
(1979) 02 BOM CK 0048

In the Bombay High Court

Case No : Civil Revision Application No. 88 of 1977

Akola Zilla Parishad, Akola

APPELLANT

Vs

Laxman Baluji Manatkar and another

RESPONDENT

Date of Decision : 02-02-1979

Acts Referred:

Limitation Act, 1963 — Section 2

Citation : (1980) MhLj 675

Hon'ble Judges : A.A. Ginwala, J

Bench : Single Bench

Advocate : M.M. Qazi, for the Appellant; A.M. Gordey for opponent No. 1 and S.V. Naik for opponent No. 2, for the Respondent

Final Decision : Dismissed

Judgement

A.A. Ginwala, J.—Non-applicant No. 1 has instituted a suit against the applicant, non-applicant No. 2 and Telhars Panchayat Samiti, which is not made party to this revision application. This suit was for damages and was instituted on 6th January 1972. Summonses were issued to the defendants. The applicant did not appear even after the service of the summons and on 22nd February, 1972 the trial Court directed the suit to proceed ex parte against it. On 26th August, 1975 the suit was dismissed in default but was restored on 1st November, 1976 with notice to the present applicant. The applicant along with the Telhara Panchayat Samiti, on 8th November, 1976 moved the trial Court by an application for setting aside the ex parte order against it. In this application it was averred that these two defendants could not file their written statements due to various difficulties such as the connected papers, correspondence, etc. were not available and in the meanwhile the suit was dismissed for default. They submitted that it was necessary to set aside the ex parte order since the suit had been restored to file on 1st November, 1976. They again contended that they had not been served properly as their description in the plaint was not correct. On this application non-applicant No. 1, who is the plaintiff in the suit, endorsed his no objection to the

prayer made in the application but prayed for costs. The learned trial Judge, by his order passed on the same day, rejected the said application on the ground that it was barred by limitation and no reasons were shown in the application to condone the delay. With regard to the contention of the applicant that service of it was not proper, the learned trial Judge held that earlier the service had been held good and even if that was an erroneous order, it was open to the applicant to get it corrected by appropriate procedure and, according to the learned trial Judge, the remedy for getting it corrected had become barred. It is against this order that the present revision application has been filed.

2. Mr. M. M. Qazi, the learned counsel for the applicant, submits that the learned trial Judge had erroneously held that the application for setting aside the ex parte order was barred by limitation, as, according to him, there is no period of limitation laid down for such an application. He submitted that in any case assuming that the application was governed by the period of limitation laid down in Article 137 of the Limitation Act, 1963, the restoration of the suit on 1st November, 1976 would give a fresh right to the applicant to apply for setting aside the ex parte order. Mr. Qazi submitted that Article 137 of the Limitation Act is the only article which lay down period of limitation for applications which are not provided for in the said Act and, according to him, this article would not apply to the applications which are made pending a suit.

3. On the other hand, Mr. A. M. Gordey, the learned counsel for non-applicant No. 1, submits that the order passed by the trial Court under rule 6 of Order 9 directing the suit to proceed ex parte can be set aside by the trial Court only under rule 7 of the Order 9, when the defendant moves the Court in that behalf by an application. According to Mr. Gordey, since an application is necessary for moving the Court for setting aside the ex-parte order under rule 7 of Order 9, such an application would be governed by the period of limitation laid down under Article 137 of the Limitation Act. Mr. Gordey submits that that article does not make any distinction between the applications made in a pending suit or otherwise. He submits that the plain reading of the article would at once indicate that it applies to any application which is made to a Court without distinction of it being made in a pending matter or not.

4. The question, therefore, which falls for consideration in this matter is whether the application which was made by the applicant for setting aside the ex-parte order is governed by the period of limitation laid down under Article 137 of the Limitation Act. The third division of the Schedule to the Limitation Act lays down period of limitation for applications. It is divided into two parts. The first part deals with the applications in specific cases. The second part consists of only one article and that is Article 137. It provides a period of limitation of three years for any other application for which no period of limitation is provided elsewhere in the said division and this period of limitation begins to run from the time when the right to apply accrues. Obviously, therefore, a plain reading of this article would indicate that it would take in its sweep all applications which are not

specified in Part I of the third division of the Schedule and it does not by itself indicate as to what type of applications are governed by it. No doubt, the word "application" has been defined in clause (b) of section 2 of the Limitation Act. But that definition does not lead us anywhere because it simply says that, "application includes a petition". It would, therefore, appear that Article 137 would apply to all applications for which no period of limitation has been provided for in the Third Division of the Schedule. In fact, this view has been taken by a Division Bench of this Court in the *The Employees' State Insurance Corporation, Bombay Vs. Bharat Barrel and Drum Manufacturing Co. Private Ltd. and Another*, *Prima facie*, therefore, it would appear that any application which is made to a Court would come within the mischief of Article 137 of the Limitation Act.

5. However, Mr. Qazi contends that this Article would apply only where an application is contemplated by any law or provision by an enactment and would not apply when no application is contemplated. In this connection he relies on the decision of the Supreme Court in *Prativa Bose Vs. Kumar Rupendra Deb Raikat and Others*, where the Supreme Court had to consider Article 181 of the Limitation Act of 1908, which corresponds to Article 137 of the Limitation Act, 1963 and provided for limitation for applications not provided for in the Limitation Act. No doubt, their Lordships did observe that that Article would have no operation where no application is required to enable a Court to make an order. However, if this decision is properly construed, it would mean that Article would have application where an application is required to be made to a Court for making an order.

6. Mr. Qazi submitted that rule 7 of Order 9 does not contemplate an application to be made by the defendant for getting the *ex parte* order set aside. He submits that though at several places in this order the Legislature has contemplated application being made, rule 7 does not speak of any application. Mr. Qazi points out that rules 4, 9 and 13 speak of application being made by the party concerned for getting an application order from the Court and such a provision is conspicuously silent in so far as rule 7 is concerned. Thus, according to Mr. Qazi, since rule 7 itself does not contemplate an application, the question of making an application and consequently such an application being governed by Article 137 of the Limitation Act would not arise. It is true that the rule by itself does not speak of any application being made by the defendant. It simply says that where the Court has adjourned hearing of the suit *ex parte* and the defendant on or before such hearing appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance. It is also true that rule 4, which speaks of restoration of a suit which has been dismissed under rules 2 and 3, requires the plaintiff to apply for an order to set aside the dismissal. Similarly, Order 9, which provides for setting aside the dismissal of a suit in default also requires an application to be made by the plaintiff. A similar provision has been made in rule 13 when a defendant wants to get an *ex parte* decree set aside. It calls upon the defendant

to make an application. It would, therefore, appear that at certain places in Order 9 itself the Legislature has provided for the party concerned making an application for getting the relief from the Court. However, the question is whether under rule 7 of Order 9, the defendant who wants to get the ex parte order set aside, would be required to make an application or not. Now when, in a case coming under rule 7 of Order 9 the defendant comes before the Court and assigns good cause for his previous non-appearance, he in effect asks the Court to set aside the ex parte order and this will have to be done by him by making out appropriate grounds as to why he did not appear in the suit previously and this could be done only by an application. Hence even though rule 7 in so many words does not speak of the defendant applying for setting aside the ex-parte order, the purport of the rule itself would indicate that such an application is called for from the defendant. Now if that is so, obviously it would attract the provisions of Article 137 of the Limitation Act.

7. Lastly Mr. Qazi submitted that in any case Article 137 of the Limitation Act would not be attracted by applications in pending suits and in this connection Mr. Qazi seeks to rely on the decision of the Madras High Court in Ramanathan v. Alagappa A I R 1930 Mad 528. That was a suit for dissolution of partnership and for accounts and a preliminary decree for accounts was passed. The Commissioner presented his report and a final decree was passed. Thereafter an application was made for carrying out a direction which had been given in the final decree. The question then arose whether this application was barred by limitation. It was in this connection that the learned Judge observed that he had not been shown any authority for the view that an application in a pending suit desiring the Court to proceed to judgment is governed by any rule of limitation. Now, Mr. Qazi wants to read this observation of the learned Judge in that case to mean that all applications which are made in the pending suit are free from the bar of limitation. However, it is not possible to read the observation of the learned Judge in this case in that sense. The learned Judge there was dealing with a particular type of application, i.e., an application desiring the Court to proceed to judgment and in his view such an application was not governed by any period of limitation. It is difficult to read these observations generally to mean that all applications in a pending suit are exempted from the provisions of the Limitation Act. The observations made in that case will have to be confined to the facts of that case only.

8. Mr. Qazi also relies on the decision of the Calcutta High Court in Madhabmani Dasi v. Lambert I L R 37 Cal. 796. In that case the Division Bench did observe that the Limitation Act does not profess to provide for all kinds of applications whatsoever. However, this observation has to be read in the context of the subsequent observation where it is said that the Act certainly does not apply to an application to a Court to do what the Court has no discretion to refuse. The Division Bench also observed that the provisions of the Limitation Act do not apply to an application to the Court to terminate a pending proceeding, the final order in which has been postponed for the benefit of the defendant or for the

convenience of the Court. Now, though the Division Bench has made a general observation that the Limitation Act does not apply to all applications whatsoever, yet it has pointed out the instances where it would not apply to certain applications and those are applications which seek to move the Court to do something which it is bound to do and where an application is not necessary. It is in this context that this ruling will have to be read. Mr. Qazi has also relied on the decisions in *Rahim v. Karim* A I R 1967 J. & K. 93 and *Bhagwoii Prasad v. Ram Roop* A I R 1962 All. 622. In both these cases I do not find any discussion on the point under consideration, namely whether Article 137 of the Limitation Act applies to an application made under rule 7 of Order 9 of the Code. Mr. Qazi has also drawn my attention to the decision of Patna High Court in *Bhagwati Prasad and Another Vs. Ram Roop Tewari and Others*, , In this case the Patna High Court has reiterated the principles which have been laid down by the Supreme Court in *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, in interpreting the Code of Civil Procedure. Now in this case there is no discussion with regard to the question of applicability of Article 181 of the Limitation Act of 1908 since the application in that case for filing written statement was made within three years of the first appearance of the defendant. This case, therefore, is of no avail on the question under consideration.

9. As seen above, Mr. Qazi submitted that the right to apply to the applicant under rule 7 of Order 9, assuming such an application was necessary, would accrue on 1st November 1976 when the suit was restored. According to Mr. Qazi, when the suit was dismissed for default. all the orders which had been passed previously, merged in order of dismissal and when the suit was revived and restored, it gave a fresh right to the applicant to apply for setting aside the ex parte order and in this way Mr. Qazi submits that the application in any case made on 8th November 1976 would be very much in time. In my view, Mr. Qazi is not on firm ground in making the submission inasmuch as when a suit is dismissed for default but is subsequently restored, it revives all the orders which are passed prior to the dismissal of the suit. In fact, the restoration of the suit places it in the same position in which it was at the time when it was dismissed for default, I am supported in this view by a decision of the Allahabad High Court in *Babu Vs. Dewan Singh and Others*, , Hence if the suit was restored on 1st November 1976, the order which was passed on 21st February 1972 directing the suit to proceed ex parte against the applicant would also be restored and if the applicant wanted to appear in the suit and proceed with it from the stage of filing the written statement, it ought to get that order set aside under rule 7 of Order 9 and hence it could not be said that a fresh right accrued to the applicant on 1st November 1976, when the suit was restored.

10. In this view of the matter, therefore, it would appear that the application which was filed on 8th November 1976 was barred by limitation as provided for in Article 137 of the Limitation Act and hence the learned Judge was right in rejecting it on this ground.

11. In the result, therefore, there is no substance in this revision application and it is hereby dismissed with costs in one set.