported in CDJ 2011 MHC 5061.***

4. Heard both sides and perused the material available on record.

5. The point for consideration in this revision petition is whether the Sub Court, Tambaram have powers to entertain the condone delay petition, in the light of the proviso under Order XXI Rule 106 of CPC. In this regard, learned counsel for the petitioner has relied upon the decision of the Hon'ble Supreme Court in the case of ***Damodaran Pillai & Ors. vs. South Indian Bank Ltd., reported 2005 (4) CTC 534.*** In paragraph 16 of the judgement, it is observed as below :

'16. An application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order 21 of the Code. Application of the said provision has, thus, expressly been excluded in a proceeding under Order 21 of the Code. In that view of the matter, even an application under Section 5 of the Limitation Act was not maintainable. A fortiori for the said purpose, inherent power of the Court cannot be invoked.'

It is also held that, ' Application under Section 5 of Limitation Act is not maintainable in a proceeding arising under Order XXI of Code of Civil Procedure, as it has been expressly excluded.'

It would be relevant to extract below, Order XXI Rule 106 :-

"106. Setting aside orders passed ex parte, etc.--

(1) The applicant, against whom an order is made under Sub-rule (2) of Rule 105 or the opposite party against whom an order is passed ex parte under Sub-rule (3) of that rule or under Sub-rule (1) of Rule 23, may apply to the Court to set aside the order and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for further hearing of the application.

...

(3) No order shall be made on an application under Sub-rule (1) unless notice of the application has been served on the other party."

6. Per contra, learned counsel for the respondent would rely the decision of **N. Rajendran Vs. Shriram Chits Tamil Nadu Pvt. Ltd.,**

reported in CDJ 2011 MHC 5061, this Court has held as follows in paragraphs 35, 36, 37, 38, 39, 40, 41 & 43 :-

' 35. *In Damodaran Pillai v. South Indian Bank Ltd.* [(2005) 7 SCC 300], the Supreme Court was concerned with the effect of the Kerala Amendment to Rule 105. As seen from paragraph 15 of the decision, the Supreme Court pointed out that the Kerala Amendment providing for the application of [Section 5](#) of the Limitation Act under Rule 105 of Order XXI became inapplicable, after coming into force of the [Limitation Act, 1963](#). In other words, the Kerala Amendment appears to have been in tune with Sub-Rule (4) of Rule 105 inserted in the year 1945 by way of amendment by this Court. Therefore, the Supreme Court held that after the [Limitation Act, 1963](#), came into force, the Kerala Amendment, taking recourse to [Section 5](#) of the Limitation Act, 1908, would not be applicable. But, it is not known whether there was any amendment in Kerala, similar to one that was made by this Court with effect from 01.11.1972, by which, Sub-rule (4) was deleted and a proviso was inserted under Sub-rule (3) itself. Therefore, the decision in *Damodaran Pillai* cannot be invoked to the

advantage of the respondent, in the absence of a clear indication that even in Kerala, a proviso was inserted under Sub-rule (3) of Rule 105, as this Court has done with effect from 01.11.1972.

36. In Ch.Krishnaiah, a Full Bench of the Andhra Pradesh High Court was concerned with the question as to whether Order XXI, Rule 106(4), CPC was enforceable in the State of Andhra Pradesh or not. After taking note of [Section 122](#), CPC, and [Section 29](#) of the Limitation Act, the Full Bench of the Andhra Pradesh High Court distinguished the decision in Damodaran Pillai and held that notwithstanding the repealing provisions contained in 1999 and 2002 Amendments to the Code of Civil Procedure, Rule 106(4) of Order XXI, inserted by the High Court in exercise of the power under [Section 122](#), would enable a party even to invoke [Section 5](#) of the Limitation Act.

37. I would not go so far, as the Full Bench of the Andhra Pradesh High Court had gone. In fact, I need not. As pointed out earlier, a Court in Tamil Nadu need

not,nay cannot, invoke [Section 5](#) of the Limitation Act, 1963, by taking recourse to Rule 105(4) as Sub-rule (4) was deleted way back in 1972. It is enough if the proviso to Sub-rule (3) of Rule 105 is invoked.

38. But, then the next question which is crucial is as to whether the proviso under Sub-rule (3) of Rule 105 also stood repealed in terms of [Section 97\(1\)](#) of Amendment Act 104 of 1976 or not.

39. The above question came up for consideration before a Division bench of Madhya Pradesh High Court in [Devendra Kumar v. Jaidayal](#) [AIR 1981 MP 160]. The Division Bench of Madhya Pradesh High Court took a view that the expression "principal Act" occurring in the last sentence of [Section 97\(1\)](#) of the Amendment Act 104 of 1976 would refer only to the "body of the Code" or the "Sections Part of the Code" and not to the First Schedule. Consequently, the Division Bench of the Madhya Pradesh High Court held that the Madhya Pradesh High Court Amendment to Order XX, Rule 11(2), made prior to

1976, did not stand repealed by Act 104 of 1976, as it was not inconsistent with the amendments introduced.

40. I would also not go so far as the Madhya Pradesh High Court had done. It is for the simple reason that if the phrase "principal Act" is construed to mean only the "body of the Code", [Section 97\(1\)](#) of Act 104 of 1976 would have no meaning at all. The only power that the High Courts have under Section 122 of the Code is to amend the First Schedule and not the body of the Code. When Section 122 of the Code does not confer any power upon the High Court to amend the body of the Code, but confers power only to amend the Rules in the First Schedule, the question of repealing the amendment to the body of the code, if any made by the High Court, would not arise at all. In other words, if the expression "principal Act" appearing in [Section 97\(1\)](#) of the Act 104 of 1976 is taken to indicate the amendments made only to the body of the Code, it would actually be repealing something that a High Court never did and could never have done. Therefore, today, the only test is as to whether the amendments made

by the Madras High Court with effect from 01.11.1972 would also stand repealed either by [Amendment Act 104 of 1976](#) or by the subsequent [Amendment Acts](#).

41. [Section 97](#) of the Amendment Act 104 of 1976 repealed only those State amendments, which were inconsistent with the amendments introduced under Act 104 of 1976. Similarly, [Section 32](#) of the Amendment Act 46 of 1999 also made it clear that any amendment made or any provision inserted in the principal Act by a State Legislature or High Court shall also stand repealed, except insofar as it is consistent with the provisions of the principal Act. In other words, the State or High Court Amendments, which were inconsistent with the amended provisions, were directed to stand repealed.

.....

43. Therefore, I am of the view that the order of the Court below, refusing to entertain the application on the ground that it was filed beyond 30 days and that there was no power to entertain the same, is not in accordance with law. Hence, the impugned order of the

Court below is set aside and the Court below is directed to number the application and take it up for hearing."

In the aforesaid judgment, the earlier decision of the Hon'ble Supreme Court, in the case of *Damodaran Pillai v. South Indian Bank Ltd.* [(2005) 7 SCC 300], has been referred.

7. In the light of the aforesaid order of this Court, the respondent has filed the application for condoning the delay of 30 days in filing the application to set aside the ex-parte decree. This Court does not find any warrant to interfere with the orders, since there is no error or illegality in the orders passed by the Sub Court, Tambaram. Therefore, the Sub Court shall proceed in accordance with law.

8. The Civil Revision Petition fails and the same is dismissed. Consequently, the Connected Miscellaneous Petition is closed. No order as to costs.

20.04.2017

Index : yes / no

Speaking Order/ Non speaking order

To
The Sub Judge, Tambaram

D. KRISHNAKUMAR, J.

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