Damodaran Pillai & Others vs South Indian Bank Ltd on 8 September, 2005

Equivalent citations: AIR 2005 SUPREME COURT 3460, 2005 AIR SCW 4603, 2005 (8) SRJ 479, (2005) 5 KHCACJ 451 (SC), (2005) 4 ALLMR 961 (SC), (2005) 2 CLR 554 (SC), (2005) 4 CTC 534 (SC), (2005) 8 JT 197 (SC), 2005 (6) SLT 625, (2005) 34 ALLINDCAS 83 (SC), 2005 (5) KHCACJ 451, 2005 (7) SCALE 229, 2005 SCFBRC 530, 2005 (4) ALL MR 961, 2005 (2) CLR 554, 2005 (4) CTC 534, 2005 (7) SCC 300, (2005) ILR(KER) 4 SC 263, (2006) 1 CGLJ 112, (2006) 2 JCR 145 (SC), 2005 (34) ALLINDCAS 83, (2005) 4 MAD LW 248, 2006 (1) HRR 205, (2005) 4 CURCC 1, (2005) 4 MAD LJ 163, (2005) 3 CIVILCOURTC 530, (2005) 3 KER LJ 608, (2005) 6 SUPREME 178, (2005) 4 RECCIVR 132, (2006) 1 ICC 14, (2005) 7 SCALE 229, (2005) 2 WLC(SC)CVL 573, (2005) 4 JLJR 116, (2005) 4 ALL WC 3160, (2006) 2 CAL HN 85, (2006) 1 CIVLJ 513, (2005) 199 REVDEC 657, (2005) 3 UC 1793, (2005) 100 CUT LT 608, (2005) 4 KER LT 192, (2005) 61 ALL LR 205, (2006) 1 LANDLR 145, (2006) 2 MAD LW 47, (2005) 4 PAT LJR 189, (2006) 1 PUN LR 30, (2005) 6 SCJ 589

Author: S.B. Sinha

Bench: Ashok Bhan, S.B. Sinha

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           CASE NO.:
Appeal (civil)  1079 of 2004

PETITIONER:
Damodaran Pillai & Others

RESPONDENT:
South Indian Bank Ltd.

DATE OF JUDGMENT: 08/09/2005

BENCH:
Ashok Bhan & S.B. Sinha

JUDGMENT:
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J U D G M E N T S.B. SINHA, J:

Interpretation of sub rule (3) of Rule 106 of Order XXI of the Code of Civil Procedure (Code) falls for consideration in this appeal which arises out of the judgment and order dated 22nd July, 2003 passed by a learned Single Judge of the High Court of

Kerala in CRP No. 1033 of 2002 whereby and whereunder the Revision Petition filed by the appellants herein from an order dated 6.10.2001 passed by the Principal sub-Judge Kollam in Execution Petition No. 234/88 in O.S. No. 178/84 was dismissed.

The basic fact of the matter is not in dispute.

The respondent herein obtained a decree against the appellant herein for a sum of Rs. 78,155.80 in a suit being No. 178/84 filed before the Principal sub-Judge, Kollam. An Execution Petition was filed by the respondent herein for execution of the said decree in the said court which was marked as Execution Petition No. 234 of 1988. It is not in dispute that the said Execution Petition had been set down hearing. It was dismissed for default on 1.11.1990. It is also not in dispute that an application for restoration of the said Execution Petition was filed by the respondent herein on 4.4.1998 inter alia on the premise that it came to learn about the dismissal of the said Execution Petition only on 25.3.1998.

Before the learned Trial Court the appellant herein inter alia raised the contention that the said restoration application was filed beyond the prescribed period of limitation.

The learned Subordinate Judge in terms of his order dated 6th October, 2001 rejected the said contention. The Revision Petition preferred against the same was dismissed summarily. The appellant is, thus, before us.

Mr. P. Krishnamoorthy, learned Senior Counsel appearing on behalf of the appellant raised a short question in support of this appeal contending that in terms of sub-rule (3) of Rule 106 of Order XXI of the Code of Civil Procedure a restoration application is required to be filed within 30 days from the date of passing of the order and not thereafter and for the said purpose Section 5 of the Limitation Act, 1963 is not applicable. It was urged that the Executing Court could not have, thus, condoned the delay in exercise of its inherent power or otherwise.

Mr. V.B. Joshi, learned counsel appearing on behalf of the respondent, on the other hand, contended that keeping in view the peculiar facts and circumstances of this case the Executing Court should be held to have inherent power to condone the delay.

It is not in dispute that the Execution Petition was dismissed in terms of the provisions of Rule 105 of Order XXI of the Code of Civil Procedure. Sub-rule (1) of the said Rule provides for fixing a day for hearing of the application; whereas sub-rule (2) thereof envisages that if on the day so fixed or on any other day to which the hearing may be adjourned, the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed. Sub-rule (3) of the said Rule postulates hearing of an application ex-parte in a case where the

applicant appears and the opposite party to whom the notice has been issued by the Court does not. Sub-rule (1) of Rule 106 of Order XXI of the Civil Procedure Code provides for restoration of the application for default or setting aside of the order passed under sub-rules (2) & (3) of Rule 105 of Order XXI in the following terms:

"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 the further hearing of the application.

Sub-rule (3) of Rule 106 provides for the period of limitation for filing such an application which reads as under:

"An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex-parte order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order."

The learned Executing Court allowed application of restoration filed by the Respondent herein on the ground that it acquired the knowledge about the dismissal of the Execution Petition only on 25.3.1998.

The learned Judge, however, while arriving at the said finding failed and/or neglected to consider the effect of sub-rule (3) of Rule 106. A bare perusal of the aforementioned rule will clearly go to show that when an application is dismissed for default in terms of Rule 105, the starting period of limitation for filing of a restoration application would be the date of the order and not the knowledge thereabout. As the applicant is represented in the proceeding through his Advocate, his knowledge of the order is presumed. The starting point of limitation being knowledge about the disposal of the execution petition would arise only in a case where an ex- parte order was passed and that too without proper notice upon the judgment debtor and not otherwise. Thus, if an order has been passed dismissing an application for default, the application for restoration thereof must be filed only within a period of thirty days from the date of the said order and not thereafter. In that view of the matter, the date when the decree holder acquired the knowledge of the order of dismissal of the execution petition was, therefore, wholly irrelevant.

We may notice that the period of limitation has been fixed by the provisions of the Code and not in terms of the second schedule appended to the Limitation Act, 1963.

It is also not in dispute that the Kerala amendment providing for application of Section 5 of the Limitation Act in Order XXI, Rule 105 of the Code became inapplicable after coming into force of the Limitation Act, 1963, (Act LVI of 1964).

It is also trite that the civil court in absence of any express power cannot condone the delay. For the purpose of condonation of delay in absence of applicability of the provisions of Section 5 of the Limitation Act, the court cannot invoke its inherent power.

It is well-settled that when a power is to be exercised by a civil court under an express provision, the inherent power cannot be taken recourse to.

An application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order XXI of the Code. Application of the said provision has, thus, expressly been excluded in a proceeding under Order XXI of the Code. In that view of the mater, 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.

In Ayappa Naicker Vs. Subbammal & Anr. [1984 (1) Madras Law Journal Reports 214], Mohan, J. (as His Lordship then was) opined:

> "Therefore having regard to the above language, it was permissible to have such a provision wherein the position is clearly changed at present. Section 5 of the present Limitation Act, 1963, states that any appeal or any application under any of the provisions of Order 21, Civil Procedure Code, 1908, may be admitted after the prescribed period if the appellant or the appellant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. The Explanation is omitted as unnecessary. Therefore, with reference to applications under Order 21, Civil Procedure Code, there is the statutory bar in applying section 5 of the Limitation Act. It may also be relevant to note section 32 of the Limitation Act before it was repealed by Central Act LVI of 1974. It is stated under that section that the Indian Limitation Act, 1908 is hereby repealed. Therefore, after 1st January, 1964, sub-rule (4) of rule 105 of Order 21, Civil Procedure Code, could no longer be applied, because of the express language of section 5 of the Limitation Act. That is why the Central Code, in rule 106 of Order 21, Civil Procedure Code, did not make any reference to the same saying that section 5 of the Limitation Act would be applicable. In view of this, the order of the Court below ought to be upheld."

It was further held:

> "The question of invoking inherent powers under section 151, Civil Procedure Code, does not arise in this case. That is because of the specific provision contained under rule 106 of Order 21, Civil Procedure Code. If, therefore, there is repugnancy between the Central Code, under rule 106, and the Madras Amendment under sub-rule (4) of rule 105 of Order 21, it is section 97 of the Civil Procedure Code, in relation to repeal and savings that would apply. That says that any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall except in so far as such amendment or provision is

> consistent with the provisions of the principal Act, as amended by this Act, stand repealed."

We respectfully agree with the said opinion.

Similar views have been taken in M. Abdul Salam & Ors. Vs. Lourdusami Chettiar [AIR 1962 Madras 386], Sri Tankala Appalaswamy Gari Samba Murthy Vs. Gopasundara Sabatho [AIR 1963 AP 127] and Ganapathy Vs. Murugesa Chetty [1989 (2) L.W. 38].

Mr. Joshi, however, placed strong reliance upon Khoobchand Jain & Anr. Vs. Kashi Prasad & Ors. [AIR 1986 MP 66]. The said decision, in our opinion, has no application to the facts and circumstances of the present case. Therein the Execution Application was dismissed on a day which was not fixed for hearing. The said order of dismissal, therefore, was not passed in terms of sub-rule (2) of Rule 105 of Order XXI of Code of Civil Procedure. In that situation it was opined:

> "In the present case, the decree-holders had already applied for execution and paid process-fee for issuance of a warrant of attachment. It was, therefore, for the Court to issue a warrant of attachment of such property as was in possession of the judgment-debtors. Submission of the inventory of moveable property in possession of the judgment-debtors is not necessary under the relevant rules. In case, the warrant is returned unexecuted, the decree-holders could, in their discretion, make an application for examination of the judgment-debtors under R.41 or could resort to any other mode to recover the decretal amount."

It was further observed:

> "Since the dismissal of the execution application on 21.8.1979 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."

The principles underlying the provisions prescribing limitation are based on public policy aiming at justice, the principles of repose and peace and intended to induce claimants to be prompt in claiming relief.

Hardship or injustice may be a relevant consideration in applying the principles of interpretation of statute, but cannot be a ground for extending the period of limitation.

In R. Rudraiah and Another Vs. State of Karnataka and Others [(1998) 3 SCC 23] interpretation of Section 48-A of the Karnataka Land Reforms Act, 1961 fell for consideration before this Court which reads, thus:

> "48-A. Enquiry by the Tribunal, etc. (1) Every person entitled to be registered as an occupant under Section 45 may make an application to the Tribunal in this behalf.

> Every such application shall, save as provided in this Act, be made before the expiry of a period of six months from the date of the commencement of Section 1 of the Karnataka Land Reforms (Amendment) Act, 1978." Prior to the amendment of the said Act by Act 1 of 1979, a specific provision existed for condonation of delay but the same was deleted. A similar contention, as in the present case, was raised therein which was repelled by this Court stating:
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> "17. It is true there is a principle of interpretation of statutes that the plain or grammatical construction which leads to injustice or absurdity is to be avoided (see Venkatarama Iyer, J. in Tirath Singh v. Bachittar Singh (AIR at 855). But that principle can be applied only if "the language admits of an interpretation which would avoid it".

Shamrao V. Parulekar v. District Magistrate (AIR at 327). In our view Section 48-A, as amended, has fixed a specific date for the making of an application by a simple rule of arithmetic, and there is therefore no scope for implying any "ambiguity" at all. Further "the fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions, equitable considerations are out of place, and the strict grammatical meaning of the words is the only safe guide"."

In Lala Ram Vs. Hari Ram [(1969) 3 SCC 173], this Court held that the period of limitation can be prescribed under Section 417 of the Criminal Procedure Code, wherefor it was not necessary for the legislature to amend the Limitation Act and insert an article dealing with such applications.

For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The Appeal is allowed. No costs.