

(1999) 10 AP CK 0068
In the Andhra Pradesh High Court
Case No : CRP No. 2205 of 1999

Gunda Jagan Mohan Rao and another	APPELLANT
Vs	
Kanneti Krishnaiah and another	RESPONDENT

Date of Decision : 08-10-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 105, Order 21 Rule 106, Order 21 Rule 58
Limitation (Amendment) Act, 1999 — Section 97
Limitation Act, 1963 — Section 5

Citation : (1999) 6 ALD 757 : (2000) 2 ALT 407

Hon'ble Judges : I. Venkatanarayana, J

Bench : Single Bench

Advocate : Mr. P. Sri Rama Murthy, for the Appellant; Mr. A. Anantha Reddy, for the Respondent

Judgement

1. The revision is directed against an order declining to entertain the petition filed u/s 5 of the Limitation Act seeking condonation of delay of 183 days in filing a petition to set aside the order of dismissal for default passed in EA No.94 of 1996 in EP No.9 of 1996.

2. The contention of the learned Counsel for the petitioner is that he filed EA No.94 of 1996 under Order 21, Rule 58 CPC making claim over the EP schedule property i.e., Ac.2.00 in S. No.554 and house-site measuring 0.4 guntas in S No.765/AA in Mellacheruvu and questioning the attachment of the property obtained by the 1st respondent herein on the ground that the schedule property is the self acquired property of their late father who bequeathed the house-site in favour of the petitioner by executing a registered sale deed dated 16-6-1989 and after the death of father the 1st petitioner became the absolute owner and possessor of the house-site and both the petitioners are in joint possession of 1/3rd of Item No.1 of the property and that their Counsel informed the date of adjournment of EA No.94 of 1996 as 19-10-1997 by way of a letter just a day before filing of the present petition and the petitioner came to know that the

Court has dismissed EA 94 of 1996 for default on 19-10-1997 and they could not attend the Court on 19-10-1997 as the letter addressed by the learned Counsel has been lost in postal transit. Therefore there is a delay in filing a petition to set aside the order of dismissal.

3. The learned Counsel for the respondent herein contended that the petition u/s 5 of the Limitation Act is not maintainable. He also opposed the bona fides of the averments in the affidavit and submitted that no evidence has been placed before this Court for condoning the delay.

4. The short question that falls for consideration before this Court is whether the petition filed u/s 5 of the Limitation Act is applicable to the proceedings under Order 21 of CPC.

5. Since the present petition seeking condonation of delay is in support of a petitions to set aside the order of dismissal of an application filed under Order 21, Rule 58 CPC, Section 5 of the Limitation Act can not be invoked for condonation of delay. The learned Counsel for the respondent has placed reliance on the decision reported in *B. Santhamma v. B. Koli Reddy* 1987 (2) APLJ 135. In the aforementioned decision the learned single Judge has discussed the issue about the maintainability of the petition filed u/s 5 of the Limitation Act arising out of the proceedings under Order 21. In another judgment of this Court reported in *Venugopalaswamyvari Devasthanam Konthivada v. K. Saraswathi*, 1987 (1) ALT (NRC) 37, it is held that:

"Section 5 of the Limitation Act did not apply to any of the applications arising under Order XXXI of the Code. Order 21, Rule 106 of the Code expressly prescribed a limitation for setting aside an ex parte order or restoration of the application dismissed for default under sub-rule (3). Therefore, within the parameters of such limitation the application had to be filed, and by necessary implication the applicability of Section 5 of the Limitation Act could not be extended. Accordingly, the Executing Court had no jurisdiction to entertain the application filed beyond the limitation prescribed under sub-rule (3) of Rule 106 of Order 21 of the Code".

Further a Division Bench of this Court in *B. Santhamma v. B. Koti Reddy*, 1987 (2) APLJ 135 (supra), has held that:

"The amendment by the High Court incorporated as sub-rule (4) of 105 of Order 21 cuts into the main provision and a new dimension is given and this is at variance with the main provision. This amendment being not in conformity with the main provision or inconsistent with the main provision, cannot subsist in view of Section 97 of the Amending Act. In view of this Order 21, Rule 106 analogous to Order 21, Rule 105 should be considered as without previous amendment and consequently Section 5 of the Limitation Act is not applicable to proceedings under Order 21 CPC."

6. In short the principle is that whatever constraints of law the substantive

proceeding is subjected to, the same shall continue to govern the subsidiary proceedings emanating from the main proceedings or as off-shoots of the main proceedings. The subsidiary or off-shoot proceedings cannot salvage the main proceeding from such constraints and can also not salvage themselves from such constraints.

7. In view of the aforementioned judgments and well settled legal principles, the revision petition is dismissed. No order as to costs.