

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.R.P. No.970 OF 2018

ORDER:

This revision petition is filed under Article 227 of the Constitution of India challenging the order dated 05.09.2017 passed in C.M.A.No.15 of 2015 by the II Additional District Judge, Guntur, whereby reversed the order dated 03.02.2015 passed in I.A.No.709 of 2013 in O.S.No.489 of 2008 by the IV Additional Senior Civil Judge, Guntur.

The 1st respondent filed suit for specific performance of agreement of sale, dated 17.01.2005 initially against the 2nd respondent herein alone, later name of this petitioner was added as the 2nd defendant without making any allegation or pleading about the contractual relationship between the petitioner and the 1st respondent herein. While the suit is pending, it was dismissed for default by exercising power under Order IX Rule 5 C.P.C. for non payment of process on 30.09.2008 and thereafter, the trial is completed and heard arguments and during reply, it was noticed that the suit against the petitioner herein was dismissed for default on 30.09.008 for non payment of process and filed petition under Order IX Rule 9 C.P.C. to set aside the dismissal order on the ground that the 1st respondent was not informed about dismissal of the suit for default on 30.09.2008 and for the first time to the utter surprise of the 1st respondent, this fact came to his notice. Therefore, sought to set aside the dismissal order.

The petitioner herein being the 2nd respondent opposed the petition on the ground that no reason was assigned in the petition to set aside the dismissal order passed in O.S.No.489 of 2008 and further in the absence of application to condone delay, petition is liable to be dismissed as it is barred by limitation. The other ground urged before the trial Court was that no relief was claimed against the petitioner in the suit itself and having allowed

the trial to go on even after dismissal of the suit on 30.09.2008, the order cannot be set aside at this stage and requested to dismiss the petition.

The Court below dismissed the petition on the sole ground that the petition filed under order IX Rule 9 C.P.C was not accompanied with the petition filed under Section 5 of the Limitation Act.

Aggrieved by the order dated 03.02.2015, the unsuccessful petitioner/plaintiff preferred C.M.A.No.15 of 2015 under Order XLIII Rule 1 C.P.C. The appellate Court framed three points for consideration. The third point is with regard to the limitation and the other two points are formal in nature. However, the appellate Court, upon hearing argument of both counsel, passed the impugned order observing as follows:

"It is rightly contended by the learned counsel for the petitioner/plaintiff that trial Court went on technicalities without observing the substantial law. It is settled law that procedure is hand made of justice and when procedural law and substantial justice. As such, civil Court is vested with inherent powers under Section 151 C.P.C., therefore, taking the aid of Section 151 C.P.C. in order to meet the ends of justice present petition need to be considered despite the technical flaw if any. For the discussion as taken above, points are answered in favour of the appellant/petitioner/plaintiff."

Aggrieved by the impugned order, the present revision petition is filed on various grounds almost reiterating the grounds urged before the Court below as the appellate Court did not appreciate the contentions raised before the Court below in proper perspective and requested to set aside the impugned order.

Learned counsel for the petitioner reiterated the grounds urged in the petition while drawing attention of this Court to the judgment of the Apex Court in **D.Devadanam v M.Jnana Prakasam and another**¹ and requested to set aside the impugned order.

¹ 1976 ALT 166 Notes on Recent Cases

Whereas, learned counsel for the 1st respondent supported the impugned order. However, at the end requested to give an opportunity to file petition under Section 5 of the Limitation Act before the Court below.

The suit was filed for specific performance of agreement of sale before the Court below initially against the 2nd respondent herein alone and later for one reason or the other, the petitioner herein was impleaded by writing the name of the petitioner in handwriting in the short cause title only and nothing is alleged against the petitioner herein and no relief was claimed in the suit. In any view of the matter, when the petitioner added as the 2nd defendant, it is for the plaintiff to serve notice by paying necessary process fee through Court, but no process fee was paid for serving notice on this petitioner and ultimately, the suit was dismissed against the petitioner on 30.09.2008 for non payment of process. Both parties went on trial and arguments were heard by the Court below, at that stage, the petitioner realized that the suit was dismissed for default against him and filed application that the petitioner and his counsel not aware about the order dated 30.09.2008.

The dismissal order was passed on 30.09.2008, but the application to set aside the order was filed on 29.04.2013 after completion of argument in the main suit itself. Article 122 of the Limitation Act prescribes period of 30 days for filing an application for restoration of 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 cost of service of process or to furnish security for costs and it starts from the date when the proceedings were dismissed.

Therefore, limitation starts for the petition on 30.09.2008. The period of limitation of 30 days expired by 30.10.2008. But the application was filed on 29.04.2013 i.e. almost after lapse of 4 years. Therefore, the petition filed

under Order IX Rule 9 CPC is to be filed along with the petition under Section 5 of Limitation Act. But the Court cannot pass an order to set aside the dismissal order passed under Order IX Rule 9 CPC. Though the trial Court accepted this contention, strangely the appellate Court recorded a specific finding for different reason which is extracted earlier. The law of limitation is procedural law indirectly and thereby exercising power under Section 151 CPC, which is inherent power. But such power cannot be exercised when there is provision in any enactment. In similar situation an order was passed by the Court in **Lanka Venkateswarlu (D) by OL.Rs. v State of A.P. and others**², which was carried in SLP before the Apex Court, the Apex Court had an occasion to decide what is sufficient cause and powers of the Court to condone the delay and held as follows:

“We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as ‘liberal approach’, justice oriented approach, ‘substantial justice’ cannot be employed to jettison the substantial law of limitation, especially in cases where the Court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under Section 5 of the Limitation Act, the Courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims and fancies; prejudices or predilections cannot and should not form the basis of exercising discretionary powers.”

² AIR 2011 SC 1199

The above principle is applicable to the power exercised by the Court below observing the law of limitation as procedural law and exercising power under Section 151 C.P.C is nothing but whims or caprice of the judge and the appellate judge passed such an order in utter disregard of the principles in exercising power under Section 151 C.P.C. Such power cannot be exercised as a matter of routine or a matter of course and to defeat the law of limitation. Mere failure to file application is not a technical flaw, it is a requirement for substantial compliance of law. Therefore, exercise of power by the appellate Court under Section 151 C.P.C in allowing such petition is an abuse of inherent power, which confer on it. As such the reason assigned by the appellate Court, which extracted earlier is a clear illegality and the same is liable to be set aside.

The other contention urged by learned counsel for the petitioner is that when the suit is filed, it is the duty of the plaintiff to pay process under Order IX Rule 2 C.P.C, but when no process fee was paid, the Court has to pass an order under Rule 5 of Order IX C.P.C., earlier, the time allowed for payment of process was 30 days and now it is 7 days. When the plaintiff failed to pay process fee, the Court is bound to dismiss the suit for non payment of process under Rule 5 of Order IX C.P.C. Therefore, such order cannot be set aside when it was filed after lapse of four years and after completion of entire trial and the case is at the stage of arguments. In **D.Devadanam's case** referred supra, this Court held that the plaintiff admittedly did not pay the necessary charges for sending the summons even, when the suit was dismissed. In other words, his default continued for a period of more than three months from the date of the order of the Court. It must therefore, be held that the dismissal of the suit was under Rule 5 and not under Rule 2 of Order IX C.P.C. and for that reason, the petition for restoration is not competent in law. Even if this principle is applied ignoring the law of limitation before the Court below, the present

petition is not maintainable. Hence, the impugned order reversing the order passed by the Court below is vitiated by serious illegality and it is liable to be set aside.

Accordingly, the civil revision petition is allowed setting aside the order dated 05.09.2017 passed in C.M.A.No.15 of 2015 by the II Additional District Judge, Guntur is set aside while confirming the order dated 03.02.2015 passed in I.A.No.709 of 2013 in O.S.No.489 of 2008 by the IV Additional Senior Civil Judge, Guntur.

Pending miscellaneous petitions in the petition, if any, shall stand closed.

25.10.2018
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M.SATYANARAYANA MURTHY,J