
(1969) 09 OHC CK 0017
In the Orissa High Court
Case No : Civil Revision No. 389 of 1966

Bhima Padhan

APPELLANT

Vs

Masyaraju 5 Ors.

RESPONDENT

Date of Decision : 26-09-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97, Order 21 Rule 97(3), Order 9 Rule 13, 115
Limitation Act, 1908 — Article 129, 10, 11, 14, 15

Citation : (1970) 36 CLT 279

Hon'ble Judges : A. Misra, J

Bench : Single Bench

Advocate : R.C. Patnaik, for the Appellant; P.V.B. Rao, for Opp. Parties 1(a) and (b), for the Respondent

Final Decision : Allowed

Judgement

A. Misra, J.—This revision is directed against an order under Order 21, Rule 97, Code of Civil Procedure. The facts, in brief, are that on the application of decree-holder-opp. parties Nos. 1 to 1(b) for delivery of possession of the disputed property, the Court issued a writ of delivery of possession. The Amin who was entrusted with the writ was obstructed by the judgment debtor No. 2's father, brothers and others when he proceeded to execute the writ on 2-2-1961. As such delivery could not be effected. The decree-holder-opp. parties filed an application under Order 21, Rule 97, CPC alleging obstruction by the father, two brothers and sons of judgment-debtor No. 2 in respect of delivery of possession of items Nos. 1 and 2 of A Schedule property and by one Baban Padhan in respect of item No. 3. This application was resisted by the Petitioner and others on the ground that on a previous partition, the disputed property had fallen to their share in which Rajib Padhan, judgment debtor No. 2 had no interest and was not in possession. The Court below allowed the petition and directed decree-holders to be put in possession by removal of the obstruction.

2. though various objections were taken in the petition, at the time of hearing, learned Counsel for Petitioner confined his arguments to the following points: (1) The application under Order 21, Rule 97, CPC being clearly barred by limitation the order of the Court below is not sustainable and (2) no specific finding has been given by the Court below that resistance or obstruction was occasioned without a just cause.

3. The first contention on behalf of Petitioner is that the application under Order 21, Rule 97, CPC is clearly barred. It is not disputed that the date of the alleged obstruction to the delivery of possession was 2-2-1964 and the present application under Order 21, Rule 97, CPC was filed on 14.4.1964 i.e., clearly more than 30 days after the date of the alleged obstruction. The period of limitation for filing such an application prescribed under Article 129 of the Limitation Act is 30 days from the date of resistance or obstruction.

Prime facie, therefore, the application filed by the decree holder opp. parties Nos. 1 to 1(b) was filed beyond the prescribed period of limitation. Learned Counsel for opp. parties Nos. 1 to 1(b) does not dispute that the application under Order 21, Rule 97, CPC was filed in the Court below beyond the period of limitation. He has, however, filed an application in this Court supported by an affidavit for condoning the delay u/s 5 of the Limitation Act when the question of limitation was raised during the course of arguments. This application u/s 5, it is argued by learned Counsel for Petitioner, is not maintainable on the following two grounds: (1) Section 5 of the new Limitation Act expressly excludes from its purview an application under any of the provisions under Order 21 of the CPC and (2) even if Section 5 as it stood, before the present Limitation Act came into force, is held to be applicable, this Court is not competent to condone the delay as it is only within the competence of the Court in which the application was filed to consider, if there was sufficient cause and entertain application beyond the period of limitation.

4. Mr. Rao, learned Counsel for opp. parties Nos. 1 to 1(b), while conceding that Section 5 of the new Limitation Act excludes from its purview applications under Order 21, Code of Civil Procedure, contends that in the present case, Section 5 as it stood under the repealed Act, is applicable and not Section 5 of the new Act. This contention is based on the Orissa Amendment to Order 21, Rule 97, CPC by adding Sub-rule (3) which runs as follows:

The provisions of Section 5 of the Limitation Act shall apply to applications under this rule.

It is argued that so long this Orissa amendment to Order 21, Rule 97, CPC had not been repealed, Section 5, as it stood under the Limitation Act, 1908, will continue to apply to applications under Order 21, Rule 97, Code of Civil Procedure. There is considerable force in this contention.

5. It is, however, not necessary in the present case to consider this aspect, because on the second ground urged by learned Counsel for Petitioner that the

application filed in this Court by opp. parties Nos. 1 to 1(b) cannot be entertained even if by virtue of the continuance of the Orissa amendment to Order 21, Rule 97, the provisions of Section 5 of the 1908-Limitation Act is deemed to apply. The power to condone the delay rests with the Court in which the application was filed beyond the period of limitation and not in the High Court before which the matter has come up in revision against the order passed on the said application. Admittedly no application u/s 5 was filed before the Court below as nobody noticed that the application was barred by limitation. Thus, the application filed by the opp. parties Nos. 1 to 1(b) under Order 21, Rule 97, CPC was clearly beyond time, and as such, barred and this Court cannot entertain the application u/s 5 of the Limitation Act filed here and condone the delay.

6. Next it is argued by Mr. Rao for opp. parties Nos. 1 to 1(b) that when the question of limitation was not raised in the Court below nor put forth as a ground in the revision petition it is not open to him to raise such a question nor the High Court in exercise of its revisional powers competent to take notice of the same. According to him, if the question of limitation is taken note of at the time of hearing of the revision petition, opposite parties Nos. 1 to 1(b) will suffer considerable prejudice, inasmuch as, they are denied an opportunity of filing a petition u/s 5 of the Limitation Act for condonation of delay before the lower Court. It is argued that the revisional powers of the High Court can be exercised only in cases and on grounds which strictly fall within the ambit of the different clauses of Section 115, Code of Civil Procedure. Further, the question whether the application was barred or not is not directly a question relatable to the jurisdiction of the Court, but it is a matter which will at most amount to an erroneous decision either on a point of law or fact. As such, it will not come within the ambit of any of the clauses of Section 115, Code of Civil Procedure, and therefore, even if the Court below is found to have entertained the application beyond the period of limitation, it is not open to the High Court in revision to interfere. Similarly, it has been argued that Section 115, CPC confers a discretionary power on the High Court to interfere in appropriate cases. When the Petitioner never raised the question of limitation in the Court below and thereby deprived the opp. parties Nos. 1 to 1(b) an opportunity of seeking condonation of delay, the High Court should not exercise the discretion in favour of Petitioner even though it comes to the conclusion that the application was barred by limitation. In support of his contention, reliance is placed on a decision of this Court reported in *Narayan v. Sara Bewa* 31 (1965) C.L.T. 443, where the Court refused to exercise its revisional jurisdiction on the ground that substantial justice had been done by the order of the appellate Court though without jurisdiction. The facts of that case are entirely different. There, in a partition suit, a composite compromise decree which was partly final and partly preliminary was passed. Plaintiff's subsequent application to make the decree final was rejected on the ground that the compromise decree was a final decree. An application for review of this order was also dismissed. Plaintiff filed an appeal against the order which was allowed. Against the appellate order, a revision was

filed in which one of the contentions was that as no appeal lay, the order of the subordinate Judge setting aside the order of the trial Court was without jurisdiction. The other contention was that the construction of the compromise decree by the appellate Court as partly final and partly preliminary was erroneous. In revision, the Court agreed with the construction of the compromise decree by the appellate Court and in these circumstances held that as substantial justice had been done by the appellate Court's order, it was not a fit case for interference in revision. In the present case, however, the facts are entirely different which affect the initial jurisdiction of the Court below to entertain the application under Order 21, Rule 97, Code of Civil Procedure. As already stated, it is admitted before me that the said application when it was filed before the Court below was clearly barred by limitation. There is abundant authority that limitation affects the jurisdiction of the Court. Section 3(1) of the Limitation Act runs as follows:

3(1). Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred and application made, after the prescribed period shall be dismissed although limitation has not been set up as a defence.

The section is mandatory and has to be obeyed in full irrespective of defence of limitation having been pleaded or not, as the Court has no choice in the matter. The Supreme Court in the decision reported in *Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others*, , observed:

Under Section 3 of the Limitation Act, it is the duty of the Court not to proceed with the application if it is made beyond the period of limitation prescribed. The Court has no choice.

Similarly, in the decision reported in *Golak Chandra Hiswal v. State of Orissa* 31 (1965) C.L.T. 1011, it was held:

If the application itself was bared by limitation, it relates to a question of jurisdiction envisaged u/s 115, CPC and to that extent, the exercise of jurisdiction by the High Court does not become discretionary.

That was a revision against an order allowing an application under Order 9, Rule 13, Code of Civil Procedure. It was held that u/s 3(1) of the Limitation Act the Court should have dismissed the application although limitation had not been set up as a defence. In the decision reported in *Lalchand Dhanalal Vs. Dharamchand and Others*, , it was held:

A suit which on the face of it is found barred by time must be dismissed even at the appellate stage though the question was not pointedly raised or specifically considered in the Court below in view of the mandatory provisions contained in Section 3(1) of the Limitation Act.

Thus, the position of law is well settled that Section 3(1) of the Limitation Act being a mandatory provision, it affects the jurisdiction of the Court where a suit, appeal or application is entertained beyond the period of limitation, and as such,

amendable to the revisional jurisdiction of the High Court u/s 115, Code of Civil Procedure.

In the present case, it is true that such an objection was not taken in the Court below nor was it noticed till the hearing of this revision when for the first time Petitioner filed a petition to take such an additional ground. When the application under Order 21, Rule 97, CPC filed in the Court below was clearly barred by limitation, it had no jurisdiction to entertain it, and as such the application should have been dismissed.

7. Thus, I hold that the application was clearly barred by limitation. Hence, the revision is allowed and the order of the learned subordinate Judge is set aside. Each party to bear his costs throughout.