

THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

WRIT PETITION No.22511 OF 2015

ORDER:

Challenging the order dated 20.04.2015 passed in I.A.No.424 of 2015 in O.A.No.673 of 2013 on the file of the Andhra Pradesh Endowments Tribunal, Hyderabad, the present writ petition is filed.

2. The facts, which lead to filing of the present writ petition, are as under:

O.A.No.673 of 2013 came to be filed by the writ petitioner herein, who is the second respondent in aforementioned I.A., along with Assistant Commissioner, Endowments Department, who is the second respondent herein/R.1 in I.A., under Section 83 of the A.P.C. and H.R.I. and Endowments Act, 30 of 1987, against the 3rd respondent herein, who is the petitioner in I.A., praying the Tribunal to remove the encroachment and deliver possession of O.A. schedule property to the petitioner herein.

3. By an order dated 10.12.2014 the said O.A. was allowed by the Tribunal, directing the respondents therein to remove the encroachments and deliver vacant possession of the schedule property to the Petitioner herein/second petitioner in I.A., within a period of one month from the date of said order. The said order was an *ex parte* order. On coming to know about the said order, I.A.No.424 of 2015 came to be filed by the 3rd respondent on

10.02.2015 seeking to set aside the *ex parte* order stating that the 3rd respondent fell sick and he was undergoing treatment at Hyderabad, for kidney ailment. It is further said that because of his ailment and treatment at Hyderabad, he could not contact his Advocate and furnish all the necessary information.

4. A counter came to be filed by the second respondent herein opposing the same. According to him, the 3rd respondent herein signed Vakalat and thereafter only, he was admitted in the hospital on 03.07.2014. It is further stated that O.A., was filed in the month of July, 2013, and the time for filing counter expired in the month of September, 2013. Hence, the respondent was in normal condition till expiry of time for filing counter. Further, the medical reports do not show that the 3rd respondent was sick from July, 2013 to July, 2014. Hence, it is stated that there are no reasons to set aside the *ex parte* order; since the limitation for filing a petition to set aside an *ex parte* order is 30 days from the date of *ex parte* decree and the 3rd respondent herein failed to file a petition to condone the delay along with the main application. Tenancy or lease of the 3rd respondent would stand cancelled by virtue of Section 82(1) of the Act, 30 of 1987. It is stated that as per the lease rules mentioned in G.O.Ms.No.866 prevailing as on the date of filing of O.A., the O.A., schedule property has to be leased out in public auction for every three (03) years and the highest bid has to be approved by competent authority. The Executive Authority has to enter into the lease agreement, and the same is to be registered as per the

provisions of Registration Act, but the documents filed by the 3rd respondent did not show the above process and no document is filed to show that he was paying the rents till the date of filing the O.A.

5. It is further stated that possession of the schedule property was taken and the shop was sealed on 20.03.2015 in the presence of the second respondent and other Endowments staff, who were deputed for the purpose, in compliance of the order of the Tribunal, with the aid of police consists of one Sub-Inspector of Police, about 15 Constables. It is further stated that the main object and aim of the Act is to protect the properties endowed by Philanthropists and devotees to show their devotion and to perform some object. Since the possession was already taken and put the seal to the O.A. schedule property on 20.03.2015, prayed for dismissal of the I.A.

6. After considering the material placed before the Tribunal, allowed the said application subject to deposit of costs awarded in the *ex parte* order. Challenging the same, present writ petition came to be filed.

7. Learned counsel for the petitioner mainly submits that the averment in the affidavit filed in support of the writ petition i.e., the 3rd respondent was taking medical treatment is utterly false, but the Tribunal having accepted the same, set aside the *ex parte* order and the findings given by the Tribunal are illegal and perverse.

8. Learned counsel for the 3rd respondent would submit that since discretion has been exercised by the Tribunal in setting aside the *ex parte* order, the same warrants no interference. He further submits that no prejudice would be caused to the petitioner if the case is decided on merits instead of allowing the same on technicalities.

9. As seen from the record, no material has been placed before the Tribunal showing the treatment taken by the 3rd respondent for his ailment. However, the 3rd respondent filed W.P.MP.No.13299 of 2017 enclosing the medical certificates and the documents to show the treatment taken by him in various hospitals at Hyderabad. A perusal of the same would show that both the kidneys of the 3rd respondent failed and he was on dialysis from 20.08.2011 to 23.08.2011. Thereafter, he underwent renal transplantation on 12.12.2014, his sister being the kidney donor. Certificate issued by the Continental Hospital, dated 23.12.2014, reads as under:

“Underwent renal transplantation with sister as the kidney donor uneventfully. he received induction with ATG 3mg/kg in 3 doses followed by immunosuppression with Tac/mmf/prednisolone. There was immediate diuresis on release of the arterial clamps. S Cr decreased to <1mg by third POD. Had transient hypotension due to sepsis. Urine c/s grew EColi sensitive to penems and Pip Taz. He was treated accordingly with meropenem and later Piptaz to which he responded.”

10. The certificate issued by Government of Telangana, Health, Medical and Family Welfare (D1) Department, dated 27.10.2014,

also shows that the son of the 3rd respondent made an application to the Government of Telangana seeking permission for donation of kidney by his cousin sister since the Authorisation Committee for Human Organ Transplantation, Telangana State, Hyderabad, has not issued permission for transplantation. Since the donor was donating the kidney out of love and affection, the Government accorded permission for transplantation of the kidney. The 3rd respondent also placed on record, the certificates issued by KIMS and Continental Hospital showing the permission taken for dialysis and also for renal transplantation.

11. Having regard to the documents filed, this Court is of the opinion that the 3rd respondent was suffering with kidney ailment and was undergoing dialysis since 2011. It may be true that the 3rd respondent has entered some rental agreements and signed on the Vakalat during interregnum, but he underwent renal transplantation in December, 2014. Thereafter also, he has been taking treatment; though the learned counsel for the petitioner submits that if the Court is inclined to accept the medical reports, the matter may be remanded back to the Tribunal for consideration of the same afresh.

12. It is to be noted that the impugned order seeking to set aside the *ex parte* order came to be filed without any application to condone the delay. It is also not in dispute that an application to set aside the *ex parte* order, has to be filed within a period of thirty days from the date of knowledge of the order. In the instant case,

there is a delay in filing the application. I.A. came to be filed without any application either under Section 5 of the Limitation Act or under Order IX Rule 13 of the Code of Civil Procedure. The main ground raised by the learned counsel for the petitioner is that the Hindu Religious and Charitable Endowments Act is silent as to when an application to set aside the order be filed. As seen from the impugned order, the Court below clearly observed that no time limit is fixed for filing an application to set aside *ex parte* order passed either in the original application or in interlocutory application.

13. Learned counsel for the petitioner relied upon a decision reported in Karumilli Bharathi v. Prichikala Venkatachalam¹, wherein it is held that:

“12. As I have already stated above, Rule 4 of Order 37 contemplates an "ex parte decree" in the same sense the CPC has used under Order 9 Rule 13 or in the same sense the Limitation Act has used under Article 123 of the Limitation Act and the period of limitation is 30 days, from the date of the decree or where the summons or notices were not duly served, when the applicant had the knowledge of the decree. The High Court of Bombay also took that both the Limitation Act and Code of Civil Procedure have used the expression "ex parte" in the same sense of the term. But, their further conclusion that for such an ex parte decree passed under Order 37, there is no provision under the Limitation Act, therefore, Article 137 of the Limitation Act applies, consequently the period of limitation is three years. In my humble opinion that would not be acceptable. Because Rule 4 of Order 37 applies only to ex

¹ AIR 1999 AP 427

parte decree on the basis of deemed admissions on the part of defendant, but not to a decree passed on contest in the presence of both parties. Therefore, Article 123 governs such ex parte decree passed under Order 37 and the limitation is 30 days, but not three years. This interpretation, in my opinion is based on reasonable construction of the provisions of Order 37 of CPC along with Section 123 of the Limitation Act. To say that for other ex parte decrees, limitation is 30 days and for an ex parte decree passed in a summary suit under Order 37 is three years would be absurd. When the Legislature thought of providing a speedy remedy for the plaintiff to obtain the decree under Order 37, they could not have thought of providing three years limitation under Article 137 of the Limitation Act for setting aside such an ex parte decree. In this view of the matter, I recorded my humble disagreement with the judgment of the High Court of Bombay in P.N. Film's case (cited supra), High Court of Rajasthan rendered in Surya Prakash's case (cited supra) and the judgment of Jammu and Kashmir High Court rendered in Subash Raina's case (cited supra).

13. In this view of the matter, the present application filed by the defendant beyond the period of 30 days would be barred by limitation and he can show the 'special circumstances' under Rule 4 of Order 37, but not the 'sufficient cause' in terms of Section 5 of the Limitation Act, since the principle of sufficient cause found under Section 5 of the Limitation Act also stands substituted by the phrase 'special circumstances' found under Rule 4. To this extent, Section 5 of the Limitation Act stands modified by Order 37 Rule 4 CPC on the ground that the special law excludes the general law. Since, the Order 37 has not provided any specific limitation as a special law, the general law of limitation provided under Article 123 of the Limitation Act applies and such period of limitation is 30 days. Therefore, in such circumstances, the defendant shall file an application

within 30 days, but should show specific circumstances for condonation of delay and for setting aside the ex parte decree. “

14. In view of the judgment referred to above, the Writ Petition is allowed and the order under challenge is set aside and the matter is remanded back permitting the petitioner to file fresh application along with an application to condone the delay, in which event, the same shall be considered, in accordance with law.

Consequently, Miscellaneous Petitions, if any, pending in this Writ Petition shall stand closed. There shall be no order as to costs.

Date:03.04.2017
INL

JUSTICE C. PRAVEEN KUMAR

