

Naresh Thaper Vs. Narayana Rao Patalay (Died) by Lrs. and ors.

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Court : Andhra Pradesh

Decided On : Mar-28-2003

Reported in : 2003(3)ALD389

Judge : C.Y. Somayajulu, J.

Acts : [Limitation Act, 1963](#) - Sections 5 and 14; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 47, Rule 1; Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960 - Sections 10; Endowments Act

Appeal No. : CMP No. 4593 of 2003 and Rev. CMP (SR) No. 14488 of 2003 in CRP No. 2324 of 1998

Appellant : Naresh Thaper

Respondent : Narayana Rao Patalay (Died) by Lrs. and ors.

Advocate for Def. : Challa Seetharamayya, Adv.

Advocate for Pet/Ap. : Vilas V. Afzulpurkar, Adv.

Disposition : Petitions dismissed

Judgement :

ORDER

C.Y. Somayajulu, J.

1. Narayana Rao Patalay (hereinafter called the deceased) filed R.C. No. 231 of 1988 against the petitioner seeking his eviction from the premises bearing Door No. 3-6-341 at Bashir Bagh, Hyderabad. After contest by the petitioner, the said R.C. was dismissed. So, deceased filed R.A. No. 134 of 1994 and died during the pendency of the appeal. So, respondents filed I.A. No. 1140 of 1995 to bring themselves on record as the legal representatives of the deceased and to permit them to continue the appeal proceedings. After contest by the petitioner the said I.A. No. 1140 of 1995 was allowed and subsequently R.A. No. 134 of 1994 was dismissed on merits. Revision against that order in C.R.P. No. 2324 of 1998 preferred by the respondents was allowed by me on 6.8.2002 granting time till the end of December, 2002 to the petitioner to vacate the premises. Against the said order in C.R.P., petitioner preferred an S.L.P. (Civil) No. 21179 of 2002 before the Supreme Court. On 14.2.2003 the Supreme Court passed the following order:

'After the case was heard for sometime, learned Senior Counsel appearing for the petitioner stated that the petitioner wants to file a review petition before the High Court and, therefore, this special leave petition may be permitted to be withdrawn. The special leave petition is, accordingly, dismissed as withdrawn. Interim order is vacated.'

Thereafter petitioner filed C.M.P.(SR) No. 14488 of 2003 seeking review of the order in the C.R.P. along with C.M.P. No. 4593 of 2003 under Section 5 of the Limitation Act to condone the delay of 169 days in preferring the Review Petition.

2. Heard Mr. Vilas V. Afzul Purkar, learned Counsel for the petitioner, and Sri Challa Sitharamayya, learned Senior Counsel appearing on behalf of respondents.

3. The contention of the learned Counsel for the petitioner is that since petitioner preferred an SLP before the Supreme Court, he did not file the review petition intime and since the delay in preferring the review was his preferring SLP., the delay that occurred in preferring the review petition deserves to be condoned. On the question of maintainability of the review petition in a CRP, preferred as per the provisions of A.P. Buildings (Lease, Rent and Eviction) Control Act, 1960 (hereinafter called 'the Act') he contends that though a learned Single Judge of this Court in A. Manmohan Shah v. Gopinath, : 1999(1)ALD517 , observed that an

application for review of an order passed in revision under the provisions of the Act not maintainable, inasmuch as that order was set aside by the Supreme Court in Civil Appeal No. 5417 of 1999 dated 20.9.1999, A. Manmohan Shah (supra) is no longer good law. He contends that since the Supreme Court in M.M. Thomas v. State of Kerala and Anr., : [2000]1SCR333, held that the High Court, as a Court of record, has inherent power to review its orders, review petition is maintainable.. He, relying on Rajasekharan v. Paramartha Bhushanam Nathella Sampathu Chetty Charities, 1983 (2) APLJ 276, contends that G.O.Ms.No. 622 dated 4.5.1960, issued under the provisions of the A.P. Charitable and Hindu Religious Institutions and Endowments Act, 1951 exempting all the buildings belonging to Hindu Religious and Charitable Institutions from the purview of the Act, continues to apply even after coming into force of A.P. Charitable and Hindu Religious Institutions and Endowments Act, 1966 and 1987 (for short 'the Endowments Act'), and so the building in question belonging to the first respondent would be exempt from operation of the provisions of the Act, and so respondents cannot seek eviction of the petitioner under the provisions of the Act. He contends that this point could not be raised at the time of hearing of the revision since the petitioner did not foresee the prospect of revision being allowed. It is his contention that since this Court while disposing of the revision petition clearly held that the building in question would be covered by the Endowments Act, the remedy, if any, of the respondents is elsewhere, but not under the provisions of the Act, and contends that since according to the provisions of the Endowments Act the Commissioner can order eviction of a tenant holding over as an encroacher, respondents can seek the remedy under Endowments Act or file a Civil Suit for eviction, but petition for eviction under the provisions of the Act cannot be continued. He relied on A.R. Antulay v. R.S. Nayak, : 1988 CriLJ1661, in support of his contention that an order, which is per incuriam, can always be reviewed; and since the question as to whether G.O. Ms. No. 622 is applicable to the building in question was not considered by this Court while disposing of the revision, and the order in revision would be non est in view of the above said G.O., the order in revision deserves to be reviewed, and so the review petition is maintainable. He relied on A.V.G.P. Chettiar and Sons v. T. Palanisamy, 2002 SAR (Civil) 822, where it is held that in view of the exemption granted to the building governed by

the Tamil Nadu Endowments Act, from the provisions of the Rent Control Act in Tamil Nadu, petition for eviction under the provisions of Rent Control Act in Tamil Nadu is not maintainable, and contends that the ratio in that decision squarely applies to the facts of this case. The contention of the learned Senior Counsel for the respondents is that a petition seeking to review the order in a C.R.P. filed under the provisions of the Act, is not maintainable, as held in *Gantasala Eswara Rao v. Gundimi Somasekhar*, : 1998(3)ALD92 (DB). It is his contention that the ratio in *MM. Thomas* case (*supra*) does not apply to the facts of this case because the Court in that case was dealing with a case arising under Kerala Private Forests (Vesting and Assignment) Act, 1971 (1971 Act), and from para-7 of the said judgment it is seen that power of review is available under the provisions of the 1971 Act. It is his contention that since this Court while disposing of the C.R.P. held that the appeal and the revision should be deemed to be continuation of proceedings initiated by the deceased, the proceeding in C.R.P. is not and cannot be treated as a fresh proceeding, initiated by the Trust created by the deceased, under the provisions of the Act, and since a proceeding validly instituted can be continued till the end, the fact that subsequent to the institution of the proceedings the person that instituted the proceeding did not survive, though the cause of action survives is not and cannot be a ground for throwing out the proceedings on the ground that subsequent to the death of the party that instituted the proceedings a new jurisdiction for seeking the same relief came into existence. In short his contention is because of a subsequent event of the death of the person that instituted the proceedings, the fact that his legal representatives can obtain the relief through some other forum, by itself would not be a ground for non-suiting the legal representative of the deceased petitioner. He fortified his said contention by relying on *Smithies v. National Association of Operative Plasterers*, 1908 Kings Bench Division 310, *K. Kapen Chako v. The Provident Investment Company (P) Ltd*, (1997) 1 SCC 593, *Commissioner of Income Tax v. Dhadi Sahu*, 1994 Supp (1) SCC 257, *R. Kapilanath v. Krishna*, : [2002]SUPP5SCR66 , and *Ambalal Sarabhal Enterprises Ltd. v. Amrit Lal And Co.*, : AIR 2001 SC3580 . It is his contention that this Court did hear on the question of maintainability of the proceedings subsequent to the death of the deceased vis-a-vis the G.O.Ms.No. 622 relied on by the Court for petitioner, and contends that since the learned

Counsel for petitioner did not seriously dispute the maintainability of the revision by the revision petitioners i.e., respondents, the question of applicability of the said G.O. might not have been considered in the order sought to be reviewed. It is his contention that since the appellate authority in I.A. No. 1140 of 1995 clearly held that the respondents, as legal representatives of the deceased, are entitled to continue the proceedings instituted by the deceased, it means that the proceedings are continued for and on behalf of the deceased, and, therefore, the mere fact that the Trust came into existence subsequent to the death of the deceased is not and cannot be a ground for review. It is his contention that the points that arise for consideration in this petition would be whether an application for eviction under the provisions of the Act can be continued by the legal representatives of the deceased-landlord and can a tenant question the capacity of the statutory authorities under the Act by way of review when he did not choose to question the reasoned order of the appellate authority by way of a revision or in the main revision petition filed by the respondents, who are the legal representatives of the deceased, and since both the questions are to be answered in favour of the respondents, the question of reviewing the earlier order does not arise. In reply the contention of the learned Counsel for the petitioner is that since the Supreme Court in para 14 of MM Thomas case (supra) clearly held that the High Court, as Court of record, as envisaged in Article 215 of the Constitution, must have inherent power to correct the records, de hors the powers conferred under the provisions of Section 8(c) of the 1971 Act, and had clearly held that the High Court, as a Court of record, has inherent jurisdiction to review its order, the review petition is maintainable. It is his contention that the fact that petitioner did not question the order of the appellate authority in IA No. 1140 of 1995 independently by way of revision or during the hearing of the C.R.P. filed by the respondents by itself is not and cannot be a ground for rejecting this petition, because petitioner had an option either to file a revision against the order in LA. No. 1140 of 1995 or to wait till the disposal of the appeal, and prefer a revision questioning the final order in the appeal by way of revision and in any event since the appeal filed by the respondents was dismissed by the appellate authority, the fact that petitioner did not challenge the order of the appellate authority in IA No. 1140 of 1995, in this Court is of no consequence.

4. The points that arise for consideration in these petitions are:

(1) Whether there are grounds to condone the delay in filing the review petition?

(2) Whether the review petition is maintainable and if so are there grounds for review?

5. Point No. 1 : The case of petitioner is that as he was pursuing the remedy of appeal available to him bona fide before the Supreme Court the delay occurred in presenting the review petition may be condoned. So the question is whether the time taken for pursuing the remedy of appeal to Supreme Court can be treated as a 'sufficient ground' for condoning the delay or not. Delay in presentation of proceedings can be condoned either under Section 5 or Section 14 of the Limitation Act. Section 14 of Limitation Act applies only to cases where the party bona fide pursues the remedy in a Court which has no jurisdiction. Filing of an appeal in Supreme Court against the order in the CRP cannot be said to be presentation of the case in a Court which has no jurisdiction, because appeal against the order of this Court, in a revision under the provisions of the Act, lies only to Supreme Court but not to any other Court. The other question is, can the time taken by the petitioner in prosecuting the remedy of appeal open to him constitute 'sufficient cause' for condonation of the delay. A party, who having pursued the remedy legally open to him, cannot, after coming to know his chances of success in availing that remedy are bleak, be permitted to avail the alternative remedy which is barred by time, because it amounts to harassing a party who has an order in his favour. A successful party cannot be permitted to be harassed by the unsuccessful party by pursuing remedies alternatively in respect of the same cause. If the petitioner felt that the adverse order suffered by him was prima facie the result of an error apparent on the face of record or the other grounds for seeking a review, he, instead of filing an appeal, should have filed the petition for review immediately within the period of limitation. He did not do so, but chose to prefer an appeal and for the reasons best known to him, thought it fit to withdraw the appeal after it was heard for sometime. In the circumstances of this case, the delay in filing of the review petition cannot be condoned merely because petitioner was pursuing the remedy of appeal in the Supreme Court. In other words, the fact

that petitioner was pursuing the remedy of appeal available to him, is not a sufficient ground for condoning the delay in filing the review petition. The point is answered accordingly.

6. Point No. 2 : In view of my finding at Point No. 1, it is not really necessary to answer this point. But, since 1 permitted the Counsel to argue on this point also, I wish to give my finding on this point also.

7. In re-maintainability of the review petition, it is no doubt true a Division Bench of this Court in Gantasala Eswar Rao case (supra) held that a petition seeking review of an order passed in a revision filed under the provisions of the Act is not maintainable, but since the Supreme Court in M.M. Thomas case (supra) in para-15 of its judgment, after referring to Halsbury's Laws of England, held that as superior Court, the High Court has inherent power to review its order, and since that decision is binding on me, I hold that the High Court, exercising its power of revision under the provisions of the Act, would have the power to review its order. I hasten to add that this power of review is not available to the primary and appellate authority under the provisions of the Act since the Act did not confer such power on them. So, I hold that the review petition is maintainable.

8. The contention of the learned Counsel for the petitioner that this Court did not consider the applicability of G.O. Ms. No. 622 while passing the order in CRP cannot be accepted for the reasons to be stated a little later. Assuming the said contention is true, the same is not, and cannot be, a ground for seeking review, because petitioner is bound to raise and defend his case on all possible aspects. Before the appellate authority petitioner took a plea in I.A. No. 1140 of 1995 that respondents cannot continue the proceedings initiated by the deceased after his death. That contention was negated by the appellate authority. A reading of the order of the appellate authority in R.A. No. 134 of 1994 does not show that petitioner took a plea that the R.C. deserves dismissal by virtue of the G.O. now relied on by him. When it is the case of petitioner that he did not question the maintainability of the proceedings under the Act being continued by the respondents after the death of the deceased, he cannot seek review on the basis of that point, which was not urged by him at the time of hearing of the main cause,

because it does not amount to an error apparent on the face of record or other causes referred to in Rule 1 of Order 47 CPC. In fact in *Collector of 24 Parganas v. Lalith Mohan Mullick*, : AIR 1988 SC2121 , the Supreme Court held that a new ground, which was not urged at the time of hearing of the main appeal, and which was also not urged before the High Court, cannot be taken into consideration for purpose of review. Therefore, petitioner cannot seek a review on the basis that he wants to urge a point which, according to him, was not urged at the time of hearing of the CRP or before the appellate authority. For that reason alone the review petition deserves to be dismissed.

9. After hearing the Counsel for both sides at length in the CRP, I reserved the case for orders, and after going through the record in detail, having entertained a doubt as to the effect of G.O. Ms. No. 622 on the proceedings in the CRP. I reopened the case, and gave an opportunity to both sides to address arguments. Sri Challa Seetharamayya, learned Senior Counsel, argued at length. Many of the decisions now cited were cited by him in support of his contention that respondents can continue the proceeding initiated by the deceased irrespective of the fact that Trust, which came on record as one of the legal representatives of the deceased, came into existence. Since the learned Counsel for petitioner did not seriously dispute the position of law propounded by the learned Senior Counsel, and since neither party raised a contention with regard to the said G.O., and since I suo motu reopened and heard both the Counsel to satisfy myself, I felt it unnecessary to refer to G.O. Ms. No. 622 in the order passed by me in the CRP. Now that applicability of G.O. Ms. No. 622 is made an issue as a ground for review, I proceed to deal with the same.

10. It should be remembered that this is not a case of a charitable institution instituting the proceedings for eviction of the petitioner from the building belonging to it, but is a case where a private individual, filing a petition for eviction of his tenant on the ground that he needs the building for the purpose of opening a charitable hospital. He died during the pendency of the appeal and the Trust created by him came on record for continuing the proceedings. That the eviction petition filed by the deceased is maintainable is beyond dispute. The Rent Controller dismissed the eviction petition of the deceased on the ground that his

requirement was not bona fide. The deceased died during the pendency of the appeal filed by him. When the respondents by filing I.A.No. 1140 of 1995 wanted to continue the appeal proceedings as legal representatives of the deceased, petitioner in paragraph-5 of his counter took a plea that the eviction petition is not maintainable and that respondents 2 to 4 have to institute a separate proceeding and cannot continue the proceeding instituted by the deceased. The appellate authority, while disposing of I.A.No. 1140 of 1995, held that since the eviction is sought by the deceased for running a charitable clinic, and since his legal representatives also need the premises for the same purpose, they are entitled to come on record and continue the proceedings, but subsequently dismissed the appeal on some other grounds. Hence respondents filed the C.R.P. While disposing of the revision filed by respondents, I observed as follows in para-16 of my order:

'When the charitable trust comes into operation, it, no doubt, becomes a separate entity and would be juristic personSo, had the deceased been alive and had he himself filed this revision, for the reasons mentioned above, it would have to be allowed. After the death of the deceased during the pendency of this appeal, since the cause of action survived, revision petitioners were allowed to come on record and continue the appeal. Therefore revision petitioners, on the same cause of action on which the deceased filed the R.C., can seek eviction of the respondent from the building.'

So, it is clear that eviction of the petitioner was ordered on the cause of action set up by the deceased, but not on the independent ground that charitable trust created by the deceased needs the premises for its occupation.

11. The ratio in *Smithies case* (supra), which was approved and followed in *K. Kapen Chako case* (supra), *Dhadi Sahu case* (supra) and *Ambalal case* (supra) is that a pending proceeding would not be affected by the subsequent change in events, and the proceeding will have to be continued and concluded in accordance with the law in existence at the time of institution of the proceedings. In *R.Kapilanath case* (supra) the Supreme Court clearly held:

'The correct approach to be adopted in such cases is that a new law bringing about a change in forum does not affect pending actions, unless a provision is made in it for change over of proceedings or there is some other clear indication that pending actions are affected.'

So, the question would be whether respondents, who came on record as legal representatives of the deceased, can continue the proceedings initiated by the deceased or should file a separate proceeding in view of the exemption of the provisions of the Act in G.O. Ms. No. 622.

12. It is no doubt true that a change in a statute is different from a change that came into existence due to death of a party, and in the case of change in law the provisions of the statute would govern the rights of parties. It is well known principle of law that a cause has to be decided on the basis of the cause of action as on the date of institution of the proceedings. No doubt, subsequent events can be taken into consideration. In cases where, by reason of the subsequent events, the cause of action does not survive only can a person be non-suited but not otherwise. There is any amount of difference between a charitable institution seeking eviction of its tenant on the cause of action available to it independently, and it continuing the proceedings as a legal representative of its creator or founder. In this case, first respondent-Trust along with respondents 2 and 3 had to come on record because cause of action survived even after the death of the deceased. It should be remembered that respondents are not seeking eviction on basis of an independent cause of action available to them. In fact, it is for the respondents to take a decision whether to continue the proceedings initiated by the deceased, or to proceed against the petitioner under the provisions of the Endowments Act. Petitioner, as a tenant of the deceased, cannot dictate terms to the respondents, who are the legal representatives of the deceased, when cause of action on which the deceased filed the petition survives. So, I am unable to agree with the contention of the learned Counsel for the petitioner that the proceedings cannot be continued by respondents in view of the exemption given under G.O. Ms. No. 622 referred to above.

13. The main object of the petitioner seems to be to somehow cling to the property for as long a time as possible. The relief sought by the deceased was eviction of the petitioner to enable him to run a charitable clinic; which I held to be bona fide requirement. Petitioner does not get an advantage, nor are any of his rights put to jeopardy, by the respondents continuing the eviction proceedings initiated by the deceased. By driving the respondents to approach the Commissioner, the petitioner wants to gain further time to vacate the premises, because he can question the order of the Commissioner in various fora by way of appeals, revisions, etc., and buy plenty of time. So, this petition is vitiated by mala fides also.

14. As rightly contended by the learned Senior Counsel for the respondents, A.V.G.P. Chettiar and Sons case (supra), relied on by the learned Counsel for the petitioner, is a case where the proceeding was instituted by the trust that is already in existence. In this case the proceeding was not instituted by the first respondent. So, the said decision has no application to the facts of this case. Similarly A.R. Antulay case (supra) relied on by the learned Counsel for petitioner also has no application to the facts of this case.

15. Therefore, I find no grounds to review my earlier order in CRP No. 2324 of 1998 dated 6-8-2002. The point is answered accordingly.

16. For the above reasons both the petitions are dismissed with costs. Time is granted to the petitioner to vacate the premises till 15-4-2003, on condition of his undertaking that he would vacate the premises without seeking further time.