
(2005) 05 J&K CK 0007
In the Jammu And Kashmir High Court

Mehjabeen Simon and Another	Vs	APPELLANT
Fayaz Ahmad Simon and Others		RESPONDENT

Date of Decision : 09-05-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Limitation Act, 1963 — Section 5
Provincial Insolvency Act, 1920 — Section 4, 5

Citation : AIR 2006 J&K 105

Hon'ble Judges : Mansoor Ahmad Mir, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Mansoor Ahmad Mir, J.—This order will govern the revision petition in hand presented by Mr. Z. A. Shah on behalf of the petitioners

assailing the order dated 7th Feb., 2005 whereby the application title as Mahajabeen Simon v. Fayaz Ahfnad Simon for restoration of suit titled as

Mahajabeen Simon v. Fayaz Ahmad Simon stands rejected. The said order shall be hereinafter referred to as impugned order.

2. Heard.

3. Mr. Shah argued that the order dated 24th March, 2004 has not been passed in terms of Order 9, Rule 3. CPC. but has been passed in terms

of Section 151, CPC. The suit can be dismissed in terms of Order 9, Rule 3, CPC only when the parties have notice of the hearing. Article 181,

governs the application for restoration and not Article 163 of Limitation Act. The Vakalatnama has been filed subsequently in the restoration

application, thus is compliance under law. If the Court holds that the suit has been dismissed in terms of Order 9, Rule 3, CPC even then notice for

restoration is not required in terms of Order 9, Rule 4, CPC, because the suit has been dismissed in absence of both the parties. In the given

circumstances Article 163 of the Limitation Act is applicable and the prayer for condonation of delay is to be made but no formal application for

condonation of delay is required to be made even oral prayer is enough.

4. Mr. B.A. Bashir, Advocate argued that the suit has been dismissed in terms of Order 9, Rule 3, CPC and the plaintiffs/petitioners have moved

the application in terms of Order 9, Rule 4, CPC for restoration of the suit. The application is apparently time barred. No application for

condonation of delay has been made. It is the duty of the Court to dismiss the application being time barred even if the plea has not been taken by

the opposite side.

5. The inherent powers in terms of Section 151, CPC cannot be pressed into service in order to restore the suit when specific provision prescribes

how to move application for restoration. Further he argued that if the petitioners/plaintiffs would have moved application for condonation of delay,

it was the duty of the petitioners/plaintiffs to carve out sufficient cause. The plaintiffs should have exercised due care and caution. The revisional

jurisdiction cannot be invoked or exercised in order to interfere with the impugned order. The vakalatnama has been presented after presentation

of restoration application, thus the restoration application was not filed by duly authorized/recognized agent.

6. Considered.

7. In order to return finding on the issues projected, it is necessary to notice the facts and minutes of the case which are relevant for returning

finding in this revision petition.

8. It appears that respondent No. 1 has filed a revision petition No. 67/1999 assailing the order passed by, City Munsiff, Srinagar and, the first

appellate Court. The respondent No. 1/revision petitioner absented and the revision petition was dismissed by this Court vide order dated 29th

October, 2003. The Registry accordingly send down the lower Court file and the same was received by the Registry of City Munsiff Court on 11

th November, 2003. In terms of order dated 11 th November, 2003, the file was posted for further proceedings on 30th December, 2003 and on

30th December, 2003 none has appeared and case was adjourned for

appearance of the plaintiff for 24th March, 2004. Nobody has appeared on 24th March, 2004 and the suit has been dismissed vide order dated 24th March, 2004 in default.

9. It appears that respondent No. 1/revision petitioner filed application on 13th November, 2003 for the restoration of the revision petition. The

said restoration application was on board of this Court till 21st April, 2004 and with the consensus of learned Counsel for the parties, the

application for restoration was granted and the revision petition has been restored to its original number.

10. During the pendency of the revision petition No. 67/99, the plaintiffs/petitibners came to know on 16-7-2004 that the suit has been dismissed

in default on 24-3-2004 and accordingly they filed an application for restoration on 19th July, 2004.

11. It is necessary to reproduce the order dated 29th October. 2003 passed by this Court in revision petition No. 67/99 herein:

Case is adjourned frequently for most revision petitioner or his counsel is not appearing in the case. Last petitioner has appeared on 2-6-2003,

thereafter case came on board on 9-7-2003, 19-9-2003 and 8-10-2003. Yet nobody appeared on behalf of the petitioner. It is so even today,

petitioner appears not interested. Dismissed. Send back the record, inform the Court below of this.

12. This Court has not fixed a date before the Court below. Had this Court fixed the date then plain tiffs/petitioners were supposed to be present

before the Court of City Munsiff, Srinagar. The file came up before learned City Munsiff, Srinagar on 11th November, 2003 and learned City

Munsiff, Srinagar passed order in Urdu that the file has been received from the High Court and posted for proceedings on 30th December 2003.

On 30th December, 2003 none of the parties were present and file was posted for 24-3-2004 and on 24th March, 2004, the suit stands

dismissed in default in absence of both the parties.

13. Now, question is whether the order dated 24th March, 2004 is an order passed in terms of Order 9, Rule 3, CPC or otherwise.

14. Order 9, Rule 3, CPC reads as under:

Where neither party appears, suit to be dismissed. Whether neither party appears when the suit is called on for hearing, the Court, may make an

order that the suit be dismissed.

15. This provision of law mandates that the suit should have been posted for hearing. The question is what does the word 'hearing' mean ?

16. In Black's Law Dictionary, the meaning of word 'hearing' is given as under:

hearing. A judicial session, usu., open to the public, held for the purpose of deciding issues of fact or of law, sometimes with witnesses testifying.

17. In New Webster's Dictionary, the meaning of word 'hearing' is given as under:

hearing ... an opportunity to be heard -- Law, preliminary investigation of a case to determine its validity; a judicial investigation before a Court.

18. In Oxford Dictionary, the meaning of word 'hearing' is given as under:

hearing...an opportunity to state one's case (give them a fair hearing), the listening to evidence and pleadings in a law Court.

19. The ""hearing"" means a positive hearing i.e. parties are to be heard or listened but when a party has no notice of posting of the case then how it can be said that case was adjourned and posted for hearing.

20. The hearing means recording of evidence, taking steps for taking the case to its logical conclusion, examination of questions involved in the suit,

Considering the arguments. While going through the provisions of Order 9, CPC read with Orders 14 and 17, CPC, the essential pre-requisite for

holding whether the case was posted for hearing is whether the Judge has to apply mind to some aspect of the case. If in a routine manner the

Court passes interim order and has adjourned the case without posting the case for hearing it cannot be said that suit was posted for hearing.

21. In terms of Order 9 CPC, the first hearing is to be conducted in terms of summons issued to the defendants. But when a case is adjourned in

absence of both the parties and when the file has been received from superior Court, it cannot be said that the file has been posted for hearing in

terms of Order 9, CPC.

22. In Nanalal M. Varma and Co. (Gunnies) P. Ltd. Vs. Gordhandas Jerambhai and Others, Calcutta High Court observed as under para 8.

8. At one stage, however, of the argument of learned Counsel for the appellant our attention was drawn to Rule 4 of Order 9 of the Code. This

Rule, inter alia, provides that where a suit is dismissed under Rule 3, the plaintiff may subject to the law of limitation bring a fresh suit; or he may

apply for an order to set the dismissal aside. Rule 3 of Order 9 prescribes that where neither party appears when the suit is called on for hearing

the Court may make an order that the suit be dismissed. In the instant case Rule 3 does not strictly apply. It is true that neither party appeared

when Mallick, J., made the order of dismissal of the suit; but the suit was not called on for hearing. The suit was in the special list under Chapter X,

Rule 35 of the Original Side Rules and the only point to be considered by the learned Judge was whether or not it should be dismissed for want of

prosecution. From this point of view it cannot be said that Rule 3 of O. 9 is attracted to this case.

23. The Hon'ble High Court of Hyderabad in *Ram Reddy v. Yenka Reddy*, reported in AIR 1956 AP 139 has observed as under:

3. The case in 1348 Nazir-e-Osmania 58 (A) is an authority for the proposition that in seeking remedy what has to be seen is the form of the order

passed and not what order ought to have been passed. We do not dispute this point. In the present case, the plaintiff has applied for restoration

which was a correct remedy considering the nature of the order. This ruling therefore does not help the contention of the learned advocate.

We do not dispute the proposition laid down in *Ajodhya Mahton and Another Vs. Musammat Phul Kuer*, that Section 151 C.P.C. has no

application where there is specific provision. An order of dismissal of a suit for default of appearance is made under Rules 38 and 12 of Order 9,

Civil P.C.

Rule 3 provides that if neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed. Rule 4

of the said order empowers the plaintiff in such case to apply to have the dismissal set aside. Rule 8 provides that where the defendant appears,

but the plaintiff does not appear, the Court shall make an order that the suit be dismissed, and Rule 9 empowers the plaintiff in such a case to apply

to have the order of dismissal set aside.

Rule 12 provides that where a plaintiff or defendant who has been ordered to appear in person or show sufficient cause to the satisfaction of the

Court, fails so to appear, he shall be subject to all the provisions of the previous rules applicable to plaintiffs and defendants respectively. Rules 8

and 12 are not applicable to the present case as both parties were absent. The

rule which appears to be applicable in this case is Rule 3 which is to the following effect:

Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

This rule contemplates a default by the plaintiff when the suit is called on for hearing. The suit could only be called on for hearing under this rule

when parties have notice of the hearing. In the present case admittedly parties were not served, as such it cannot be said that the plaintiff had notice

of the hearing. The dismissal therefore cannot be deemed to be under Order 9, Rule 3. In the result, Order 9, Rule 9 would also not become

applicable.

24. The Hon'ble High Court of Vishwanath Naganath Andage Vs. Mahadeo Sultanappa Waghmode and Another, has observed as under:

(2) In support of this application, it was urged by Mr. Walawalkar that inasmuch as the application Ex. 19 fell within the purview of Section 4 of

the Provincial Insolvency Act and all the provisions of the CPC applied to such application as if it was a suit by virtue of the provisions of Section 5

of that Act, the application for restoration of Ex. 19 was one falling under Order 9, Rule 9, of the CPC and that, therefore, since it was filed more

than 30 days after the date of the order rejecting Ex. 19 it was barred under Article 163 of the Limitation Act. In my opinion, however, unless and

until it is shown on the record of the case either in the form of an endorsement on the Ex. 19 itself or an entry in the Roznama relating to the case,

that opponent No. 2 or his pleader or both were present in Court on 22nd April, 1960 when the date for hearing the application Ex. 19 was fixed

by the Court, the default in appearance on the date of the hearing of the application on the part of opponent No. 2 could not be said to be one

which would attract the provisions of Order 9, Rule 9 or of Article 163 of the Limitation Act. Rule 9 of Order 9 contemplates a case where the

plaintiff is aware, as is almost invariably the case, of the date of hearing of the suit and yet for some reason or the other he fails to appear in Court

on that date. If in that event, the Court dismisses the suit, an application for restoration of the suit may be made by the plaintiff under that Rule. But

where the plaintiff is not aware of the date of hearing of the suit as in the case of a suit adjourned sine die and suddenly taken up for hearing and

final disposal without giving previous intimation to the parties thereto, and the suit dismissed for his default in appearing in Court on such date, then, in my opinion, any application that might be made by him for restoration of the suit would not fall within the purview of Order 9, Rule 9. In such a case, if the Court is satisfied that the plaintiff was not at all aware of the date of hearing of his suit and the suit was dismissed in his absence, the Court would, in exercise of its inherent jurisdiction u/s 151 of the Civil Procedure Code, entertain and grant an application by such plaintiff for restoration of the suit and order the suit to be restored. In the present case, the Court was satisfied that opponent No. 2 had no notice of the date of hearing of his application Ex. 19 which was fixed on 22nd April, 1960 and that, therefore, he could not remain present in Court on the date when that application was disposed of. The learned Judge accordingly allowed the application for restoration of the application Ex. 19 in exercise of his jurisdiction u/s 151 of the CPC although that application was made more than 30 days after the order dismissing the application Ex. 19 was passed.

25. The Hon'ble High Court of Punjab has observed in *Sohan Singh Ram Singh and Another Vs. Hans Raj and Others*, as under:

5. Now, what is the meaning of the expression ""hearing"" in its application to the particular facts and circumstances of this case ? To ""hear"" implies that there is someone before the Court to speak. In a broad general sense the expression ""hearing"" is applied to the consideration of a case before a person clothed with judicial or quasi-judicial powers at the several stages of its progress, subsequent to its inception. A hearing is said to be 'final' if the case is absolutely determined on that hearing and to be 'interlocutory' if its purpose is to get the case into such shape that it may, in the end, be properly heard and finally adjudicated on the merits. In a more technical sense the expression ""hearing"" means the introduction of evidence, the arguments of counsel and the pronouncement of a decree. I think the word ""hearing"" in Rule 6 of Order 9 of the CPC has been used not in its broad or general sense but in its technical sense to mean a hearing at which the Judge either takes evidence or hears arguments or considers questions relating to the determination of the suit which would enable him finally to come to an adjudication upon it : *Balmakund Marwari v.*

Lachmi Narain Marwari AIR 1920 Pat 595 Mt. Barkat Bibi v. Fateh Ali AIR 1949 Lah 63. A day on which interlocutory matters concerning the

future conduct of the case are taken up for consideration does not fall within the ambit of the expression "the date of the hearing" AIR 1949 Lah

63. A day on which a commissioner submits his report to the Court and on which no other matter relating to the suit is taken up for consideration

cannot possibly be regarded as the date of the hearing. Manohar Dass v. Birandari Sheikhpurain AIR 1936 Lah 280. On that day it is not

necessary for any one to speak for no evidence is to be recorded, no arguments are to be heard and no other question regarding the determination

of the suit is to be agitated. The Court is only to direct that the Commissioner's report be placed on the file.

26. When a superior Court sends down the file usually the date is to be fixed for causing appearance in the Court below and then on that date

parties are supposed to cause their appearance and then it can be said that case had been posted for hearing in the Court below. But when no

such date has been fixed by the superior Court, then it cannot be said that the case has been fixed for hearing and, the lower Court has to issue

notice to the parties while keeping in view the principles of natural justice. In the given circumstances it is the practice of the Courts to issue notice

to the parties.

27. Applying the test to the instant case, it is hereby held that suit was not adjourned for hearing. Thus the suit cannot be said to have been

dismissed in terms of Order 9, Rule 3, CPC.

28. In the given circumstances, one comes to inescapable conclusion that the suit has been dismissed in terms of Section 151, CPC.

29. The application for restoration is to be presented within three years in terms of Article 181 of Limitation Act. The application has been

presented well in time. The trial Court should have granted the application.

30. No doubt, the petitioners/plaintiffs have mentioned in the application that application for restoration is in terms of Order 9, Rule 4, CPC but

mere quoting the provision of law does not mean that Court is precluded from holding that under what provision of law the application has

been made and which of the provisions are applicable.

31. Having glance of the aforesaid discussion, it is admitted that revision petition

No. 67/99 is still pending and the parties were contesting the restoration application from 13th November, 2003 till 21st April, 2004. It is admitted fact that respondent No. 1 has filed revision petition which was dismissed and restored with the consensus of the learned Counsel for the parties vide order dated 21st April, 2004. This means the parties were litigating consciously before this Court.

32. The parties have caused appearance before this Court in application for restoration of the revision petition from 13th November, 2003 till 21st April, 2004 and on the said date the revision petition has been restored then how it can be said that the plaintiffs/petitioners herein, had no interest and have not caused appearance deliberately before the trial Court on 24th March, 2004, whereby the suit stands dismissed in default and, have not exercised due care and caution. The trial Court (City Munsiff, Srinagar) ought to have taken notice of all the facts and circumstances.

33. In the given circumstances, it can be safely held that the petitioners/plaintiffs and even the respondent No. 1 were and are litigating in this Court in good faith with due care and caution.

34. Now the question which needs answer is, that if the file would have been posted for hearing and the case would have been dismissed in default of the parties, whether the application for condonation of delay was required to be made or oral prayer was sufficient.

35. In the given circumstances Article 163 of Limitation Act is applicable. Thus the prayer for condonation of delay is to be made.

36. This Court has held in Shanti Devi and Ors. v. Ram Lal reported in 1988 KLJ 335 as under:

2. ...The powers to condone delay can be exercised if the applicant satisfies the Court that he had sufficient cause for not filing the application

within the period prescribed. In this regard the Court can be satisfied even from affidavits or documents on the record. It is not at all necessary in

law that a formal application must be filed. The Division Bench of Allahabad High Court in Mt. Kulsoomun Nissa and Another Vs. Noor

Mohammad alias Sultan Haider and Another, has held that the Court dismissing an appeal as time barred merely on the ground that the appellant

has not made a formal application for extension of time u/s 5 of the Limitation Act errs in exercising its discretion in the matter. In Nirmal

Chaudhary Vs. Bishambar Lal, it has been held that it does not even necessarily imply in law that power of the Court to condone delay is

circumscribed by an application being filed and the powers of the Court are not necessarily dependent on a formal application being made by the

appellant. In this case it has been held further that if such an application is made well and good but if it is not made only an oral prayer is made for

condonation of delay the Court is not powerless, if there is material on the record to show the facts constituting sufficient causes, for condonation

of delay.

37. The Calcutta High Court in State of West Bengal and others Vs. Nripendra Nath Banerjee and others, has held as under, Paras 27 and 28.

27. Quite clearly, the application for condonation need not necessarily be in writing, it may be orally made. Nor need it be very formal. But an

application there must be. I do not see any contrary view in the authorities cited for the Smt. Sandhya Rani Sarkar Vs. Smt. Sudha Rani Debi and

Others, .

28. An oral application is equally subject to the laws of limitation as a written application. There is no law which says otherwise. If it were

otherwise, one could attempt to get round limitation intentionally by making oral applications instead of written ones. But I quite see that if there is a

slight delay in filing the memo of appeal originally, an oral prayer for condonation, made at the time of hearing of the appeal, (may be after many

years), is not always realized to be an application orally made, which is barred by time under the residuary Article.

38. The Apex Court in Naik Mahabir Singh v. Chief of Army Staff reported in 1990 SCC 89 has held as under:

1. Heard counsel for the petitioner. This petition is barred by limitation and no application for condonation of delay has been made. We have,

however, accepted the oral prayer of the counsel to condone the delay and have proceeded to hear the matter on merits.

39. Having glance of the above discussion even the oral submission is also enough.

40. It is the beaten law of the land that technicalities and mystic maybes shall not come in the way in order to do justice between the parties but the

fact is that the party praying for condonation of delay must carve out a cause.

41. The Rajasthan High Court in case Shishupal Vs. Manak Chand, observed as under:

14. The said view is in conformity with Mool Chand Vs. Ganga Sahai, and Nagpur view Ramchandra Khatik v. Sahadeo Khosti AIR 1945 Nag

185 and we have taken the above view having to the law laid down by their Lordships of the Supreme Court in Sangram Singh Vs. Election

Tribunal, Kotah, Bhurey Lal Baya, . We are therefore of the opinion that when the suit has been dismissed in default of both the parties and it has

been restored back on the application of the plaintiff, without notice of the application to the defendant, a notice is necessary to the defendant after

restoration for proceeding with the hearing of the suit, although, there may be an ex parte order passed against the defendant before dismissal of

the suit in default of the parties. The question does not make any reference to the situation that there was an ex parte order against the defendant.

Even if there is no ex parte order against the defendant, the answer to the question would be that for proceeding in the suit after restoration, notice

to the defendant is necessary. We accordingly answer question No. 2 in the manner that notice to the defendant is necessary for proceeding with

the suit after restoration.

15. The revision petition shall now go back for disposal in accordance with law.

42. The Allahabad High Court in Kumari Savitri Roy Vs. Union of India, , has observed as under:

5. Before we proceed further to ascertain whether the impugned order was covered under the provisions of Rule 4, Order 40 of the Code, it is

convenient to have certain principles of interpretation of the procedural law. The principles of interpretation of the procedural law are slightly

different that the principles in respect of substantive law.

6. In owners and Parties interested in Owners and Parties interested in M.V. "ValiPero" Vs. Fernando Lopez and Others, Hon'ble J.S. Verma J.

was pleased to observe as follows (at p. 2212):

Rules of procedure are not by themselves an end but the means to achieve the end of justice. Rules of procedure are tools forged to achieve justice

and are not hurdles to obstruct the pathway to justice Construction of a rule of procedure which promotes justice, and prevents its miscarriage by

enabling the Court to do Justice in myriad situation, all of which cannot be

envisaged, acting within the limits of the permissible construction, must be preferred to that which is rigid and negatives the cause of justice.

7. In Central Bureau of Investigation, Special Investigation Cell-I, New Delhi Vs. Anupam J. Kulkarni, it was observed that ""procedural law is

meant to further the ends of justice and not to frustrate the same and interpretation which furthers the ends of justice to be preferred.

43. Keeping in view the ratio of the judgments, referred hereinabove, the rules of procedure are not an end but are means to achieve the ends of

justice and, the procedural law means to further the ends of justice and not to frustrate the same.

44. Applying the test to the instant case and while keeping in view the facts discussed hereinabove, the petitioners/plaintiffs were contesting the

case with due care and caution in this Court.

45. Viewed thus it can be safely held that the petitioners have carved out a sufficient cause for condoning the delay and the trial Court ought to

have granted the application.

46. Having glance of the above discussion, it is hereby held that the trial Court has passed the impugned order illegally and erroneously.

Accordingly the, revision petition is allowed and impugned order is set aside. The application for restoration is granted. The Registry is directed to

inform the Court below. The trial Court record is required in the revision petition No. 67/99.