

(1961) 12 AP CK 0003

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 36 of 1959

Sri Tankala Appalaswamy Gari Samba Murthy

APPELLANT

Vs

Gopasundara Sabatho

RESPONDENT

Date of Decision : 22-12-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 104, Order 21 Rule 105, Order 21 Rule 105(1), 151

Citation : AIR 1963 AP 127

Hon'ble Judges : Anantanarayana Ayyar, J

Bench : Single Bench

Advocate : N.V. Ranganatham, for the Appellant; K.B. Krishnamurthy, for the Respondent

Final Decision : Allowed

Judgement

Anantanarayana Ayyar, J.—This is a petition to revise the order of the District Munsif, Sompeta in E. A. No. 578 of 1958 in E. P. No. 303 of 1958 in O. S. No. 41 of 1946 on his file.

2. The relevant facts are briefly these:- The petitioner is the decree-holder. He was the plaintiff in O. S. No. 41 of 1946. He filed E. P. No. 303 of 1958 in execution of the decree in O. S. No. 41 of 1946. On 7-11-1958, the E. P was dismissed on the ground that batta was not paid. On that day, more than twelve years had elapsed from the date of the passing of the decree in O. S. No. 41 of 1946. The decree-holder filed E. A. No. 578 of 1958 praying for restoration of the E. P. alleging that the batta could not be paid due to over-sight on the part of the clerk of the pleader appearing for him (plaintiff) and that he would be put to irreparable loss if the E. P. was not restored. The learned District Munsiff framed one point for determination as follows:

"Whether the execution petition can be restored, which was dismissed for default?"

He found that there are no grounds to restore the E. P. and dismissed the E. A. Thereupon, the plaintiff-decree-holder has filed this revision.

3. Rules 104 and 105 (1) of Order 21 CPC run as follows: -

"104. (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 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.

Explanation:- An application referred to in Sub-rule (1) includes a claim or objection made under Rule 58 of this order."

"105 (1): The applicant against whom an order is made under Sub-rule (2) of the preceding rule or a respondent against whom an order is passed ex parte under Sub-rule (3) of the preceding rule or under Sub-rule (1) of Rule 23 of this order, 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 the further hearing of the application."

It is clear that the dismissal of the execution petition comes under Order 21, Rule 104 (2) CPC and that the restoration of the E. P. can be done under Order 21 Rule 105 (1) Civil Procedure Code.

4. The learned District Munsif has relied on the Full Bench decision of the Madras High Court in Alagasundaram Pillai Vs. Pichuvier, and the decision of the Supreme Court in Keshardeo Chamria Vs. Radha Kissen Chamria and Others, for holding that the E. P. which was dismissed, could not be restored u/s 151 CPC when the dismissal was due to a mistake other than one committed by the Court itself. The learned District Munsif dismissed the petition on the ground that there was no mistake committed by the Executing Court, but that there was a mistake committed by the plaintiff in not paying the batta, as ordered by the Court. After framing the question, the learned District Munsif proceeded to state as follows: -

"It is well settled that the provisions of Order IX, CPC do not apply to execution proceedings. The only question is whether this Court in exercise of its inherent powers u/s 151 CPC can restore an application dismissed for default in execution proceedings?"

On this basis, he has only considered the question formulated by him and referred to a decision of this Court in Budla Eswaraiah v. Kasala Sam-bamma 1958 1 Andh WR 320 : AIR 1958 Andh 341 wherein Kumarayya, J., observed

thus:-

"It is however clear that the executing Court has inherent power not only to dismiss the applications in the execution proceedings but also to restore them to file u/s 151 Civil Procedure Code, though save in certain cases, it ought not to resort to Section 151, in so far as restoration is concerned."

The lower Court stated that the above ruling did not lay down a general proposition that applications dismissed for default in execution proceedings could be restored u/s 151 CPC as a general rule (of course, if the Court were satisfied that there were grounds for restoration). In *Peddinti Gopalacharyulu Vs. Rudraveeranna and Others*, this Court observed that the inherent power vested in Courts u/s 151 CPC could not be invoked where the procedure to be adopted in a particular case or class of cases was expressly provided for by the Code and that in such matters the Court could not act except under the conditions specified by the express provisions. In this particular case, there is a specific statutory provision under Order 21 Rule 105 (1) CPC under which the Execution Petition could be restored on sufficient cause being shown for non-appearance. Consequently, the question of restoration by the exercise of inherent powers by the Court u/s 151 CPC does not arise at all.

5. In *Narayana Chettiar v. Muthu Chettiar* 57 MLJ 219 : AIR 1926 Mad 980 the Madras High Court held that Order 9, CPC did not apply to execution proceedings and that the Court had no power to restore to file an application, which was dismissed for default, under that provision. To a similar effect are the decisions in *Kaliakkal Vs. Palani Koundan and Another*, and *Subbiah Naicker Vs. Ramanathan Chettiar*, wherein it was held that Order 9 did not apply to proceedings in execution except such as involve the determination of any question u/s 47 Civil Procedure Code, in which case the orders thereon would amount to decrees.

6. In *(Vemareddi) Ramaraghavareddi and Others Vs. Raja of Venkatagiri*, it was held that the mere fact that the Code contained no express provision for restoring an execution petition dismissed for default would not by itself warrant the invocation of Section 151 Civil Procedure Code. Jackson, J., suggested that if the Court would simply strike off such cases, to be restored if necessary on the appearance of the party, there would be no trouble at all.

7. In *Alagasundaram Pillai Vs. Pichuvier*, a Full Bench of the Madras High Court had to deal with the following questions, which were referred to it, on the facts of that case :

"(1) Whether the provisions of Order 9, CPC apply to proceedings instituted under Rule 100 of Order 21 of the Code, and

(2) Whether otherwise, the Court has inherent power to set aside the dismissal for default of an application made under Rule 100 where the ends of justice render it necessary to do so."

8. The learned Judges answered the first question as follows:- (at page 391)

"Therefore, on the first question, the answer is that Order 9 does not apply to such proceedings under Rule 97 or 100 as do not also fall within Section 47."

9. On the second question, they answered it in the negative and held that the Court had no inherent power to set aside, on sufficient cause being shown, either an order dismissing for default an application under Order 21 Rule 97 or 100, or an order allowing such an application ex parte. The learned Judges observed:-

"The resort to inherent powers may be justified in a case of gross injustice where the party has no other remedy. But, here the party has his remedy by way of suit."

This decision has been followed in subsequent decisions of the Madras High Court.

10. In *Siva Subramania Chettiar v. Adaikkalam Chettiar* 1944 1 MLJ 259 : ATR 1944 Mad 293 the relevant facts were as follows:-On 4-4-1941, the next friend of the minor decree-holder was absent from Court and the execution petition was dismissed for default. On 18-4-1941, the next friend of the minor, being the natural father of the minor, whose adoptive father was dead, applied for a review of the order of dismissal. The District Judge granted the application, not as one falling within Order 47, Rule 1 CPC but because he felt that the dismissal of the execution application would work great hardship, as it was too late to file a fresh one, and consequently it was a case in which the Court should invoke the inherent powers recognised by Section 151. Two, out of the three, judgment-debtors, filed appeals which were heard and allowed by Horwill, J. Then, the appellants filed Letters Patent Appeals under Clause 15 and they came up for hearing before Leach, C. J., and Kunhi Raman, J. The learned Judges held that neither the minor's pleader nor his next friend was present when the execution petition was called on 4-4-1941 and that the E. P. was rightly dismissed, as several decisions of the Madras High Court showed that an application for review did not lie and that there was no scope for the exercise of the inherent power of the Court u/s 151 Civil Procedure Code. The learned Judges pointed out the desirability of amending Order 9, Rule 15, CPC and observed thus:- (at page 261) .

"The case appears to be one of great hardship and suggests that a case has been made out for an amendment to Rule 15 of Order 9, CPC so that a Court may in suitable circumstances set aside an order of dismissal of an execution petition passed for default of appearance. After this Court had held in *Arunachalam, minor, by mother and guardian Periammai Vs. P.K.A.C.T. Veerappa Chettiar* through his authorised agent S. Ramaswami Aiyar, (FB) that Order 9 did not apply to execution proceedings, Rule 15 was inserted in order to make the order applicable in execution proceedings so far as the judgment-debtors are concerned in cases analogous to those dealt with in "Rules 6, 13 and 14. Rule 9 applies to the dismissal of a suit for the default on the part of the plaintiff and at the moment we can see no room why this rule should not be made to apply to the dismissal of an application for execution for default. Of course, where by

default an execution petition is dismissed and the period of limitation has not expired, the decree-holder can file a fresh application; but where the application has been dismissed for default and the decree-holder cannot then file a fresh application by reason of the law of limitation, there should be some provision of law which allows him to get the order of dismissal set aside if he can show that he was prevented by sufficient cause from appearing."

It is obvious that the learned Judges made the above observations as they were dissatisfied with the provision of Rule 15 of Order 9, as it then existed, and suggested a remedy to cure the existing defect. The above judgment was rendered on 10-12-1943. Subsequently, by an order P. Dis. No. 397 of 1945 dated 4-9-1945, Order a Rule 15 was omitted altogether and by the same Order, Rules 104 and 105 were newly inserted in Order 21 Civil Procedure Code. This change has brought about the rectification of the defect which caused hardship and which was pointed out by the learned Judges in Siva Subramania Chettiar, minor by natural father and guardian, Veerappa Chettiar Vs. Adaikkalam Chettiar and Others, .

11. Consequently, all the decisions of the Madras High Court, including the decision of the Full Bench in Alagasundaram Pillai Vs. Pichuvier, which related to the law, as it then existed, before Rules 104 and 105 of Order 21 CPC were inserted, ceased to be in force so far as they related to what is provided for by these two rules. The restoration of the dismissal of an execution petition for default comes clearly within the scope of Order 21, Rule 105 (1) read with Rule 104 CPC and the restoration was certainly possible under that rule. This position stood unaffected by the Full Bench decision of the Madras High Court and the other decisions which followed it.

12. The learned District Munsif has only dealt with the question whether the Court has got inherent power u/s 151 CPC to restore an application dismissed for default in execution proceedings and held that he had no such power. Unfortunately, the attention of the learned District Munsif was not drawn to the statutory power which he had under Order 21 Rule 105 (1) read with "Rule 104 CPC and to the fact that there was no need for him to go to Section 151 CPC for exercising the power of restoration. He has also not considered the question of restoring the E. P. on merits, if he had power to restore it in law.

13. I, therefore, allow this revision petition, set aside the order of the lower Court and direct the learned District Munsif to go into the question as to whether on merits, the E. P, should be restored under Order 21 Rule 105 (1) CPC and decide it in accordance with law. In the circumstances of the case, I make no order as to costs.