

(2016) 05 GUJ CK 0016

In the Gujarat High Court

Case No : Civil Revision Application No. 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 of 2015.

Ramprasad Ramchandra Acharya - Applicant @HASH Anil Jivatram Savlani and 1 - Opponents

Date of Decision : 05-05-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 105(3), Order 21 Rule 106, Order 21 Rule 97
Limitation Act, 1963 — Section 5

Citation : (2017) 171 AIC 290 : (2017) 1 CivilLJ 533 : (2016) 4 GLR 3090

Hon'ble Judges : R.D. Kothari, J.

Bench : Single Bench

Advocate : Mr. Chinmay M. Gandhi, Advocate with Mr. M.B. Gandhi, Advocate, for the Applicants No. 1; Mr. S.K. Bukhari, Advocate with Mr. Vimal M. Patel, Advocate, for the Opponents Nos. 1 and 2

Final Decision : Dismissed

Judgement

Mr. R.D. Kothari, J.(Oral) - Present Civil Revision Applications arise from the order passed by the trial court below Exh.107 (in CRA No.13 of 2015) on 25.11.2014. It is an admitted position that same order is passed in other CRAs.

2. During the course of hearing, with joint request of learned advocates for the parties, R & P was called from the trial court.

3. One of the facets of Rule 105(3) and 106 of Order 21 fall for consideration herein.

4. Brief facts emerging from the record, relevant for the present discussion are, thus;

4.1. One HRP Suit was filed by the landlord (hereinafter referred to as "the decree holder") (DH) - bearing No.1791 of 1992. The said suit came to be decreed on 14.3.2001. The tenant had preferred an appeal i.e. Appeal Nos.71/2001 and 80 of 2001 before the appellate bench of Small Causes Court.

Said appeals came to be dismissed on 7.12.2007. Against that, revisions were preferred before this Court being Civil Revision Application Nos.70 of 2008 and 71 of 2008 which came to be dismissed on 27.4.2010. Thereafter, the DH has filed Execution Petition No.3 of 2011 on 4.1.2011.

4.2. The suit property is known as "Kohinoor Chambers". It is four storeyed building. It comprises of 48 shops and godowns. In the execution proceedings, pursuant to warrant issued by the court, DH was given possession of five shops by the bailiff. So far as all other 42 shops are concerned, either they were locked and/or goods were lying in those shops and the DH applied for issuance of possession warrant of those remaining shops and in the alternate, prayer was made to grant any other appropriate relief. This application (Exh.23) was filed on 11.5.2011. It appears that the persons, who were alleged to be in possession, had filed obstruction application. DH also filed his reply (Exh.25). It is the say of the DH that even Kohinoor Corporation is not his tenant. That the original tenant, despite the expiry of period of tenancy, has created "Kohinoor Corporation" and has transferred the property by subletting. The persons, who have filed obstruction applications, are rank trespassers. It is the say of the DH that they were not required to be joined as a party in eviction suit. Otherwise also, the alleged occupants were not unaware of litigation going on since 1990. DH had prayed for dismissal of obstruction applications and handing over possession of the property. It appears that on similar line, another application was filed by the DH (Exh.27).

4.3 It further appears that detailed obstruction application was filed by the persons claiming to be in possession (Exh.31) on 8.7.2011 followed by similar applications by other persons. They had produced documents purported to be the rent receipts and also bills / receipts of the Municipal Corporation. By order dated 29.6.2012 passed below Exh.1 and Exh.177, the trial court directed that all these obstructions applications be registered and numbered as CMA. This order was challenged by DH before this Court in SCA No.10315 of 2012. This Court by order dated 13.9.2012 has set aside the order of the trial court dated 29.6.2012 and has directed the trial court to register DH's application as an application under Order 21, Rule 97 of CPC and to proceed with the execution in accordance with law. Accordingly, DH's application was numbered as Obstruction Application No.420 of 2012 and therein, the court had issued notices to the obstructer. Despite the service of notice, the obstructors failed to file reply within 30 days as provided under Order 21, Rule 105 . After lapse of period, the present respondents moved an application for condonation of delay and setting aside the ex parte order. Said application of the respondent came to be allowed by the trial court and against that, present CRAs are preferred by the DH.

5. Heard Mr. M.B. Gandhi, learned advocates for the applicant. Mr. Patel for some of the respondents and in other group of cases, Mr. S.K. Bukhari.

6. Mr. Gandhi, learned advocate for the applicant, besides making oral submissions and at the conclusion of argument has also submitted brief written

submissions. In substance, the submission of Mr. Gandhi and Mr. Patel center around two points; (i) maintainability of Revision and (ii) in the circumstances of the present case, whether the respondents can claim right to contest the proceeding or they have missed the opportunity to contest the proceeding. If we deal with second point first, Mr. Gandhi submitted that respondents are required to file application for setting aside the order to proceed ex-parte within 30 days. In the present case, it was submitted, there is no dispute about service of notice to the respondents. It was ordered to proceed ex-parte. Then, it is on record that respondents have not filed application for setting aside the order to proceed ex-parte within the time prescribed. Section 5 of the Limitation Act is not applicable to Rule 106. Mr. Gandhi has drawn attention to *Damodaran Pillai & Ors. v. South Indian Bank Ltd.*, AIR 2005 SC 3460. On this point, Mr. Patel has submitted that no order is passed by the trial court under Rule 105 and applicant's application is still pending. It is pending against the present respondents also. In the facts of the present case, respective applications of the respondents would not be applications to set aside ex-parte order. Therefore, no question of filing application before the trial court within 30 days and no question of condonation of delay. It was submitted that judgment relied on by the applicant does not apply to the facts of the present case. Mr. Patel, learned advocate has placed reliance on the decision of the Supreme Court in case of *Noorduddin v. Dr. K.L. Anand*, (1995) 1 SCC 242, in case of *Babulal v. Raj Kumar & Ors.*, (1996) 3 SCC 154, in case of *Ghasi Ram & Ors. v. Chait Ram Saini & Ors.*, (1998) 6 SCC 200 and in case of *Sameer Singh & Anr. v. Abdul Rab & Ors.*, AIR 2015 SC 591 (Para.12 to 16).

7. Before considering the submissions of maintainability of revisions, this submission may be examined first. Rule 105 Order 21 provides for hearing of application. It reads, thus;

"Rule 105. Hearing of application.-(1) The court, before which an application under any of the foregoing rules of this order is pending, may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the respondent to whom the notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit."

8. Among other sub-rule of Rule 105, sub-rule-3 is important for immediate discussion. In order to appreciate the meaning of sub-rule 105(3), it may be read and compared with Order 9, Rule 6. This later provision deals with consequence that ensue when plaintiff appears in suit but, defendant does not. It reads, thus;

" Order 9, Rule 6 - When summons duly served - (a) If it is proved that

summons was duly served, the court may make an order that the suit be heard ex-parte."

8.1 Now, if we read Rule 105(3) along with this sub-rule, it would appear that passing of an order is not provided in sub rule (3).

9. What does Rule 105(3) appears to convey? On failure of opposite party to appear despite due service of notice, the executing court need not pass formal order of ex-parte, in order to proceed with the petition, it can just hear (".... whom? obviously DH") and pass an order that he thinks fit. Nature of hearing that precedes passing of an order by the court apart, it is obvious that order passed on hearing would be reasoned order. Reasons may be concise. It may not be as elaborate as order of consequence to be passed on any point in a suit, at the same time it cannot be too cryptic or too bald to be acceptable. It would be speaking order passed on hearing the applicant / parties. Prima facie, it is also possible to argue that if opposite party turns up before the court passes an order under Rule 105(3) then "hearing" cannot be denied to the opposite party. It would be interesting to refer *Perumal Naicken*'s case - AIR 1939 Madras 385, in this context I may refer to it little later.

10. But the question herein is somewhat different. It appears that opponent herein did not appear though served. In the Rojkam dated 21.1.2013, it is recorded that the matter to proceed ex-parte against the present opponents and therein, it is further recorded that so far as those who are served and who have filed their appearance, next date for filing the reply is fixed at 5.2.2013. Then, it appears that application with which we are concerned came to be filed on 9.5.2013 and same application on later dates, in other cases. The respondents herein have prayed for condonation of delay caused in filing their respective replies. It also appears that the court has passed first order on such application, "fixed for haring" on the same day i.e. 9.5.2013. Thereafter, order under challenge came to be passed on 25.11.2014.

11. The court had allowed the application. Main ground weighed with the court in allowing the application is "language" of Order 8, Rule 1 . In view of the said provision - it says - delay could be condoned in exceptional cases. That the provision of the said rule is directory and it is not to be read as mandatory. The ground weighed with the trial court is erroneous. It is one thing to refer and read analogous provision for proper construction of provision at hand and it is quite another thing - and impermissible also - to rely and so apply the analogous provision that the conclusion turns on analogous provision and not on provision at hand. Reference to analogous provision is to seek light and not get obscured and distorted picture of provision at hand. The trial court has seriously erred in relying and concluding by invoking and applying Order 8, Rule 1 . In strict sense, Order 8, Rule 1 does not apply.

12. In the facts and circumstances of the present case and looking to the provisions, application for condonation of delay itself was uncalled for. While Rule

105(3) provides for passing of an ex-parte order, Rule 106, inter-alia, provides for hearing ex-parte and to pass order therein. Rule 106 provides that such application for setting aside the order should be moved within 30 days from the date of the order. It also provides that, that if notice not served to opposite party then from the date of knowledge of such order, he has to file an application within 30 days. Proceeding on this line, Mr. Gandhi, learned advocate has submitted that Section 5 of the Limitation Act is not applicable for consideration of delay condonation application under this sub-rule. Rule 106 may be referred to. It reads, thus;

"106. Setting aside orders passed ex parte, etc. :- (1) The applicant, against whom an order is made under Sub-rule (2) of Rule 105 or the opposite party against whom an order is passed ex parte under Sub rule (3) of that rule or under Sub-rule (1) of Rule 23, may apply to the Court to set aside the order and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for further hearing of the application.

(2) No order shall be made on an application under Sub-rule (1) unless notice of the application has been served on the other party.

(3) An application under Sub-rule (1) shall be made within thirty days from the date of this order, or where, in the case of an ex parte order, the notice was not duly served within thirty days from the date when the applicant had knowledge of the order."

13. In support of this submission, reliance was placed on Damodar Pillai's case (supra). In that case, the decree holder had filed an execution petition for enforcement of money decree. That execution petition was dismissed for default. That order came to be passed on 1.11.1990 and on 4.4.1998 the decree holder had filed an application for restoration. It was contended that decree holder came to know about the order of dismissed for default only in March,1998. Before the trial court, it was contended that it is barred by limitation. This contention was rejected by the trial court. The High Court also summarily dismissed the Revision. Against that, appellant's appeal was allowed by the Supreme Court. Agreeing with the view taken in Aayappa Naicker's case by Madras High Court in 1984 (1) Mad. L.J. 214, it was held that the court neither can invoke nor apply Section 5 of the Limitation Act nor can invoke inherent powers. Par.17 of the said decision reads, thus;

"17. In Ayappa Naicker v. Subbammal & Anr. [1984 (1) Madras Law Journal Reports 214], Mohan, J. (as His Lordship then was) opined:

"Therefore having regard to the above language, it was permissible to have such a provision wherein the position is clearly changed at present. Section 5 of the present Limitation Act,1963, states that any appeal or any application under any of the provisions of Order 21, Civil Procedure Code, 1908, may be admitted after

the prescribed period if the appellant or the appellant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. The Explanation is omitted as unnecessary. Therefore, with reference to applications under Order 21, Civil Procedure Code, there is the statutory bar in applying section 5 of the Limitation Act. It may also be relevant to note section 5 of the Limitation Act before it was repealed by Central Act LVI of 1974. It is stated under that section that the Indian Limitation Act, 1908 is hereby repealed. Therefore, after 1st January, 1964, sub-rule (4) of rule 105 of Order 21, Civil Procedure Code, could no longer be applied, because of the express language of section 5 of the Limitation Act. That is why the Central Code, in rule 106 of Order 21, Civil Procedure Code, did not make any reference to the same saying that section 5 of the Limitation Act would be applicable. In view of this, the order of the Court below ought to be upheld."

It was further held : "

"The question of invoking inherent powers under section 151, Civil Procedure Code, does not arise in this case. That is because of the specific provision contained under rule 106 of Order 21, Civil Procedure Code. If, therefore, there is repugnancy between the Central Code, under rule 106, and the Madras Amendment under sub-rule (4) of rule 105 of Order 21, it is section 97 of the Civil Procedure Code, in relation to repeal and savings that would apply. That says that any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall except in so far as such amendment or provision is consistent with the provisions of the principal Act, as amended by this Act, stand repealed."

We respectfully agree with the said opinion."

14. Reference to the facts of cited case preceding the quote would clearly show that cited case has not much bearing to the case on hand.

14.1. In the present case, it is not in dispute that applicant's application is pending before the trial court. Except recording in Rojkam to proceed ex-parte, no substantive order is passed in Application No.420 of 2012. Said application is still pending before the trial court. Assuming for the moment that "hearing" has taken place after recording ex-parte in the Rojkam, it is not in dispute that still no effective order is passed on Application No.420 of 2012 in the application / objection preferred by the present opponent.

14.2. Rule 106 comes into play only if such order is passed under Rule 105(3). Since no effective order is passed under sub-rule 105(3), no question of filing application for condonation of delay much less filing of such application within 30 days.

15. It is interesting to refer Perumal Naicken's case (supra) wherein, somewhat identical question arose. Therein, on defendant being absent on the date of hearing, the proceedings were "declared" ex-parte against him on 10.1.1936. On

30.7.1936, the defendant applied to set aside ex-parte order alleging that summons was not served on him. This assertion was not believed by the trial court and application was rejected. An appeal was filed before the District Court and the District Court partly allowed the same. In Revision before the High Court by holding in favour of the defendant, view taken by it is interesting to compare and contrast. It was held, thus :

"Though it is the practise in the mofussil to pass an order declaring a defendant ex parte, the Code does not, in terms, provide for an application to set aside that order. All that R.7 O.9 provides is that where the ex parte hearing of a suit has been adjourned, the defendant may at any time before the disposal of the suit appear and if he assigns good cause for his previous nonappearance, he may be heard in answer to the suit as if he had appeared on the day fixed for his appearance. It is only when a decree has been passed that an application in terms to set aside that decree is contemplated in R.13."

(emphasis supplied; See Para.9 herein above)

16. In short, the court has not passed any order under Rule 105(3). Hence Rule 106 does not come into play.

17. So far as the first question of maintainability of Revision is concerned, in view of above conclusion on merits, Mr. Patel has not invited any order on this point and it was not pressed.

18. In view of above discussion, present Civil Revision Applications are dismissed. Since the Revisions arising from execution proceeding is fairly old, the trial court is directed to dispose of Application No.420 of 2012 as expeditiously as possible. Office to send back R & P to the trial court forthwith.