

(2011) 03 SHI CK 0223
In the High Court Of Himachal Pradesh
Case No : Civil Revision No. 161 of 2006

K.D. Sharma and Others

APPELLANT

Vs

The H.P. State Co-Operative Bank Ltd. and Another

RESPONDENT

Date of Decision : 21-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 34(1), Order 9 Rule 9(1), 115
Limitation Act, 1963 — Article 122, 123, 12, 14, 16

Citation : AIR 2011 HP 60 : (2011) 6 RCR(Civil) 209 : (2011) 2 ShimLC 223

Hon'ble Judges : V.K. Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

V.K. Sharma, J.—The challenge in this revision petition u/s 115, the Code of Civil Procedure, 1908 (in short "CPC"), is against order dated 30.8.2006, passed by the learned District Judge, Shimla, allowing an application under Order 9 Rule 9(1) CPC and thereby setting aside order dated 29.10.2001 and restoring the suit of Respondent No. 1-Plaintiff, filed against the Petitioners-Defendants, proforma Respondent No. 2-Defendant, whose name stands deleted from the array of Respondents vide order dated 22.10.2007, passed by this Court and the original Defendant No. 2, Shri P.S. Rawat, who died during pendency of the proceedings in the restoration application before the learned trial Court and whose name was also deleted vide order dated 2.11.2004, passed by that Court. For the sake of convenience, the parties shall here-in-after be referred to as the "Plaintiff-bank" and "Defendants."

2. The question for determination is as follows:

Whether the limitation under Article 122 of the Limitation Act, 1963 (in short "the Limitation Act"), begins to run from "the date of dismissal" or "the date of knowledge?

3. Article 122 of the Limitation Act is as under:

122. To restore a suit or appeal or application for review or revision dismissed for default of appearance or for want of prosecution or for failure to pay costs of service of process or to furnish security for costs. Thirty days The date of dismissal.

4. The factual background may be stated first. The suit which was valued for the purpose of jurisdiction at Rs. Six Lac was initially filed by the Plaintiff-bank in this Court (High Court). Later on, consequent upon enhancement of original pecuniary jurisdiction of this Court to Rs. Ten Lac and above and the corresponding increase in the pecuniary jurisdiction of the subordinate Courts by virtue of amendment in the H.P. Courts Act vide amendment Act No. 16 of 2001, the suit was transferred to the Court of the learned District Judge, Shimla, with a direction to the parties through their learned Counsel to appear before the transferee Court on 29.10.2001. On 29.10.2001, though the Defendants appeared before the learned District Judge through counsel, none appeared for the Plaintiff-bank and consequently the suit was dismissed in default.

5. Against the above backdrop, the application under Order 9 Rule 9(1) CPC was moved on the averments that Shri S.S. Mittal, who had since been designated as Senior Advocate, was the counsel for the Plaintiff-bank before the Hon'ble High Court. He had instructed Shri Parkash Thakur, Advocate, to attend the Court on 29.10.2001, on behalf of the Plaintiff-bank and he had been told that power of attorney in his favour would be procured. However, Shri Parkash Thakur, Advocate, had to suddenly leave for his home town on 29.10.2001 and he could not inform Shri S.S. Mittal, about his sudden departure. Shri S.S. Mittal, remained under the impression that the Court would be attended by Mr. Parkash Thakur. Because of non appearance of Shri Parkash Tahkur, in the Court on that day the suit was dismissed in default. Even thereafter Shri Parkash Thakur, did not inform the Plaintiff-bank or Shri Mittal that he had not been able to attend the Court on that day and it was only in the first week of April, 2002, that the matter came to be noticed in the office of Shri S.S. Mittal, Advocate. Immediately, thereafter a copy of the order was applied for and the application for setting aside the order of dismissal was moved without undue delay. It was further averred that non appearance of the counsel for the Plaintiff in the Court of learned District Judge on 29.10.2001, was not intentional, but on account of the above circumstances.

6. The application was contested by the Defendants on preliminary objections regarding limitation, particularly in the absence of any prayer for condonation of delay, the suit having abated owing to death of original Defendant No. 2, Shri P.S. Rawat and lack of sufficient cause for non appearance on behalf of the Plaintiff-bank. On merits, it was admitted that the suit was filed in the High Court and was later on transferred to the Court of learned District Judge, Shimla, with a direction to the parties through their counsel to appear before the transferee Court on 29.10.2001. On merits, it was alleged that the averments made in the application are vague in nature, as no date of alleged instructions has been given

nor it is stated that power of attorney was executed by the Plaintiff-bank in favour of the said instructed Advocate, authorizing him to appear in the Court on 29.10.2001. The alleged cause is neither good nor sufficient, as no efforts within reasonable time after 29.10.2001, were made by the Plaintiff-bank to find out the fate of the suit and it was only when rejoinder in CWP No. 297 of 2002, titled K.D. Sharma and Ors. v. H.P. State Co-Operative Bank was filed by the Defendants in the High Court stating about the dismissal of the suit by the learned District Judge, Shimla, in default on 29.10.2001, when the present application happened to be filed by the Plaintiff-bank. According to the Defendants, non appearance was intentional just to prolong the agony of the Defendants and deny them fruits of the decree dated 16.1.1997, legally and validly passed in their favour, which decree the Plaintiff-bank claimed to be null and void after a period of more than three years in the suit, which was dismissed in default on 29.10.2001.

7. On the above pleadings of the parties, the following issues were settled by the learned trial Court:

- 1) Whether there exists sufficient grounds to restore the suit dismissed in default as alleged?. OPA.
- 2) Whether the application is within limitation?. OPA.
- 3) Relief.

8. After the parties led evidence and were heard by the learned trial Court, the application was allowed by holding both the issues in affirmative.

9. I have heard the learned Counsel for the parties and gone through the record.

10. It was contended on behalf of the Defendants that the starting point of limitation under Article 122 of the Limitation Act is "the date of dismissal" and not the "date of knowledge". As such, the application ought to have been filed within 30 days from the date of dismissal of the suit for non appearance on 29.10.2001, that is, on or before 28.11.2001. However, since the application was filed only on 29.4.2002, that is, after more than five months after expiry of the period of limitation, the same was hopelessly barred by time. Furthermore, neither any prayer for condonation of delay was made in the application nor a separate application u/s 5 of the Limitation Act was moved.

11. Conversely, the impugned order dated 30.8.2006, was supported on behalf of the Plaintiff-bank and in the alternative, it was submitted that permission to file an application u/s 5 of the Limitation Act for condonation of delay in filing the restoration application may be granted even at this stage.

12. The learned trial Court has based the impugned order dated 30.8.2006, on a decision of this Court in Prem Chand v. Sundar Ram Latest HLJ 2000 (HP) 22 and another decision of the Hon"ble Kerala High Court in Unniraman Vs. Padmanabhan and Another,

13. Insofar as the judgment of this Court in *Prem Chand v. Sundar Ram*, supra, is concerned, it would be seen that in that case an application for setting aside an order of dismissal of appeal for non appearance on behalf of the Appellant was also dismissed in default. Thereafter, another application seeking to restore the earlier application was also dismissed in default. Thus, both these questions fell within the purview of Article 122 of the Limitation Act. However, a combined and harmonious reading of the judgment would go to show that question of limitation in filing these applications was not at all involved and the appeal was ordered to be restored by allowing both the applications subject to costs.

14. However, in the present case, a specific preliminary objection was raised by the Defendants that the application was prima facie barred by limitation and was liable to be dismissed, *moreso*, in the absence of any prayer for condonation of delay.

15. In *Unniraman v. Padmanabhan and Anr.* supra, the application was for setting aside *ex parte* decree, which fell within the ambit of Article 123 of the Limitation Act and not under Article 122 of the said Act.

16. In *Lanka Venkateswarlu (D) by LRs. v. State of A.P. and Ors.* JT 2011 (2) SC 540 the Hon'ble Supreme Court has laid down the following law on the application of the provisions of the Limitation Act and condonation of delay in such matters. Paras 19, 20 and 22 of the judgment being relevant are extracted below:

19. We have considered the submissions made by the learned Counsel. At the outset, it needs to be stated that generally speaking, the Courts in this country, including this Court, adopt a liberal approach in considering the application for condonation of delay on the ground of sufficient cause u/s 5 of the Limitation Act. This principle is well settled and has been set out succinctly in the case of *Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others*,

20. In the case of *M. Balakrishnan* (supra), this Court again reiterated the principle that rules of limitation are not meant to destroy the rights of parties. They are meant to see that the parties do not resort to dilatory tactics, but seek their remedy promptly.

22. The concepts of liberal approach and reasonableness in exercise of the discretion by the Courts in condoning delay, have been again stated by this Court in the case of *Balwant Singh* (supra), as follows:

25. We may state that even if the term "sufficient cause" has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of "reasonableness" as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of party to arise. These principles should be adhered to

and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly.

17. The Hon''ble Apex Court has further held as under in Noharlal Verma Vs. District Co-Operative Central Bank Limited, Jagdalpur, vide paras 27, 28 and 29:

27. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation, a Court or an Adjudicating Authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.

28. Sub-section (1) of Section 3 of the Limitation Act, 1963 reads as under;

(3) Bar of limitation.--(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. (emphasis supplied)

29. Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in absence of such plea by the Defendant, Respondent or opponent, the Court or Authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation.

18. In Damodaran Pillai and Others Vs. South Indian Bank Ltd., the Hon''ble Supreme Court has held that the statutory period of limitation for filing of a restoration application would be the date of order and not the knowledge thereabout, vide para 11 of the judgment, which is as under:

The learned Judge, however, while arriving at the said finding failed and/or neglected to consider the effect of Sub-rule (3) of Rule 106. A bare perusal of the aforementioned rule will clearly go to show that when an application is dismissed for default in terms of Rule 105, the starting period of limitation for filing of a restoration application would be the date of the order and not the knowledge thereabout. As the applicant is represented in the proceeding through his Advocate, his knowledge of the order is presumed. The starting point of limitation being knowledge about the disposal of the execution petition would arise only in a case where an ex-parte order was passed and that too without

proper notice upon the judgment debtor and not otherwise. Thus, if an order has been passed dismissing an application for default, the application for restoration thereof must be filed only within a period of thirty days from the date of the said order and not thereafter. In that view of the matter, the date when the decree holder acquired the knowledge of the order of dismissal of the execution petition was, therefore, wholly irrelevant.

19. To the similar effect is the law laid down by the Hon''ble Delhi High Court in *Shri Virender Kumar Vs. Smt. Maya Devi*, (paras 3 and 4) and Punjab and Haryana High Court in *Smt. Dev Bala Seghal v. Devinder Pal Sehgal* 2002 (1) CCC 32 (P&H) (paras 9, 11 and 12).

20. In *Antonysami Vs. Arulanandam Pillai* (D) by Lrs. and Another, the following dictum of law has been laid down by the Hon''ble Supreme Court vide para 17 of the judgment:

The fixation of periods of limitation are bound to be to some extent arbitrary and may at times result in hardship. But in construing such provisions equitable considerations are out of place and the strict grammatical, meaning of the words is the only safe guide. (See *Nagendra Nath Dey v. Suresh Chandra Dey*) The decree was enforceable immediately after the date specified in the decree i.e. 23.9.1966 for the decree-holder to deposit the consideration money. If the direction given in the decree to the judgment-debtor to measure and demarcate the land by that date (23.9.1966) was not complied with the decree-holder was free to execute the decree. The steps to be taken by the decree-holder in this regard are provided in Order 21 Rule 34(1) Code of Civil Procedure.

21. In *Ragho Singh Vs. Mohan Singh and Others*, the Hon''ble Apex Court has held that condonation of delay is not permissible in the absence of any application.

22. To the similar effect is the law laid down by this Court in *Kailash Distt. Co-operative Society v. Sher Singh and Ors.* ILR 1986 (HP) 721 (paras 6 to 8).

23. In view of the above legal position, the irresistible conclusion that emerges is that starting point of limitation in an application under Order 9 Rule 9(1) CPC is from "the date of order" and not "the date of knowledge".

24. Insofar as the submission on behalf of the Plaintiff-bank with regard to grant of permission to file an application for condonation of delay in moving the application under Order 9 Rule 9(1) CPC at this stage is concerned, suffice it to say that the same cannot be considered at this belated stage, as such a course would be in negation of the legal position enunciated in the judgments referred to here-in-above.

25. In view of the above, the petition is allowed and consequently the impugned order dated 30.8.2006, shall stand reversed.