

(1973) 05 PAT CK 0008
In the Patna High Court
Case No : Civil Revision No. 225 of 1973

Mohammad Gulam Rabbani APPELLANT
Vs
Bankipore Hari Sabha and Others RESPONDENT

Date of Decision : 03-05-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97, Order 21 Rule 97(3), 122, 151
Limitation Act, 1963 — Section 5

Citation : AIR 1973 Patna 358

Hon'ble Judges : S. Sarwar Ali, J

Bench : Single Bench

Advocate : Guru Sharan Sharma and Rama Kant Sharma, for the Appellant;
Anish Chandra Sinha and Kalyan Kumar Ghose, for the Respondent

Final Decision : Allowed

Judgement

S. Sarwar Ali, J.—This application in revision is directed against the order of the Court below holding that the petition filed by the opposite party on 13-7-72 under Order 21. Rule 97 of the CPC is maintainable. It may be stated that there is no dispute that the alleged obstruction had taken place in July. 1971, nearly one year before the filing of the application dated the 13th July, 1972. The court below has held that although the application aforesaid is barred by time under Article 129 of the Indian Limitation Act, the said application is nevertheless maintainable as the Court has power to condone the delay u/s 151 of the Code of Civil Procedure.

2. The opposite party obtained a decree against opposite party No. 2 for his eviction from the shop premises. The decree was being executed. When the Nazir of the Civil Court went to deliver possession there was obstruction by the petitioner. The Nazir, therefore, reported the matter to the court on the 18th of July. 1971. In the report he stated that the delivery of possession could not be effected as there was no order to break open the lock. He also sought direction from the Court. It will be necessary to give some further facts but not at this

stage as I propose to deal with some legal aspects first. I will refer to the relevant facts later.

3. So far as the petition dated the 13th of July. 1972 is concerned it cannot be disputed that the application has been filed beyond the period prescribed in Article 129 of the Indian Limitation Act. 1963. The question, therefore, is whether the court has power to condone the delay in filing of the application under Order 21, Rule 97 of the CPC under any provision of the Limitation Act, CPC or the inherent powers."

4. The court has condoned the delay in exercise of its inherent power. This in my view was clearly not permissible in law. There is specific provision in the Limitation Act prescribing the period of limitation and that period cannot be got over by resorting to the power u/s 151 of the Code of Civil Procedure. The learned Court below has not correctly appreciated the scope of power u/s 151 nor has he correctly appreciated the ratio of decision in the case of *The State of West Bengal Vs. The Administrator, Howrah Municipality and Others*, referred to in his order. It may be stated that learned counsel for the opposite party (who shall be hereinafter referred to as the decree-holder) did not support the view taken by the Court below. He however, contended that the court has power to condone the period of limitation under Order 21. Rule 97 (3). This contention I propose to notice in the next paragraph.

5. The sub-rule aforesaid is as follows:--

"the provisions of Section 5 of the Indian Limitation Act. 1908, shall apply to applications under this Rule". (This sub-rule has been introduced by Patna High Court amendment).

Indian Limitation Act, 1908 has been repealed. In order to find out the effect of the repeal reference may be made to Section 8 of the General Clauses Act, 1897. Section 8 aforesaid is as follows:--

"(1) Where the Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts with or without modification, any provision of a former enactment, then references in, any other enactment or in any instrument to the provision so repealed shall unless a different intention appears be construed as reference to the provision so re-enacted."

(2) Where before the fifteenth day of August, 1947 any Act of Parliament of the United Kingdom repealed and re-enacted with or without modification any provision of a former enactment, then references in any Central Act or in any Regulation or instrument to the provision so repealed shall unless a different intention appears, be construed as reference to the provision so re-enacted."

The result, therefore, is that reference to Section 5 of the Limitation Act in Sub-rule (3) of Order 21. Rule 97 would be construed as a reference to the corresponding provisions of re-enacted Limitation Act, namely. Section 5 of the Indian Limitation Act. 1963. The difficulty of the decree-holder however, is that

Section 5 of the Limitation Act specifically bars its application to Order 21 of the Civil Procedure Code. In that situation even if we read Section 5 of the Limitation Act, 1963 instead of Section 5 of the Limitation Act, 1908 it cannot be of any assistance to the decree-holder, if Section 5 of the New Limitation Act does not permit its applicability to Order 21 of the Code of Civil Procedure.

The only way in which the power to condone the delay could have been said to rest with the courts, in view of the third proviso to Order 21, Rule 97, would be if the said sub-rule can be said to be a legislation by incorporation. It is well established that where there is legislation by incorporation, the repeal of the first statute does not affect the section, as the incorporated provisions have become part of the second Statute (See Craies on Statute Law 7th Edition, page 361). It is, therefore, necessary to examine the nature of the power exercised by the Patna High Court in introducing the third sub-rule aforesaid in Order 21, Rule 97. Learned counsel for the decree-holder contended that this amendment was brought about in exercise of powers u/s 122 of the Code of Civil Procedure, being a matter relating to procedure. In my view this is not the correct position. Section 5 of the Limitation Act of 1908 was as follows:--

"Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

This section permits the applicability of the section to "any other application to which this section may be made applicable by or under any enactment for the time being in force". In my view, it was by virtue of the powers u/s 5 of the Limitation Act itself, read with Section 122 of the CPC that this amendment was made. The view that I have expressed is supported by the opinion of Courts Trotter, C.J., in the Full Bench decision in Krishnamachariar Vs. Sri Rengammal and Others, . This being the position it is not possible to take a view that Sub-clause (3) of Order 21, Rule 97 was a legislation by incorporation.

6. I am, therefore, of the view that the Court below did not have the power to condone the delay in filing the application under Order 21. Rule 97 of the Code of Civil Procedure. It now becomes necessary to consider the alternative submissions advanced on behalf of the decree-holder by Mr. S. C. Ghose. He contended that in fact and in law an application was filed by the decree-holder on 16-8-1971 which fulfils the requirement of Order 21. Rule 97 and thus it should be treated as an application under that Rule. This application, he contended was clearly within time. Mr. Shree Nath Singh on behalf of the petitioner contended that this application was not an application under Order 21. Rule 97 of the CPC and placed certain materials in support of his contention. It is, therefore, necessary to mention some more facts and refer to some other orders in order to come to a conclusion as to which of the two arguments is correct.

7. I have already mentioned that Nazir gave a report on the 18th of July, 1971. On 19th of July, 1971 the petitioner filed an application stating that there was some disturbance in the delivery of possession and therefore, order should be passed directing the Nazir to give possession of the shop by breaking open the locks with the help of the police if necessary. On the 29th of July, 1971 the Court ordered that the decree-holder may file an application under Order 21, Rule 97 of the Code of Civil Procedure. In spite of this order no application was filed. On the other hand, on the 30th of July, 1971 it was contended on behalf of the decree-holder that it was not necessary to file any application under Order 21, Rule 97. This position was reiterated, as is clear from the order dated the 2nd August, 1971. On that day the Court thought that it was not proper to issue delivery of possession without hearing the petitioner. It was in pursuance of this order that the application dated the 17th August, 1971, was filed. I have gone through this application with the assistance of the learned counsel for the parties. I do not find that this petition can be legitimately interpreted to be an application under Order 21, Rule 97 of the Code. The prayer made in this application was that since the petitioner had to be heard before issue of delivery of possession a special peon should be deputed for serving the processes on the petitioner. It may further be stated that the petitioner had filed an application which gave rise to Miscellaneous Case No. 100 of 1971. In disposing of this application the observation made in paragraph 4 of the order and in my view rightly is that "the decree-holder was asked to file a complaint as envisaged in Order 21, Rule 97 of the Code but the decree-holder did not comply and insisted for the issue of delivery of possession". The Court rightly held that the registration of the miscellaneous case was not correct. I have stated this only to point out that the Court below was also of the view that no application under Order 21 Rule 97 had been filed. It may further be stated that the order of the Court below does not indicate that the learned counsel appearing for the decree-holder then took the stand that his application D/- the 17th August, 1971 should be taken to be an application under Order 21, Rule 97. Considering the various orders that I have mentioned, and on the interpretation of the petition filed on the 17th August, 1971 I am of the view that it is not possible to hold that the petitioner had actually filed an application under Order 21, Rule 97 of the Code on the 17th of August, 1971 as is contended in this Court Learned counsel for the decree-holder has placed reliance on certain decisions, including the case of Dr. Parmanand Verma Vs. Satnarain Prasad and Another, , for the proposition that although the application may not be in proper form yet if necessary averments have been made it may be treated to be an application under the relevant provisions of law. There is no dispute as to this legal proposition. But as already indicated the application of the petitioner was neither in proper form nor in substance an application under Order 21, Rule 97.

8. In this view of the matter I am of the view that the Court below acted with material irregularity in the exercise of jurisdiction in holding that the petition filed by the decree-holder on the 13th July, 1972. (sic) was maintainable. I would,

however, like to observe that the decree-holder would be entitled to file a fresh application for delivery of possession. There can be no bar to this as was held in *Raghunandan Prosad Misra v. Ram Charan Manda* 4 Pat LJ 94 : AIR 1919 Pat 425 (2)). The mere fact that the present application under Order 22. Rule 97 has not been held to be maintainable will not take away his right to file another application for delivery of possession.

9. In the result this application is allowed with the observation made above. There will be no order as to costs.