
(2012) 03 KL CK 0159
In the High Court Of Kerala
Case No : O.P. (C) No. 570 of 2012

Girija Vallabhan

APPELLANT

Vs

J.B.J. Plantation Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 19-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 2(2)
Constitution of India, 1950 — Article 226, 227
Limitation Act, 1963 — Section 14
Transfer of Property Act, 1882 — Section 55(6)(b)

Citation : (2012) 2 KarLJ 309 : (2012) 2 KLJ 309

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : T.C. Suresh Menon, P.S. appu and P.B. Suresh Kumar, for the Appellant; V.G. Arun, T.R. Harikumar and T. Krishnan Unni (Sr.), for the Respondent

Judgement

S.S. Satheesachandran, J.—Petitioner is the plaintiff in O.S.No. 69/10 on the file of the Sub Court, Ottapalam. That suit was one for Specific Performance of an Agreement of Sale, and, in the alternative for refund of the advance amount of Rs. 1,75,00,000/- paid on the agreement. Ext.P2 is the copy of the plaint. The defendants resisted the suit claim on various grounds, but the execution of the agreement and also receipt of the advance amount, as stated, were admitted by them. Ext.P3 is the copy of the written statement. Suit was instituted paying 1/10th of the court fee and after settling of issues the court directed for payment of the balance court fee which came to Rs. 23,92,560/-. Extension of time by the plaintiff for payment of the court fee, requested on two occasions, was allowed by the court. Further extension applied for was turned down, and the plaint was rejected. Plaintiff initially moved an application for restoring the suit with a petition to condone delay of 164 days tendering the balance court fee payable on the plaint claim. Notice was ordered on that application. Objection being raised that the application for restoration is not the proper course to be followed when

the suit had been rejected for non-payment of the court fee, withdrawing the petition for restoration, the plaintiff moved an application for review of the order rejecting the plaint with a petition to condone delay of 275 days in its presentation. Ext.P11 is the petition for review and Ext.P12, application for condonation of delay. The 1st defendant/1st respondent filed a counter resisting the applications. The learned Sub Judge vide Ext.P13 common order dismissed Exts.P11 and P12 applications. Challenge in the original petition is against Ext.P13 order invoking the supervisory jurisdiction vested with this court under Article 227 of the Constitution of India.

2. I heard the counsel on both sides.

3. The learned Senior Counsel for the petitioner assailed Ext.P13 order contending that the learned Sub Judge has proceeded and analysed the grounds canvassed for condoning the delay on an erroneous view that allowing the condonation of delay would amount to circumventing the provisions contained in Section 4A of the Kerala Court Fees and Suits Valuations Act {for short "the Act"}, rejection of the plaint for non- payment of the court fee within the time where it has been shown that there is no dispute over the agreement of sale, the enforcement of which was sought for through intervention of the court, and also the receipt of substantial sum on the sale price, an amount of Rs. 1,75,00,000/- by the defendants, was not even appreciated and given any consideration by the court and it has turned down the petition for condonation of delay and also rejected the application for review taking hyper technical views, according to the learned counsel, would demonstrate, if Ext.P13 order is sustained, it would cause grave injustice.

4. Per contra, the very entertainability of the original petition is impeached by the learned senior counsel for the respondents contending that where the petitioner has an alternate efficacious remedy he cannot invoke the visitorial jurisdiction of this court to challenge the correctness of Ext.P13 order. The learned Senior Counsel would submit that as against Ext.P13 order the petitioner has an efficacious remedy of filing a revision u/s 115 of the CPC (for short "the Code"). When that be so, the original petition filed to challenge Ext.P13 order, according to the counsel, is not entertainable. The learned counsel has relied on A. Venkatasubbiah Naidu Vs. S. Challappan and Others, to buttress the submission made that the petitioner cannot resort to constitutional remedy as under Article 227 of the Constitution of India, where he has an alternative remedy of filing a revision against Ext.P13 order. Reliance is also placed on Punjab National Bank Vs. O.C. Krishnan and Others, :: 2001 ICO 471 Sadhana Lodh Vs. National Insurance Company Ltd. and Another, and Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others, to contend that the relief under Article 226/227 of the Constitution of India cannot be resorted to, if an efficacious remedy is available to the aggrieved person. Not only that a challenge against Ext.P13 order can be canvassed by filing a revision u/s 115 of the Code, the petitioner has also another efficacious remedy of impeaching the

rejection of the plaint filing an appeal against such order as it is a "decree" as defined in Section 2(2) of the Code, is the further submission of the Senior Counsel. To prefer such an appeal, the court fee payable is also much less, a sum of Rs. 25/- as per Schedule II of Article 3(iii) (A)(1) of the Act, and, on such appeal ad valorem court fee is not to be paid, is also pointed out by the counsel placing reliance on *Thanappan Vs. Hassan Kappor*, Scope of review is undoubtedly limited: but, in an appeal, it is submitted, the entire issues; are open for further scrutiny by the appellate court. Assailing the correctness of the order of rejection of the review petition by way of an original petition rather than preferring an appeal against the order rejecting the plaint, as provided by the Code, is itself a circumstance to hold that the original petition is not entertainable, according to the counsel. Lastly on merits also, according to the learned Senior Counsel, challenge against Ext.P13 order passed by the learned Sub Judge must fail. No proper explanation, leave alone sufficient cause, was made out for condoning the delay in moving the application for review, and, the rejection of the plaint was after providing extension of a period of two months time to pay the balance court fee, is the further submission of the counsel, to contend that the original petition impeaching Ext.P13 order has no merit, and it is liable to be dismissed.

5. Going through Ext.P13 order, it is evidently clear that the learned Sub Judge has not taken note of any of the circumstances involved in the case, a suit instituted for enforcement of an agreement of sale in which not only the execution of the agreement of sale was not challenged, but the very case of the plaintiff that substantial sum of Rs. 1,75,00,000/- on such agreement had been collected on the sale, which has not been completed, was conceded to by the defendants, while considering the application for review with a petition to condone delay moved by the plaintiff as against the order rejecting the plaint for non-payment of the balance court fee. In fact, what is seen from Ext.P13 order is that the court has proceeded with forming a view, even without examining the cause pleaded for condonation of the delay, that if the petition is allowed "after condoning the delay of 275 days, it would be an act as circumventing the provisions contained in Section 4A of the Act." Section 4A of the Act fixes an outer limit for payment of the balance court fee and there are also some riders in the grant of further extension of time by the court to pay the balance court fee, it appears, according to the learned Sub Judge, would whittle down the powers of the court in condoning the delay where a review is sought for against an order rejecting the plaint with a petition to condone delay. When such a review with a petition to condone delay is applied for, the time limit fixed u/s 4A of the Act, with respect to the payment of balance court fee, no doubt, is a relevant factor to be taken note of, but it can never be stated that consideration of the review, nor of the delay petition, which the court is fully empowered to examine and pass appropriate orders in accordance with equity and justice, is any way affected or interdicted by the proviso covered by Section 4A of the Act. Power of the court to condone delay and to allow the review petition as against an order of

rejection is supreme and in doing so, there is no question of circumventing the provisions contained in Section 4A of the Act as has been opined by the learned Sub Judge, who, it is seen, has proceeded with the enquiry in considering the merit of the petitions for condonation of delay on such a basis. The very approach made by the court below in examining the merit of the review petition and also the application for condonation moved by the petitioner totally ignoring the admitted facts presented in the case was egregiously faulty, and there is error apparent on the face of Ext.P13 order inasmuch the enquiry proceeded on the application of the plaintiff was grossly irregular and also with a pre-conceived wrong view that condonation of delay, if allowed, would cause circumvention of the proviso to Section 4A of the Act. Whatever be the conclusion formed by the court over the cause pleaded by the petitioner for condonation of delay, after formation of such a wrong and irrational jurisdictional approach and analysis to hold that he has not made out a case for condonation, in the facts and circumstances cannot be approved.

6. Now, examining the challenge canvassed that the petitioner has alternate efficacious remedy by way of revision and as such the petition filed invoking the visitorial jurisdiction vested with this court under Article 227 of the Constitution of India to impeach the dismissal of the review petition is not entertainable, it has to be stated that the power conferred on this court under the aforesaid Article is supervisory jurisdiction to see that the subordinate courts function within the bounds of its authority. More than the fundamental principle that no party has a substantive right of revision as against any order passed by a subordinate court and it can be invoked only when improper exercise or non-exercise of jurisdiction by the subordinate court, the first principle covered under revision and Article 227 of the Constitution is the exercise of supervisory jurisdiction vested with this court. Whereas, after amendment of the proviso to Section 115 of the Code interdiction is placed in invoking the revisional jurisdiction over orders passed on interlocutory applications, there is no such limitation over the exercise of supervisory jurisdiction under Article 227 of the Constitution, but it has to be guided by the well settled principles laid down by the Apex Court and also within the narrow limits permissible under law. Where there is an error of jurisdiction apparent on the face of the order passed by the subordinate court, which is shown to be wholly unreasonable, and if that order is allowed to remain in force it would cause grave injustice the challenge against such order invoking the visitorial jurisdiction of this court cannot be denied on the premise that such order could be revised by way of revision as well. An error of jurisdiction apparent on the face of the record, needless to state, cannot be defined precisely or exhaustively there being an element of indefiniteness inherent in its very nature. Where the subordinate court as in the present case has proceeded with a wrong pre-conceived notion that the condonation of delay applied for to entertain the review petition would amount to circumventing the interdiction placed u/s 4A of the Act and on that basis appreciated the cause pleaded by the petitioner for condonation it is essentially an error apparent on

the face of the record inasmuch as the court below has not examined the merit of the condonation for delay consistent with the law and procedure applicable thereto. Where such order passed by the court is allowed to stand, it would, no doubt, cause grave injustice. Admittedly there is no challenge over the execution of the agreement of sale on which the suit claim was based, nor of the receipt of a sum of Rs. 1,75,00,000/- as advance on the sale price by the defendants. Though the learned Senior Counsel for respondents would submit that the amount collected as advance on the sale price will constitute a charge over the property u/s 55(6)(b) of the Transfer of Property Act, and that it is open to the petitioner to sue for recovery of the money charged over the property, I find, whether such a remedy is available or not, in the light of the dismissal of the suit for specific performance where in the alternate plea of refund of money was canvassed as well, such questions have no significance in examining the cause pleaded by him for condonation of the delay to entertain his review petition. Petitioner had previously moved an application for restoring the suit with a petition for condonation of delay of 164 days. After notice given, on the challenge raised by the respondents, withdrawing that restoration petition, he moved for review of the order rejecting the plaint with a petition to condone delay of 264 days. There is nothing to indicate that filing of the application for restoration and its prosecution was not bona fide. If that be so, the period of time, during which such petition was prosecuted, can be reasonably considered for exemption as envisaged u/s 14 of the Limitation Act, while examining the merit of the petition for condonation filed with the review petition. The balance court fee payable in the case was substantial sum of Rs. 23,92,560/- cannot also be ignored for a moment. That the court should not take a hyper technical view in examining the condonation of delay especially where the entire balance court fee had been remitted before the court at least by the time when the review petition was presented with a petition to condone delay. Medical certificate was not produced by the petitioner to sustain his case that he suffered from [gout], nor did he enter the box to give evidence thereof cannot be viewed in isolation as destroying the edifice of his case for condoning the delay without reference to the totality of the facts and circumstances presented in the case. As indicated earlier, taking hyper technical approach to throw out the case of a litigant and lock the doors of the court against him even if it is shown that he was not so vigilant in prosecuting his claim and, perhaps, a little bit negligent too, especially in a fact situation where rejection of the plaint for non-payment of the balance court fee is sought to be reviewed with a petition to condone delay seeking indulgence of the court, in which the stakes involved are substantial and the balance court fee to be paid was also about Rs. 24 lakhs, I am certain, would only negate and obstruct the flow of justice and, in fact, result in perpetration of grave injustice as well. That is more so where the petitioner has paid the balance court fee while seeking review with a petition moved for condonation of the delay thereof.

7. There is no merit in the challenge canvassed that the order of the court below

is amenable only by way of revision u/s 115 of the code and not by way of an original petition under Article 227 of the Constitution of India. In *Sadhana Jose's* case {2003 (3) SCC 524} relied by the counsel, the Apex Court was considering the challenge by an insurer against the awarding of compensation in a claim raised under the Motor Vehicles Act. Taking note of the defences which could be canvassed by the insurer and the right of statutory appeal to challenge the award in that case, it was held that the petition filed by the insurer under Article 226 of the Constitution was not entertainable. While pointing out that remedy by way of a statutory appeal was available to the insurer barring its right to invoke the constitutional remedy under Article 226/227 to impeach the award, it was observed that where the statute does not bar exercise of revisional jurisdiction against the judgment of the District Judge, the remedy available to a litigant is by a revision u/s 115 of the Code. The Apex Court then continued to observe thus:

Where remedy for filing a revision before the High Court u/s 115 of the CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie, and not under Article 226 of the Constitution."

The word "only" used in relation to a proceeding under Article 227 in the aforesaid observation does not indicate, nor lay down a law that in cases where the revisional jurisdiction could be exercised the High Court cannot invoke its supervisory jurisdiction over the orders of the subordinate court either under Article 226 or 227 of the Constitution of India. The word "only" cannot be given an interpretation as canvassed by the counsel to hold that where the orders of the subordinate court is amenable to revisional jurisdiction invoking of the constitutional remedy under Article 227 is barred. On the other hand, the remedy by way of Article 227 of the Constitution may be available, subject to satisfaction of the grounds thereof, in cases where invoking of such jurisdiction by this court "to keep the subordinate courts within the bounds of their authority" is established to interfere with the orders impugned. Too much significance to the word "only" used in the observation made by the Apex Court in the above decision over the maintainability of a petition under Article 227 of the Constitution cannot be given in detachment of the facts situation whereunder the decision was rendered to. The Apex Court, in the above case, was expressing the ambit and scope of Article 226/227 of the Constitution of India in a case where a statutory right of appeal was available to the party, who has resorted to the constitutional remedy. Even if a right of appeal was not available a challenge by way of a revision can be resorted to, and, if a revision is barred, then, a petition under Article 227 of the Constitution would lie, but not a challenge under Article 226 of the Constitution was the view expressed in relation to the facts of that case. In the American case *Henry R. Towne v. Mark Eisner* {245 US 418 at 425}, the court said that "A word is not a crystal, transparent and unchanged; it is the sign of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used. "Though the word "only" is

used as an exclusionary term, in understanding its meaning its placement is material and so also the context in which it has been used. To ascertain the meaning of the word "only" in the observation made by the Apex Court, necessarily the factual background of that case has to be taken note of and it would indicate that dilation over the availability of Article 227 of the Constitution of India was made in relation to alternate remedy by way of appeal and revision in the case where a right of statutory right of appeal was available to the party who sought for such constitutional remedy.

8. In *A. Venkatasubbiah Naidu v. S. Chellappan & others*, 2000(7) SCC 695, the Apex Court has pointed out the time tested principle to be followed so far as the exercise of the constitutional remedy under Article 226/227 when alternate remedies are available to the parties. It has been stated thus:

Though no hurdle can be put against the exercise of the constitutional powers of the High Court it is a well recognized principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies one or the other before he resorts to a constitutional remedy."

So everything depends upon the question whether the party has an efficacious alternate remedy, and if so, whether he can avail of the constitutional remedy. That was also a case where the party who invoked the constitutional remedy has had two alternate efficacious remedies, one of approaching the court which had passed the adverse ex parte order against him for vacating it and the other to prefer an appeal thereof. In the other two decisions referred to by the counsel, *Punjab National Bank v. O.C. Krishnan and others*, 2001(6) SCC 569 and *Kanaiyalal Lalchand Sachdev & ors. v. State of Maharashtra and ors.*, 2011(2) SCC 782, both of them arose from orders passed under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, which were impeachable by way of appeal provided under that statute before the Debt Recovery Tribunal. In that context, analysing the fact situation therein the Apex Court held that the constitutional remedy under Article 226/227 is not available where an efficacious alternate remedy is available to the aggrieved person. Suffice to state, the rule of "alternative remedy" is only a consideration for the exercise of discretion and does not exclude the jurisdiction of the High Court in exceptional cases. Where the order suffers from basic illegality or passed in contravention of the established principles of law, even if an alternative remedy may be available to the party, if it is shown that grave injustice has been done by such order, the High Court has absolute authority in exercise of its power under Article 226 and 227 of the Constitution to interfere with such order.

9. Now, coming to the present case, as against the order passed in the review petition, the petitioner has an efficacious remedy of filing a revision u/s 115 of the Code since there is a decision of the case itself and the proviso added by amendment in the aforesaid section, which applies only to orders on interlocutory applications pending the lis, is inapplicable is the argument

canvassed to contend that constitutional remedy under Article 227 cannot be resorted to impeach the orders of the court below. In *Surya Dev Rai v. Ram Chander Rai*, 2003(3) KLT 490 (SC)::2003 ICO 884 the Apex Court holding that even in cases where remedy of revision as against the interlocutory orders has been exempted by the amendment of Section 115 of the Code under the Amendment Act of 46/99 the constitutional remedy to challenge such orders under Article 226/227 will still be available, but its exercise should nevertheless be based on time tested principles to be followed thereof. In the aforesaid decision, the Apex Court has given the guidelines to be followed in the exercise of the jurisdiction of the High Court under Articles 226 and 227 of the Constitution, as stated hereunder:

Certiorari, under Art. 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate Court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice. Supervisory jurisdiction under Art. 227 of the Constitution is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction. Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby. A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long drawn process of reasoning. Where two inferences are reasonably possible and the subordinate Court has chosen to take one view the error cannot be called gross or patent."

10. Another question may also emerge for consideration in the given facts of the case as regards the right of revision available to a party to challenge the order of the subordinate court In *Siva Shakti Co-operative Housing Society v. Swaraj Developers*, 2003 (2) KLT 503:: 2003 ICO 693 whether a party has a vested right to file a revision u/s 115 of the Code as against the order of the subordinate court has been considered and explained thus:

Section 115 is essentially a source of power for the High Court to supervise the subordinate courts. It does not in any way confer a right on a litigant aggrieved by any order of the subordinate court to approach the High Court for relief. The

scope for making a revision under S. 115 is not linked with a substantive right."

In both, the revision and also a challenge under Article 227 of the Constitution of India, what is involved is exercise of supervisory jurisdiction of the High Court. A remedy by way of revision, which is not linked with the substantive right of the party, is available to impeach the order of the subordinate court by itself would not debar the aggrieved person from invoking the constitutional remedy under Article 226/227 in cases where a writ of certiorari or the exercise of supervisory jurisdiction to keep the subordinate court within the bounds of its authority is made out. In what type of cases such exercise is permissible no doubt has to be examined with reference to the general guidelines and time tested principles as enunciated in *Surya Dev Rai's* case referred to above.

11. I have already found that the whole approach made by the court below in examining the condonation of delay applied for with a preconceived notion that it would amount to circumventing the interdiction placed u/s 4A of the Act was patently erroneous, and the enquiry proceeded on such premise has resulted in the impugned order, which, if allowed to stand, would cause grave injustice, the exercise of supervisory jurisdiction of this court under Article 227 of the Constitution of India is called for. The execution of the agreement of which specific performance is sought for in the suit and also the receipt of Rs. 1,75,00,000/- as advance on the sale price fixed are admitted to by the defendants, and, with the review petition balance court fee payable had been remitted, are all circumstances which have, necessarily, to be taken into account in examining the petition for condoning the delay and reviewing of the order rejecting the plaint. Before seeking review inadvertently the petitioner had filed a petition for restoration and prosecuted it is also a matter to be taken note of to consider whether the period during which prosecution of such restoration petition till its withdrawal can be exempted for condoning the period of delay. Period of delay would then come to 163 days. The petitioner suffered from [gout], during such period was canvassed as a ground for condoning the delay with an explanation that the rejection of the plaint for non-payment of the balance court fee arose since talks were going on for settlement with the defendants to resolve the disputes involved in the lis. What could be seen from Ext.P13 order of the court below is that the challenge made by the respondent against such cause canvassed by petitioner was only of disputing the assertion made over the settlement talks, contending that there was no sufficient ground to condone the delay. It would appear that even the defendants did not raise any serious objection to the petition for condonation of delay and also to the review petition, though they contended that there is no sufficient ground to condone the delay. When such be the case, I find that the dismissal of the petition to condone delay and rejection of the review petition on the premise that allowing the condonation of delay would circumvent the provisions of Section 4A of the Act and then holding that sufficient cause has not been made out for condonation is patently erroneous and unsustainable. Ext.P13 order in such circumstances is liable to be set aside. Taking note that the stakes involved in the case are very high and the

balance court fee has already been remitted, considering the time lag in moving for review on rejection of the plaint for non-payment of the balance court fee in time, I find, the petitioner has necessarily to compensate the defendants. Petitioner shall pay a sum of Rs. 25,000/- to the defendants in reparation of the loss and injury likely to be suffered by them in allowing the condonation and also the review petition. Costs ordered as above shall be deposited before the court below within a period of three weeks from today. If costs, as directed is paid. Ext.P13 order will stand set aside with both petitions for condonation of delay and the review, allowed. If any default is made in depositing the costs ordered nothing more need be done in the case.

If costs is deposited as directed within the time limited, the plaint will be taken back on file, and the learned Sub Judge shall make every endeavour to dispose of the suit as expeditiously as possible, at any rate, within a period of six months from the date of receipt/production of a copy of this judgment.

Original petition is disposed of as above.

Send a copy of this judgment to the court concerned forthwith.