

(1996) 11 AP CK 0087

In the Andhra Pradesh High Court

Case No : C.R.P. No's. 4007 and 4008 of 1992

Rajyalakshmi Cotton and Ginning Mills

APPELLANT

Vs

National Insurance Co. Ltd.

RESPONDENT

Date of Decision : 15-11-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 17 Rule 3, Order 9 Rule 13
Limitation Act, 1963 — Section 5

Citation : (1996) 4 ALT 702

Hon'ble Judges : K.B. Siddappa, J

Bench : Single Bench

Advocate : D. Ramalingaswami, for the Appellant; S. Hanumaiah, for the Respondent

Final Decision : Dismissed

Judgement

K.B. Siddappa, J.—C.R.P. No. 4007/92 is filed against the order passed in I.A.No. 1399/92 in O.S. No. 75/90. C.R.P.No. 4008/92 is filed against the order passed in LA. No. 1830/92 in O.S.No. 75/90.

2. I.A.No. 1399/92 was filed u/s 5 of Limitation Act to condone the delay of 22 days in filing the petition under Order 9 Rule 13 C.P.C. LA. No. 1830/92 was filed to set-aside the ex parte decree.

3. As common questions of law arise in these two Revisions, they are disposed of by a common order.

4. Plaintiff is the revision petitioner in both the Revisions. The Suit was filed by the plaintiff claiming Rs. 7,00,930/- as compensation for loss of cotton said to have been sustained by them on account of fire accident dated 28-6-1989. In the Suit several adjournments were given for the defendants to file written statement. As a last chance the Court granted time on condition of paying Rs. 25/- to the plaintiff as costs and posted the Suit for compliance of conditions on 20-8-1992. On that day, the 1st defendant neither complied with the condition

nor filed the written statement. Therefore, the Court proceeded to record the evidence of the plaintiff and passed the decree against 1st defendant on 20-8-1992. Subsequently, the Revision petitioner (plaintiff) filed Execution Petition against the first defendant (1st respondent herein) and attached some movables. At that stage, 2nd respondent filed a petition on 20-10-1992 under order 9 Rule 13 C.P.C. praying to set-aside the ex parte decree. As there was delay, they filed I.A.No. 1399/92 to condone the delay, u/s 5 of Limitation Act. The main petition was kept unnumbered. After receiving notice in the I.A. 1399/92, the Revision petitioner filed counter and contested the petition, and the Court passed the following order.

"....Hence, the petition is allowed on costs of Rs. 100/- (Rupees hundred only) to be paid to the Respondent No. 1 on or before 2-12-1992, failing it the application stands dismissed".

On 2-12-1992, the Revision Petitioner refused to receive costs as he was filing the Revision. However, the amount was deposited in the trial Court.

5. On 2-11-1992, the main petition filed under Order 9 Rule 13 was numbered as I.A.No. 1830/92. It is alleged that the lower Court, without giving any notice to the petitioner and without giving an opportunity to file counter and without considering the merits of the case, passed arbitrarily, a non-speaking order, allowing the petition.

6. Aggrieved by the said Orders, the present Revisions are filed.

7. The learned counsel appearing for the Revision petitioner submitted that the 2nd defendant did not file written statement. The Court granted time, as a last chance on condition of paying Rs. 25/- to the plaintiff as costs and posted the suit for compliance. On that day i.e., on 20-8-1992, costs were not paid and the written statement also was not filed. Therefore, the time granted worked out itself. The Court became functus-officio. Therefore, the petition under Order 9 Rule 13 C.P.C. cannot be filed. Consequently, the condone delay petition u/s 5 of Limitation Act, in filing the petition under Order 9 Rule 13 C.P.C. does not arise. According to him, the only remedy is to file an Appeal. Therefore, the orders of the lower Court are liable to be set-aside on this ground alone. It is further submitted that the lower Court failed to see that the decree in question does not fall under Order 9 Rule 13 C.P.C. It was passed under Order 17 Rule 3 C.P.C. Therefore, the Court has no jurisdiction to condone the delay. Further, simply because the condone delay petition is allowed, the set aside petition, ipso-facto, cannot be allowed. The lower Court did not give any opportunity in the main petition i.e., I.A.No. 1830/92. Therefore, the order is liable to be set aside.

8. In this case, the Advocate appearing for the respondent filed affidavit. He stated that the file was misplaced in his office and he could not trace out the same. The learned counsel appearing for the Revision petitioner submitted that negligence on the part of the Advocate constitutes negligence of the party. Therefore, the lower Court was wrong in giving preference to the affidavit of the

Advocate.

9. In support of his various contentions he relied upon the following judgments: The Bench judgment of this Court in *Sheik Peda Nasar Saheb v. Perecherla Nabi Saheb*, 1956 (3) ALT 489. In this case, it was held that u/s 148 CP.C. where any period is fixed or granted by the Court for doing an act prescribed or allowed by the Court, the Court may in its discretion enlarge such period from time to time even though the period originally fixed or granted may have expired. The period prescribed can be extended only during the currency of the previous order. Once the order has become defunct no question of extending the time granted under that order can arise.

10. He also relied upon the judgment *In Re: Ramineni Suryanarayana*, . In this case it was held that the presence of defendant's counsel amounts to presence of defendant for the purpose of Order 17 Rule 3 C.P.C. On the day of hearing the defendant was absent. However, his counsel was present, but did not produce any evidence. His request for adjournment was refused. The plaintiff's evidence was recorded in his presence. On the next day judgment and decree were passed in his presence. In those circumstances it was held that the decree was not ex parte, and therefore application to set-aside the decree under Order 9 Rule 13 C.P.C. is not maintainable.

11. There cannot be any doubt with regard to the propositions of law laid down in the above judgments. Certainly, the petition to extend time after expiry of the time granted in the earlier order does not lie in the same petition as is held in *Sheik Peda Nasar Saheb's* case, cited (1 supra). Further, the presence of the Advocate certainly constitutes the presence of the party.

12. It is true that the facts come under the purview of Order 17 Rule 3 C.P.C. as the condition granted earlier was not complied. By that, it cannot be said that the Court has become functus-officio. Rule 3 of Order 17 envisages that where any party to a suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witness or to perform any other act necessary to further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, if the parties were present, proceed to decide the Suit forthwith or if the parties are, or any one of them is absent, proceed under Rule 2. Rule 2 of Order 17 C.P.C. envisages that where on any day to which the hearing of the suit is adjourned, the parties or any one of them fail to appear the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 9 C.P.C. The explanation is not attracted in this case because there was no evidence or substantial portion of evidence on behalf of the defendants. Therefore, ultimately we have to fall back to the provisions of Order 9 C.P.C. When the condition is not complied and the Court proceeded to pass a decree, nonetheless it is an ex parte decree and the petition under Order 9 Rule 13 C.P.C. is maintainable as held by the lower Court. The contention that the Court had become functus-officio and should not have entertained the I.As. is devoid of any merit. If sufficient cause is shown, certainly the delay can be

condoned on a petition u/s 5 of the Limitation Act, in filing the petition under Order 9 Rule 13 C.P.C. and if sufficient cause is shown to set-aside the ex parte decree, that also can be done.

13. In the case on hand, the lower Court considered the affidavit of Divisional Manager and the affidavit of the counsel for the defendants. In the affidavit filed by the learned counsel, he stated that the plaint copy was entrusted to him. But however, it was misplaced in his office and no written statement could be prepared and filed within the stipulated time. Further, he stated that from 29-9-1992 to 8-10-1992 he was away to Hyderabad and Delhi on personal works. Due to that, the application could not be filed immediately. So, the delay of 22 days occurred, etc.

14. In my opinion, this was certainly a good ground for condoning the delay. The lower Court rightly condoned the delay in I. A.No. 1399/92. While doing so, the lower Court took into consideration the principles laid down in the judgment in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, .

15. It is true that I.A. under Order 9 Rule 13 C.P.C. to set-aside the ex parte decree was numbered subsequently on 2-11-1992. The lower Court considered the relative merits and the reasons given by the defendants to set-aside the ex parte decree also in I.A.No. 1399/92. The detailed reasons are also given for setting aside the ex parte decree. Therefore, no fresh notice is necessary while disposing of I.A.No. 1830/92. The lower Court made it specifically clear that since I.A. No. 1399/92 is allowed this I.A., i.e., I.A. 1830/92, is allowed as similar allegations are made and consequently ex parte decree was set aside. There is nothing wrong in the orders passed by the lower Court.

16. For the above reasons, I dismiss both the Revisions, and in the circumstances without costs.