
(1999) 11 AP CK 0065

In the Andhra Pradesh High Court

Case No : Rev. CMP No. 27166 of 1998

Gudivada Kasi Ratnam

APPELLANT

Vs

Gudivada Rama Rao

RESPONDENT

Date of Decision : 03-11-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 104, Order 21 Rule 105(2), Order 21 Rule 106, Order 47 Rule 1
Limitation Act, 1963 — Article 137

Citation : (2000) 1 ALD 329 : (1999) 6 ALT 551

Hon'ble Judges : Vaman Rao, J

Bench : Single Bench

Advocate : Mr. P.R. Prasad, for the Appellant; Mr. G. Krishna Murthy, for the Respondent

Judgement

1. This review petition has been filed to review the order of a learned Judge sitting singly passed in CRP No.4405 of 1996 on 20-3-1998. The review sought is limited to the extent of ordering of costs while allowing the said revision petition.
2. The said revision petition was filed against the orders dated 31-7-1996 in EA No.296 of 1995 in EA No.385 of 1982 in EP No. 26 of 1989 in OS No. 142 of 1967 on the file of the Principal District Munsif Machilipatnam.
3. The decree holder is the revision petitioner. It is stated that the revision petitioner has filed EA No.385 of 1982 for delivery of the property under the decree before the lower Court and the delivery was ordered. The judgment debtor, the respondent in the revision petition, has filed OS No.20 of 1989 on the file of the I Additional District Munsif Court, Bandar for declaration of title and grant of permanent injunction. In IA No. 154 of 1989, ex parte temporary injunction was granted on 31-1-1989 and the same was made absolute on 29-11-1989 and the main suit itself was dismissed on 18-4-199. The temporary injunction was in force till the disposal of that suit.
4. It appears that EA No.385 of 1982 filed by the petitioner for delivery of

possession was dismissed on 31-10-1989 purportedly on the ground of failure to pay batta. The contention was, as on the said date temporary injunction was in force, no execution could have been effected and failure to pay batta should not have resulted in dismissal for default and the said dismissal should be treated as the petition having been closed for statistical purposes. It was also contended that it was mistake of the Court that the EA was posted for steps for execution and payment of batta.

5. The learned Assistant Judge did not find favour with the contention on the ground that interim injunction was granted only on 29-11-1989 in the suit long after dismissal of the EA. No. 385 of 1982. It was held that on 31-10-1989, no injunction was in force against the decree holder. It is further observed that the petitioner has not taken any steps for restoration of EA No.385 of 1982 even if it was dismissed due to mistake of the Court. The lower Court also held that the matter was covered by the provisions in Order XXI, Rule 105(2) of the CPC and if the petition was dismissed, the remedy was to file a petition under Order XXI, Rule 106 of the CPC to have the order set aside. The learned District Munsif accordingly dismissed the EA No.296 of 1995.

6. Before the learned single Judge of this Court, the petitioner appeared to have raised similar contention that inasmuch as an order of temporary injunction restraining the petitioner from executing the decree was in force, an application for revival of the execution application could not be said to have been barred by limitation. It was also contended that Article 137 of the Limitation Act applies to this case and not the limitation as contemplated in Order XXI, Rule 106 of the CPC.

7. Obviously the revision petition was opposed on behalf of the respondent by contending that the EA was rightly dismissed by the trial Court inasmuch as it was filed beyond the period of 30 days prescribed under sub-rule (3) of Rule 106 of Order XXI, of CPC.

8. It appears from the order sought to be reviewed, on behalf of the revision petitioners the judgment in the case of Syedamian Sahib v. Janaki Ammal AIR 1948 Mad. 1948 was cited. The learned Judge observed that in that case the Madras High Court (supra) laid down a proposition that revival of an execution application which has been dismissed is not a final dismissal of the execution application and subsequent application can be filed for revival at any time and such applications are held to be one for revival or continuation of previous applications. However, in the subsequent paragraph the learned Judge observed that in view of the peculiar circumstances of the case, the order of the Court below was set aside on condition of petitioner paying an amount of Rs. 10,000/- to the Counsel for the respondent towards costs. It was further directed that on the payment of such costs within 6 weeks, EAno.385 of 1992 in EP No.26 of 1979 shall stand restored.

9. During the hearing of this review petition, the learned Counsel for the

petitioner Sri P.R. Prasad and the learned Counsel for the respondent, Sri G. Krishnamoorthy advanced arguments on the merits of the case as though this Court was hearing the CRP itself.

10. The learned Counsel for the petitioner besides relying on the judgment cited in the judgment under review Syedamian Sahib Vs. Janaki Ammal and Others, , relied on the case of Khoobchand Jain and Another Vs. Kashi Prasad and Others, which seems to support the view taken in the Madras High Court decision in the case of Syedamian Sahib (supra). He also relied on a judgment of this Court in the case of Narayana Deo v. Ranganayakulu AIR 1958 AP 493, in which it was held that where the execution Court wrongly dismissed the execution petition for no fault of the decree holder as the judgment debtor had obtained a stay of execution in a proceedings u/s 19 of the Madras Agriculturists Relief Act, a second application for execution filed after the stay was vacated cannot be treated as a fresh application but only as a revival or continuation of the previous application which should be deemed pending.

11. The learned Counsel for the respondent on the other hand relied on the judgment of this Court in Sri Tankala Appalaswamy Gari Samba Murthy Vs. Gopasundara Sabatho, . In that case, the decree holder filed EA. for restoration of EP which was dismissed for non-payment of batta on the ground that the batta was not paid due to oversight on the part of the clerk of the pleader appearing for the petitioner. The lower Court dismissed the application stating that there was no ground for allowing it. This Court relying on Rules 104 and 105(1) of Order XXI of CPC (before 1976 amendment of CPC) which were incorporated in Andhra Pradesh amendments held that where an execution petition was dismissed under Order 21, Rule 104(2), its restoration can be done under Order 21, Rule 105 (1) of CPC by showing sufficient cause for non- appearance of the petitioner when the application was called for hearing.

12. The learned Counsel for the petitioner, however, distinguishes it by pointing out that in the case on hand before this Court now, the date on which executing Court purported to have dismissed the petitioner's execution application for nonpayment of batta, an injunction order restraining the petitioner from executing the decree was in force and under these circumstances failure to pay batta on his part could not be considered an act of default and the petition could not have been dismissed on that ground. Such a dismissal, according to the learned Counsel for the petitioner, could be treated only as closing the proceedings for statistical purposes which could be revived after injunction order was vacated without reference to any limitation.

13. I may however make it clear at this stage that I am not hearing the revision petition, as such I am not required to go into the merits of the case and the correctness or otherwise of the order passed by the learned executing Court.

14. The question for consideration before me now is whether the order passed by the learned Judge of this Court can be reviewed in the light of the provisions

contained in Order XLVII CPC.

""Application for review of judgment.

1.(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;

(b) by a decree or order from which no appeal is allowed; or

(c) by a decision on a reference from a Court of Small causes; and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

XXX XXX XXX"

16. Before discussing this issue, it may be pertinent to mention here that the learned District Munsif against whose order CRP has been preferred to this Court has in his order mentioned that temporary injunction order was granted on 29-11-1989. EA No.385 of 1982 for delivery of certain immovable property was dismissed on 31-10-1989 for default namely, non-payment of batta for issuing delivery warrant and he proceeded on the assumption that the EA was dismissed before the injunction order was passed. It is conceded by the teamed Counsel for the respondent herein that this is erroneous and as stated in the memorandum of grounds of the revision petition, the ex parte temporary injunction order was obtained on 31-1-1989 which was later made absolute on 29-11-1989. Thus, it is conceded by both sides that as on the date of order of dismissal of the EA, an injunction order restraining the petitioner from executing the decree was in force. This is being stated for the purpose of record to avoid any confusion as to the facts.

17. As stated above, it is not for me now to go into the merits of the case as if I was hearing the civil revision petition itself. The scope of this petitioner under Order 47 of the CPC is limited. The question is whether the order passed by the learned Judge of this Court allowing the civil revision petition on payment of costs discloses any mistake or error apparent on the face of record as contemplated under clause (c) of Rule I of Order 47 of the CPC.

17. For this purpose, it is necessary to examine closely the order sought to be reviewed.

18. After narrating the facts of the case and after referring to the respective contentions of the learned Counsel appearing for both sides, the learned Judge made the following observation:

"The learned Counsel Mr. Prasad has cited a decision reported in Syedamian Sahib v. Janaki Ammal (supra). In which the Madras High Court laid down a proposition that revival of execution application which has been dismissed is not a final disposal of the execution application and subsequent applications can be filed for revival at any time and after such applications are tiled they are held to be one for revival or continuation of the previous applications.

In view of the peculiar circumstances of the case, the order of the Court below is set-aside, on condition of the petitioner pays an amount of Rs. 10,000/- to Sri G. Krishna Murthy learned Counsel for the respondent,....."

19. The contention of the learned Counsel for the petitioner is that the order passed by the learned Judge proceeds on the acceptance of the position of law as laid down in the case of Madras High Court AIR 1948 Mad. 498 (supra) which according to the learned Counsel as in clear terms laid down that order of "dismissal of the previous application" does not amount to final disposal of the same but it must be deemed to be still pending and the subsequent application could properly be considered to be a mere continuation or revival of the previous application. The contention is that once this position of law with reference to the specific facts of the case including the fact that injunction order was in force as on the date of purported dismissal of the execution application is accepted, it was logical on the part of the learned Judge to allow the civil revision petition. It is then contended that once an order is passed on merits in favour of the petitioner, the question of ordering the petitioner to pay huge costs in a sum of Rs. 10,000/- would not arise and it is under these circumstances that the part of the order awarding costs is now sought to be reviewed.

20. The learned Counsel for the respondent on the other hand contends that in fact the order sought to be reviewed was based on the consent of the parties and an order passed on the basis of consensus cannot be reviewed. That an order passed on the basis of consent cannot be reviewed is obvious enough unless there are circumstances to show that there was ground for believing that such consent was vitiated. But, in this case, there is absolutely no indication and there is no whisper in the order passed by the learned Judge of this Court to show that it was a culmination of any concession or consent emanating from or on behalf of the petitioner herein. It is not possible to treat the order sought to be reviewed as an order passed on consent.

21. The learned Counsel for the respondent further contends that the order under review also does not indicate that it was passed on the acceptance of the proposition of law as laid down in the case of the Madras High Court (supra) and as such it cannot be said allowing the CRP was the only course open to the learned Judge.

22. It is true that the order of the learned Judge sought to be reviewed does not mention in so many words that the learned Judge has accepted the preposition of law as laid down in the judgment of the Madras High Court AIR 1948 Mad. 498

(supra). But the manner and the language in which it has been cited and referred to would leave no manner of doubt that the learned Judge accepted the proposition as laid down in that judgment. After referring to the citation, the learned Judge proceeded to state "in which the Madras High Court laid down a proposition that revival of execution application which has been dismissed is not a final disposal of the execution application and subsequent applications can be filed for revival at anytime...." This makes it abundantly clear that the learned Judge proceeded on the basis of acceptance of law as laid down in the said citation.

23. If it were held otherwise and if it is assumed that the learned Judge has not accepted the proposition of law in the said citation and in the absence of any indication of consent as stated above, there remains no basis whatsoever for the order passed by the learned Judge. In the case of judicial orders, there is presumption that it is based on some foundation of law and facts unless the order absolutely fails to disclose any such foundation.

24. In this case, it cannot be said that the order is not based on same facts. The learned Judge has extracted the facts and the manner in which the judgment of the Madras High Court AIR 1948 Mad. 498 (supra) was referred would show that the learned Judge accepted the proposition of law as laid down in that citation. Thus, the order sought to be reviewed must be held to be based on facts as narrated in the order and on application of law as laid down in the Madras High Court judgment to the facts of the case.

25. If an order has been passed on merits in favour of a party, it is unusual that such successful party should be burdened with costs. The general rule is that costs shall follow the event unless the Court for good reasons otherwise orders. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some good cause for not-awarding costs to him. Thus, under certain circumstances a successful party can be denied costs. But, it is difficult to conceive how a successful party who was entitled for judgment on merits could be burdened with costs awarded to the opposite and unsuccessful party. In this view of the matter, the direction to the successful party to pay costs to the unsuccessful party in the absence of any special reasons mentioned in the order for such direction must be considered an error apparent on the face of the record.

26. In the result, this review petition is allowed and that part of the order dated 20-3-1998 in CRP No. 4405 of 1996 in which the revision petitioner is directed to pay costs of Rs. 10,000/- to the respondent's Counsel is re-called.