

(2004) 12 CAL CK 0019
In the Calcutta High Court

Case No : G.A. No's. 4215 and 4277 of 2004 and A.P.O.T. No's. 704 and 716 of 2004

Allahabad Bank

APPELLANT

Vs

M.L. Bose and Co. (Pvt.) Ltd. and Another

RESPONDENT

Date of Decision : 15-12-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2(2)
Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Article 122, 123, 137
Writ Proceedings Rules, 1977 — Rule 53

Citation : (2005) 2 CHN 642 : (2004) 2 ILR (Cal) 541

Hon'ble Judges : Asit Kumar Bisi, J; Altamas Kabir, J

Bench : Division Bench

Advocate : Bimal Chatterjee, for the Appellant; Ajoy Chatterjee, for the Respondent

Final Decision : Allowed

Judgement

1. The respondent No. 1 before us filed a writ petition, being W.P. No. 318 of 2000, which was initially taken up on 31st January, 2000, when certain directions were given by the learned Single Judge to the appellant bank in the presence of its learned Advocate-on-Record. Thereafter, directions were also given for filing of affidavits on 9th March, 2000. As will appear from the materials on record, the Advocate-on-Record for the bank forwarded to the Advocate-on-Record for the writ petitioners-respondents an advance copy of the bank's affidavit-in-opposition on 24th March, 2000, but the said affidavit-in-opposition does not appear to have been filed in Court.

2. The writ petition appeared after an interval of almost 4 years in the warning list of the learned Single Judge on 11th March, 2004, as well as on 12th March, 2004, when the same does not appear to have been called on for hearing. On 15th March, 2004, when the matter was ultimately taken up, no one appeared on behalf of the appellant-bank and the hearing of the writ petition was adjourned

till 17th March, 2004, with a direction upon the Advocate-on-Record of the writ petitioners to inform the Advocate-on-Record of the appellant-bank that the matter was appearing in the list and would be taken up on 17th March, 2004.

3. As will appear from the affidavit-of-service filed before the learned Single Judge, the learned Advocate-on-Record of the appellant bank did not accept the notice on the ground that he had no further instructions to appear for the bank. The learned Advocate requested the writ petitioners-respondents to serve notice on the bank directly. On the same day, that is, 15th March, 2004, a notice was sent by the learned Advocate-on-Record of the writ petitioners to the bank and the said notice appears to have been received by the appellant bank. However, on 17th March, 2004, still no one appeared on behalf of the appellant bank and the hearing of the writ petition was concluded by the learned Single Judge who reserved judgment and ultimately delivered judgment on 26th March, 2004, allowing the writ petition with certain directions to the appellant-bank.

4. On 20th April, 2004, the learned Advocate-on-Record for the writ petitioners-respondents forwarded a copy of the judgment and order dated 26th March, 2004 to the bank for compliance. The same was duly received by the appellant-bank on the same date. Even the General Manager of the bank was served with the copy of the order under registered cover on 23rd April, 2004. On 20th June, 2004, since the time to comply with the directions contained in the order dated 26th March, 2004, expired, notice was sent on behalf of the writ petitioners to the Chairman and Managing Director of the bank demanding payment of Rs. 63,33,684.00 said to be payable under the said order within the time mentioned, failing which, it was mentioned in the said notice that an application for contempt would be filed.

5. The said notice was duly received by the appellant bank on 20th June, 2004, and on 6th July, 2004, the bank filed two applications before the learned Single Judge : one for recalling and/or modification of the judgment and order dated 26th March, 2004, and the other for condonation of delay in making such application.

6. The application for condoning the delay in filing the application for recalling the judgment and order dated 26th March, 2004, passed in the writ petition was taken up for hearing on 15th October, 2004. After considering various submissions made on behalf of the respective parties, the learned Single Judge was not satisfied with the explanation given for condoning the delay, and, accordingly, dismissed the said application. Consequent upon such dismissal, the application for recalling and/or modification of the order also stood dismissed.

7. It is against the said order of the learned Single Judge that these two separate appeals have been filed and two separate applications have been made therein with a prayer for stay of operation of the said judgment and order which governs both the applications.

8. When the application regarding the prayer made for recalling of the judgment

and order in the writ application was taken up for consideration, a query was put to the learned Counsel as to the period of limitation which would be applicable in making such an application. In answer to our query, Mr. Bimal Chatterjee, learned Advocate, appearing on behalf of the appellant bank, submitted that although arguments had been advanced before the learned Single Judge on the supposition that Article 122 of the Limitation Act, 1963, would have application to such an application, upon further examination it would appear that Article 122 would have no application to the facts of the case where a writ petition was involved, particularly when the application was one for recalling an order and not an application either for review or revision. Mr. Chatterjee also urged that although it could be urged that Article 123 may have application, strictly speaking the same would not also be applicable to the instant case since the said Article makes reference to a decree in a suit and the expression "decree" has been defined in Section 2(2) of the CPC to mean the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Mr. Bimal Chatterjee submitted that since the instant proceeding was not a suit, the aforesaid expression used in Article 123 would not apply to the facts of the instant case.

9. On the other hand, it was submitted by him that it is, in fact, Article 137 of the Limitation Act, which deals with applications in general for which no other provision has been made, which would apply to the facts of this case, and, in such an event, the period of limitation would not be 30 days but 3 years from the date of the order. Mr. Chatterjee submitted that since the judgment had been delivered on 26th March, 2004 and the application for recalling the order had been filed on 6th July, 2004, such application was well within the period of limitation as prescribed under Article 137 of the Limitation Act.

10. Apart from the above, Mr. Chatterjee also addressed us on the merit of the application for condonation of delay which prevented the appellant-bank from making the application for recalling the judgment and order of 26th March, 2004 expeditiously. According to Mr. Chatterjee, the order came to be known to the bank only on 20th April, 2004/ 23rd April, 2004. Of course, Mr. Chatterjee admitted the fact that notice of the matter appearing in the list of the learned Single Judge had been duly received on behalf of the bank but for some reasons or the other the same had been overlooked and the matter was allowed to be decided in the absence of the bank. Mr. Chatterjee, however, submitted that non-appearance at the time of hearing of the application was in fact the subject-matter of the application for recalling the order passed in the writ application, which application was dismissed consequent upon the dismissal of the application for condonation of delay. According to Mr. Chatterjee, the said matter was not really gone into in detail and the learned Single Judge never got the opportunity to consider the matter on merits as such. On both counts Mr. Chatterjee submitted that the learned Single Judge had decided the matter erroneously and

the order under appeal was liable to be set aside with a direction upon the learned Single Judge to rehear the application for recalling the order passed in the writ application, on merits.

11. In support of his submissions Mr. Bimal Chatterjee referred to the decision of the Hon''ble Supreme Court in the case of The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, wherein it was observed that Article 137 of the 1963 Limitation Act would apply to any petition or application filed under any Act to a Civil Court. The same view was reiterated by the Hon''ble Supreme Court in a later judgment reported in The Addl. Spl. Land Acquisition Officer, Bangalore Vs. Thakoredas, Major and others, .

12. Mr. Chatterjee urged that the matter should be sent back to the learned Single Judge for a decision on the bank's application for recalling of the judgment and order dated 26th March, 2004, on merits.

13. Mr. Ajoy Chatterjee, learned Advocate appearing on behalf of the writ petitioners-respondents, strongly opposed the stand taken by Mr. Bimal Chatterjee. According to Mr. Ajoy Chatterjee, the point which has been urged before the Appeal Court had not been urged before the learned Single Judge and, in any event, even on merits the application for condoning the delay could not have been allowed by the learned Single Judge.

14. Mr. Ajoy Chatterjee pointed out that due to sheer negligence and/or laches the appellant bank had failed to file its affidavit-in-opposition or to take steps in the matter when the writ application came up for final hearing, despite notice having been given that the matter was appearing in the warning list of the learned Single Judge. Mr. Chatterjee also urged that despite having notice of the judgment and order dated 26th March, 2004, of the learned Single Judge, at least on 20th April, 2004, the bank had acted negligently in not taking expeditious steps in filing the application for recalling the final judgment in the writ application.

15. Apart from the above, Mr. Ajoy Chatterjee also urged that while Article 122 of the Limitation Act, 1963 would possibly have no application to the facts involved in these appeals, Article 123 squarely applies having regard to the provisions of the Writ Rules framed by this Court in dealing with matters under Article 226 of the Constitution. Mr. Chatterjee urged that Rule 53 of the Writ Rules makes it very clear that save and except as provided by the rules and subject thereto, the provisions of the CPC in regard to suits shall be followed, as far as it can be made applicable in all proceedings under Article 226 of the Constitution. Mr. Ajoy Chatterjee drew our attention to the wording of Article 123 of the Limitation Act, 1963, which, inter alia, provides that to set aside a decree passed ex parte or to rehear an appeal decreed or heard ex parte, the period of limitation is 30 days from the date of the decree when the summons had been served, or where the summons or notice had not been served, when the applicant first had knowledge of the decree,

16. Mr. Ajoy Chatterjee contended that since the provisions of the CPC have been made applicable to writ matters, as far as practicable, the expression "decree" as defined in the CPC u/s 2(2) should also be included to give proper meaning to the provisions of the Writ Rules. In other words, according to Mr. Ajoy Chatterjee, Rule 53 of the Rules under Article 226 of the Constitution as also the provisions of Article 123 of the Limitation Act, 1963 must be read together in order to give a harmonious meaning to the provisions of both the rules and the procedures to be followed in matters relating to Article 226 of the Constitution, particularly since no provision at all had been made in the rules for recalling orders disposing of writ petitions finally.

17. Mr. Chatterjee submitted that in view of the matter the learned Single Judge had rightly dismissed the application for condonation of delay which had not been made within the period of limitation as prescribed under Article 123 of the 1963 Act and no interference was called for in respect thereof.

18. On a careful consideration of the submissions made on behalf of the respective parties it is quite clear that Rule 53 of the Rules of the High Court under Article 226 of the Constitution makes the Civil Procedure Code, wherever possible, applicable to proceedings under Article 226 of the Constitution, but the same does not ipso facto bring within its ambit the law of limitation with regard to suits. Both Articles 122 and 123 of the Limitation Act, 1963 clearly refer to suits, whereas Article 137 which is the residuary provision deals with applications of all kinds for which no specific provision has been made. Apart from the above, Rule 53 of the Writ Rules while indicating that the provisions of the CPC in regard to suits shall be followed as far as it can be made practicable in all proceedings under Article 226, also indicates that the rules shall not be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

19. In our view, the said expression recognises the inherent power of the High Court to deal with matters applicable to proceedings under Article 226 of the Constitution. We are of the view that Article 137, which deals with applications of all kinds, would have application in these matters. It may be pertinent to reproduce the language of Article 137 of the Limitation Act, 1963 which reads as follows :

Description of suit Period of Limitation Time from which period begins to run 137. Any other application Three years When the right to apply for which no period of accrues. limitation is provided elsewhere in this Division.

20. The aforesaid view is bolstered by the observation made by the Hon''ble Supreme Court in the case of Kerala S.E. Board (supra) in which it was clearly explained that Article 137 of the 1963 Act is applicable to any petition or application filed under any Act to a Civil Court. Undoubtedly, the Writ Court primarily functions as a Civil Court dealing with civil matters.

21. In such circumstances, we are inclined to allow both the appeals.

22. The appeals and the applications for stay are all treated on the day's list and are allowed. The order passed by the learned Single Judge on 15th October, 2004, dismissing the application for recalling as also the application for condonation of delay is set aside. The learned Single Judge is directed to hear out the application for recalling of the judgment and order dated 26th March, 2004 on merits, as expeditiously as possible.

23. There will be stay of the directions contained in the judgment of the learned Single Judge dated 26th March, 2004 for a period of two months within which period the bank will be at liberty to apply for further extension before the learned Single Judge.

24. There will be no order as to costs.

25. Department and all parties are to act on a signed copy of the minutes of the operative portion of the judgment and order.

26. Xerox certified copy of this judgment and order be made available to the parties, if applied for, as expeditiously as possible.

27. Prayer for stay of operation of this order made on behalf of the writ petitioners-respondents is considered and refused having regard to the views expressed by us hereinabove.

Altamas Kabir and Asit Kumar Bisi, JJ.