

(1997) 07 AP CK 0087

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1468 of 1997

Shaik Galib Saheb

APPELLANT

Vs

Ponnala Radha Krishna and Others

RESPONDENT

Date of Decision : 24-07-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 106, Order 21 Rule 72, Order 21 Rule 90, Order 21 Rule 92, Order 43 Rule 1
Limitation Act, 1963 — Section 5

Citation : (1997) 4 ALT 629 : (1997) 3 APLJ 226

Hon'ble Judges : V. Bhaskara Rao, J

Bench : Single Bench

Advocate : M.V.S. Suresh Kumar, for the Appellant; Y.V. Ravi Prasad, for the Respondent

Final Decision : Dismissed

Judgement

V. Bhaskara Rao, J.—This Civil Revision Petition is directed against the order in I.A.No. 4475 of 1993 in unregistered C.M.A. on the file of the learned District Judge West Godavari at Eluru, refusing to condone the delay of 252 days in filing the said C.M.A.

2. The facts leading to this Revision Petition in brief are that the revision petitioner filed E.A.No. 856/92 on the file of I Additional District Munsif, Eluru, under Order 21 Rule 90 C.P.C. for setting aside the sale held in E.P. No. 74/83 on 8-7-1991. The auction purchaser as well as decree-holder have resisted the above petition and it was posted for enquiry on 1-3-1993. As the revision petitioner as well as his advocate were absent, the said E.A. was dismissed for default. Thereupon, he filed E.A.No. 296/93 seeking restoration of E. A.No. 856/92 and that petition was also contested by the auction purchaser and the decree-holder. The learned Additional District Munsif, Eluru, dismissed the same on merits on 2-9-1993. That order was assailed in this Court in C.R.P.No. 3980 of 1993. This Court passed the following order at the admission stage on

22-11-1993.

"This Revision Petition is directed against an order refusing to restore E.A.No. 856 of 1992, which was dismissed for default on 1-3-1993.

The learned District Munsif has given cogent reasons for dismissing the said application. Thus, I find no merit in this revision petition. It is accordingly dismissed. No costs."

3. The Revision Petitioner did not allow the matter to rest there. He challenged the order in E.A.No. 856/92 dated 1-3-1993 in appeal to the District Court, Eluru, by filing C.M.A. (SR) No. 11273 of 1993. As there was delay of 252 days in filing the C.M.A., he filed I.A.No. 4475/93 u/s 5 of Limitation Act, seeking condonation of delay of 252 days in filing the said, appeal. After setting out the facts leading to the dismissal of E.A.No. 296/93 he stated that he obtained certified copies of the order and decree in E.A.No. 856/92 and filed the appeal. According to him the delay of 252 day occurred in his bona fide pursuit of other remedies and that the same is fit to be condoned. The respondents opposed the petition by filing a counter. It is stated that E.A.No. 856/92 was posted to 26-2-1993 as a last chance, that the petitioner obtained adjournment to 1-3-1993 and since the petitioner as well as his Counsel were absent on 1-3-1993 it was dismissed and then he filed E.A.No. 296/93 for restoration of E.A.No. 856/92 but the same was dismissed on 22-9-1993 and his revision petition - CR.P.No. 3980 of 1993 has also been dismissed on 22-11-1993. It is asserted that no sufficient cause is shown by the revision petitioner for condonation of delay and that the sale in question has been confirmed and this petition is meant for dragging on the matter.

4. The learned District Judge considered the rival contentions and held that the petitioner is unable to show any cause for condonation of delay and hence he dismissed the petition.

5. Sri M.V.S. Suresh Kumar, learned Counsel for the revision petitioner contended that the revision petitioner could not be present in the lower Court on 1-3-1993 on account of his sister's death at Bheemadolu and hence he filed restoration petition -E.A.No. 296/93 but unfortunately it was also dismissed and the revision petition filed thereon was not favourably considered by this Court and hence he is constrained to file C.M.A. He strenuously argued that he has been pursuing a legal remedy available to him under the law and therefore it is a good ground for condonation of delay. Whereas Sri Y. V. Ravi Prasad, learned Counsel for the respondents contended that the sale has been confirmed on 11-9-1994 and a sale certificate has already been issued to the auction purchasers and hence the question of setting aside the sale under Rule 90 at this stage does not arise. Adverting to the impugned order, he argued that the order in C.R.P.NO. 3980 of 1993 dated 22-11-1993 is a bar for the present petition inasmuch as the revision petitioner has already exhausted one of the remedies available to him and having failed in all the Courts in that remedy it is not open to him to fall back on the

second remedy. He relied on *Shankar Ramadumdra Abhyankar v. Krishnaji Dattatrya Bapat*, AIR 1970 SC 1. He added that no reasons whatsoever are assigned for condonation of delay of 252 days much less than sufficient cause. He also contended that an order under Order 21 Rule 90 C.P.C. is not appealable under Order 43 Rule 1 (j) and hence the dismissal of restoration petition therein under Rule 106 is also not appealable under Clause-(a) which is inserted by 1976 amendment to C.P.C.

6. An interesting legal objection has been raised by Sri Y. V. Ravi Prasad, learned Counsel for the respondents in this case. It is contended that whenever two remedies are open to a party he has to exercise his option and adopt any one of those remedies. It is alternatively contended that even if he adopts both the remedies simultaneously, the result in one will operate as *res judicata* in the other and there cannot be conflict of judgments. A similar case came up for consideration before me in *Dittakavi Ramachandra Rao Vs. Padamata Bullaiah and Another*, . An application to set aside sale under Order 21 Rule 90 C.P.C. was dismissed for default and thereupon, the judgment-debtor filed a restoration petition under Order 21 Rule 106(1) C.P.C. and he also preferred a C.M.A. The restoration petition was dismissed by the learned District Munsif but the appeal was allowed by the I Additional Subordinate Judge, Vijayawada, and the petition under Order 21 Rule 90 C.P.C. was restored to file. That order was challenged by the auction purchaser in this Court on the ground that the order of District Munsif refusing to restore that petition has become final and that judgment-debtor cannot adopt two remedies simultaneously so as to invite conflicting judgments. On consideration of the rival contentions, this Court held,

"A party who has an option to exercise one of two remedies, has to choose the same before adopting one of them, but he cannot adopt both the remedies and invite two conflicting orders. It is an elementary principle that a situation like this leading to conflicting orders/judgments cannot be allowed and hence it is necessary that Respondent No. 1 (J. Dr) should have adopted one of two remedies, which were open to him. When the dismissal order in the restoration petition has become final, there is no other alternative for this Court (except) to allow this C.R.P. and set aside the impugned order to resolve the conflict".

7. The Supreme Court considered this question exhaustively in the judgment cited *supra* (1) and it is held,

"Where, on its revisional jurisdiction being invoked against the order of the appellate Court under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, the High Court dismisses the revision, after hearing both the parties, the order of the appellate Court becomes merged with the order made in revision, and, thereafter, the appellate order cannot be challenged or attacked by another set of proceedings in the High Court under Articles 226 or 227 of the Constitution. The principle of merger of orders of inferior Courts would not become affected or inapplicable by making any distinction between a petition for revision and an appeal."

It is further held,

"The right of appeal is one of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. Two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. When the aid of the High Court is invoked on the revisional side it is done because it is a superior Court and it can interfere for the purpose of rectifying the error of the Court below. Section 115 of the CPC circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior Court. It is only one of the modes of exercising power conferred by the Statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider, and larger sense."

8. Their Lordships also considered whether a Writ Petition in the alternative can be entertained as second remedy and held,

"Further even on the assumption that the order of the appellate Court had not merged in the order which disposed of the revision petition, a writ petition ought not to be entertained, by the High Court when the petitioner had already chosen the remedy u/s 115 of the Code of Civil Procedure. If there are two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the subordinate Court. The refusal to grant relief in such circumstances would be in consonance with the anxiety of the Court to prevent abuse of process as also to respect and accord finality to its own decisions."

9. I carefully perused the judgment cited supra (1) and I am satisfied that the Supreme Court has resolved an important question whether multiple remedies as discussed above can be adopted or not. It is not in dispute that the revision petitioner has adopted the remedy available under Order XXI Rule 106 and when the petition was dismissed, he filed Civil Revision Petition namely, C.R.P.No. 3980 of 1993 u/s 115 C.P.C. and having failed to get relief therein he is now seeking to file an appeal. It is, however, pointed out in this context by Sri Suresh Kumar that the order in E.A.No. 296/93 was assailed in the above C.R.P. but not the order in E.A.No. 856/92 and hence the above authority is inapplicable.

10. It is no doubt true that the C.R.P. was directed against the order in E.A.No. 296/93 but not the one in E. A.No. 856/92; but it must be borne in mind that E.A.No. 296/93 is off shoot of E.A.No. 856/92 and in such a situation any order passed in E.A.No. 296/93 will have its effect upon the order in E.A.No. 856/92. In otherwords, if E.A.No. 296/93 was to be allowed, its effect would have been that E.A.No. 856/92 would have been restored and both these orders by legal fiction would merge. Whereas the converse has happened and E.A.No. 296/93 has been dismissed and the order of dismissal has become final on account of

refusal of this Court to admit C.R.P. No. 3980 of 1993. The effect of the order is that the order of dismissal of E.A.No. 856/92 has become final. It is, therefore, immaterial whether the C.R.P. was filed against the order in E.A.No. 296/93 inasmuch as it has its effect upon the order in E.A. No. 856/92 which is now sought to be assailed in the C.M.A. I am, therefore, of the view that this case would squarely be covered by the case cited supra (1).

11. Another ingenious contention raised by Sri Ravi Prasad is that a C.M.A. does not lie against the order Order XXI Rule 90 C-PC. as Clause (j) of Rule 1 of Order ILXXX provides for an appeal against an order under Rule 72 or Rule 92 of Order XXI but not under Rule 90 of Order XXI. He further argued that in case of dismissal of such an application for default it can be restored under Order XXI Rule 106 C.P.C. but dismissal of that application is not appealable under Clause-(ja) thereof.

12. For better appreciation of the above contention Clauses (j) and (ja) are reproduced below.

"(j) an order under Rule 72 or Rule 92 of Order XXI setting aside or refusing to set aside a sale;

(ja) an order rejecting an application made under Sub-rule (1) of Rule 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in Sub-rule (1) of Rule 105 of that order is appealable."

13. A look at Clause (j) shows that only an order which results in setting aside or refusing to set aside a sale either under Rule 72 or under Rule 92 is appealable. Then, coming to Clause (ja), an order rejecting a restoration petition contemplated by Rule 72 or Rule 92 is again appealable. "

14. Proviso to Clause (ja) limits the scope of this clause inasmuch as an order under Sub-rule 1 of Rule 105 (like the one in E.A.No. 296/93 dated 22-9-1993) is appealable provided that the original application (E.A. No. 856/92 dated 1-3-1993) is appealable. It is evident from a bare reading of Clause-(j) that only orders under Rule 72 and Rule 92 setting aside or refusing to set aside a sale thereunder are appealable. It is noteworthy that E.A. No. 856/92 was filed under Rule 90 C.P.C. and hence the order of dismissal for default of the same is not appealable. That being so, an order rejecting the application made under Rule 106(1) is also not appealable. C.R.P.No. 3980 of 1993 was filed for the same reason. The order in E.A.No. 856/92 is, therefore, not appealable. I am fortified in my above view by a judgment of Kerala High Court in Velappan and Ors. v. Sahasranamam and Ors., AIR 1980 Kerala 12, wherein it is held,

"The "allowing" or "disallowing" of an application mentioned in Order 21 Rule 92 can only be a disposal on the merits after notice to parties entitled to the same. The dismissal of the application filed under Rule 90 for default in not taking fresh steps cannot be "disallowing" of the application under Rule 92. Only by disallowing the application the Court refuses to set aside the sale under Rule 92

even though the dismissal of the application for default will also result in confirmation of the sale. But it is the refusal to set aside the sale which is made appealable under Order 43 Rule 1(j). Therefore, the order dismissing an application under Rule 90 to set aside the sale for default in not taking fresh steps cannot be said to be one refusing to set aside the sale and therefore is not appealable under Order 43 Rule 1(j).& "

15. Assuming that C.M.A. is maintainable, the last question that falls for consideration is whether the delay of 252 days is fit to be condoned. The only ground on which the delay is sought to be condoned is that the revision petitioner was pursuing another remedy under a bonafide belief. It is on record that the C.R.P.No. 3980 of 1993 was dismissed on 22-11-1993. If the assertion of the revision petitioner is true, he ought to have filed C.M.A. immediately thereafter, but he filed the C.M.A. on 8-12-1993. The learned District Judge noticed this fact and held that no sufficient cause is shown especially in view of the fact that the Munsif Court as well as the District Court are located at Eluru. I am unable to take a different view of the reasons recorded by the learned District Judge in the impugned order.

16. Thus, I find that there are no merits in this Civil Revision Petition and it is accordingly dismissed but without costs.