

(1999) 03 KAR CK 0030

In the Karnataka High Court

Case No : Civil Revision Petition No. 3175 of 1998

Harsh Chandravardhan Desai

APPELLANT

Vs

Karnataka State Financial Corporation, Hubli and Another

RESPONDENT

Date of Decision : 30-03-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 151
Limitation Act, 1963 — Section 123, 137
State Financial Corporations Act, 1951 — Section 31 (1) (aa), 32

Citation : (1999) 3 CivCC 422 : (1999) 5 KarLJ 568

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Advocate : Sri J.S. Shetty, for the Appellant; Sri K. Gopal Hegde, for the Respondent

Judgement

1. This revision petition u/s 115 of the CPC arises from the order dated 8th July, 1998, passed by the III Additional District Judge, Dharwad in Civil Miscellaneous Case No. 32 of 1995.

2. The facts of the case in the nutshell are that the Karnataka State Financial Corporation, the present respondent 1 had filed an application u/s 31(1)(aa) and Section 32 of the State Financial Corporations Act, 1951. The Additional District Judge by an order dated 13-12-1994 allowed the application, in the absence of the respondent 1, as according to the Additional District Judge, as it appears from the order dated 13-12-1994 the respondent was personally served who was absent. So, the District Judge observes as under: "So, he has placed ex parte". About the respondent 2 also it is mentioned "He is placed ex parte". It means that ex parte order has been passed against the applicant and others.

3. Against the order dated 13-12-1994, the present revision petitioner moved an application u/s 151 of the CPC for setting aside the ex parte order. This application was filed on 29-5-1995. The learned III Additional District Judge rejected that application on the ground that application was barred by limitation

of 30 days and there was no sufficient cause shown for delay in moving the application. Feeling aggrieved from the order dated 8th July, 1998 whereby the revision petitioner's application u/s 151 has been rejected on the ground of limitation, the revision petitioner has come up before this Court.

4. I have heard Sri J.S- Shetty, learned Counsel appearing for the applicant and Sri K. Gopal Hegde for respondent 1. Respondent 2 remained absent.

5. The learned Counsel for the applicant contended that the learned Court below acted illegally in rejecting that application by taking the ground as time-barred. Mr. Shetty contended that the Court below wrongly opined that application was barred by time. He further submitted as the application was not barred by time, there was no question of explaining any delay. Mr. Shetty, invited my attention to Article 137 of the Schedule to Limitation Act, 1963 and urged that Article 123 of the III Schedule to Limitation Act did not apply. He submitted that Article 123 in its application is confined to the case of setting aside the ex parte decree and not for the case of setting aside ex parte order, or the order of the Trial Court. The learned Counsel also contended that there is no provision in the Article dealing with setting aside the ex parte order. Article 137 which is residuary article could be applicable.

6. The learned Counsel further contended that as the Court below misapplied the Article 123 and wrongly opined that 30 days limitation was prescribed, it illegally refused to exercise jurisdiction in considering the application u/s 151 of the CPC on merits for setting aside the ex parte order. The contentions of the learned Counsel for the revision petitioner have been hotly contested on behalf of the respondent by Sri Gopala Hegde. Sri Gopal Hegde contended that the order in this case said to have been passed u/s 32(4)(a) or (5)(a) at the most and from such an order the Act provides for an appeal u/s 39(2) of the Act. The learned Counsel contended that as such the revision petition is misconceived and application for setting aside the ex parte order was also misconceived. Therefore, there is no good ground for allowing the revision. He further contended that the order may be deemed to be the decree even expression "order" is used, and therefore Article 123 does apply.

7. I have applied my mind to these respective contentions. There is no doubt that the order dated 13-12-1994 was passed ex parts in proceedings. There is no doubt that an appeal could have been preferred from the order dated 13-12-1994, which could be said to be an ex parte order under sub-section (4) (a) or sub-section (5)(a) of Section 32 of the State Financial Corporations Act, 1951. But, that does not mean that his remedy to approach the Court to set aside the ex parte order itself available for expeditious disposal was taken away. In this case, if an appeal supposed would have been filed and this Court would have found that sufficient cause had been shown or that the order could not be passed an ex parte, again the matter would have been sent for decision afresh on merit after good long time. So, remedy for setting aside ex parte order in my opinion was available u/s 151 of the CPC and Court could exercise its powers to

do justice and avoid multiplicity of proceeding on good cause being shown.

8. That Section 151 of the CPC is only declaratory, of powers which are inherent in the Court to pass orders in the ends of justice to avoid multiplicity of proceedings as well as abuse of Court proceedings. Section 151 says that no provision in the Code shall be deemed to otherwise affect that power. So, the inherent power of Court stands vested in the Court itself to pass the order necessary in the interest of justice in course proceeding of a case, this power cannot be deemed to be taken away unless there is an express provision to the effect of depriving or denying of the inherent power from the Civil Court or it may be so established that by necessary inherent powers have been taken away. The appropriate remedy of an appeal lies under sub-sections (4)(a) and (5)(a) of Section 32 of the Act. The District Judge here is referred to and is indicated as the Court of civil jurisdiction i.e., District Judge and those powers including inherent powers remain vested in the District Judge, when acting as a Civil Court. That the petitioner could as such have the remedy to approach the Court u/s 151 of the Code of Civil Procedure. The Court could recall the order and give him an opportunity if the Court was satisfied, the applicant had shown sufficient cause for not preferring objections in the time and in showing the cause for his absence on the dates. It is always open to the District Court to reject or refuse to exercise inherent jurisdiction if no cause was shown. But, when two remedies were available, if applicant opts for one remedy, then it may be said that the other may be closed. Anyway, I do not express any view on this point, but no doubt, u/s 151 of the CPC remedy was available to the respondent. An application for setting aside ex parte order whether comes under Article 123 or 137, yet remains a question to be determined. The expression "decree" or "order" has nowhere been defined in the Limitation Act, the expressions "decree" or "order" have only been defined in the Code of Civil Procedure.

9. Sub-section (2) of Section 2 of the CPC defines "Decree" which reads as under:-

"(2) "Decree" means 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. It shall be deemed to include the rejecting of a plaint and the determination of any question within Section 144, but shall not include:-

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default".

Sub-section (14) of Section 2 defines "Order" as under:

"(14) "Order" means the formal expression of any decision of a Civil Court which is not a decree".

A reading of two expressions as defined in the CPC and the yardstick provided by the Code for determining the decree as is applied in my opinion clearly reveals

that the order impugned cannot be said to be a decree and specifically when the Principal Act dealing with the matter does not declare the order to be decree and it has to be held to be an order.

10. Order dated 13-12-1994 the Act describes that such an order is said to be an order and when the Act itself states that the order to be treated as an order and not the decree, an application for setting aside such an order when made, though could not be made under Order IX, Rule 13 of the CPC, could be made only u/s 151 of the Code of Civil Procedure. Article 123 deals with an application for setting aside the decree passed ex parte or to hear the appeal decreed or ex parte. So, in such case, in my opinion, Article 123 could not be applicable. The Article applicable will be residuary Article namely Article 137.

11. Before parting the judgment, I may mention that a Division Bench of Allahabad High Court in the case of Rakesh Sugar Tail Factory, Mohammadabad and Others v Uttar Pradesh Financial Corporation, Kanpur, has also opined that Section 151 is applicable to such situation.

In my opinion, in the present case, Article 137 was applicable and the Court below illegally refused to consider the application u/s 151 on merits simply on the ground that application was barred by limitation by erroneously relying on Article 123 of Limitation Act and by holding that no sufficient cause was shown. Without making any observations on the merits of the application or allegation made in the application, I allow the revision setting aside the order impugned dated 8-7-1998 holding that the application was within time and I direct the District Judge to consider the application u/s 151 of the CPC on merits within a period of two months from the date of communication of the order of this Court.

12. Revision is allowed with costs.