
(1997) 09 AP CK 0023

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 3998 of 1995

N.V. Chowdary

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 24-09-1997

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : AIR 1998 AP 83 : (1997) 6 ALT 24 : (1998) 1 CivCC 258

Hon'ble Judges : D.H. Nasir, J

Bench : Single Bench

Advocate : G. Krishna Murthy, for the Appellant; Government Pleader for Arbitration, for the Respondent

Final Decision : Allowed

Judgement

D.H. Nasir, J.—A very short question arises for our consideration in this Civil Revision Petition whether the provisions of Section 5 of the Limitation Act could be pressed into service in spite of categorical exclusion of Order XXI, C.P.C. from the applicability of the said provisions of the Act.

2. Section 5 of the Limitation Act reads as under :--

"5. Extension of prescribed period in certain cases :-- Any appeal or any application, other than an application under any of the provisions of Order XXI of the CPC 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

3. According to the learned Counsel for the Decree-Holder/Petitioner, the real question before the Court was whether a review petition could be entertained in respect of any order passed by the Court in any proceeding under Order XXI of the Civil Procedure Code. According to the learned Government Pleader for the State the exclusion of Order XXI of C.P.C. from the scope of Section 5 of the Limitation Act does not come in the way of the respondent because the executing

Court was considering the maintainability of a review petition and not any order passed under Order XXI of the C.P.C.

4. The learned Counsel for the petitioner emphatically submitted that review petition was not an independent proceeding. It emanated from the order passed by the executing Court in E.A. No. 41/95 dated 15-6-1995 for condoning the delay of 48 days in filing the review petition under Order 47, Rule 1 of C.P.C. "Exclusion" from the purview of Section 5 of the Limitation Act, therefore, according to the learned Counsel for the petitioner, amply covered not only the provisions of Order XXI of C.P.C. but also the off-shoots of the proceedings taken under Order XXI of C.P.C. including the review petition.

5. I am inclined to agree with the submissions made by the learned Counsel for the petitioner that having regard to the fact that review petition in all cases would not be an independent proceeding; it is necessarily to be correlated to any order passed under any statute which is amenable to review.

6. The learned Counsel for the rival parties cited various rulings in support of their respective contentions which we may now take up for consideration.

7. In the case of *Sri Venugopalaswamyvari Devasthanam Konthivada v. K. Saraswathi* 1987 (1) ALT 37 (Notes on recent cases) it is held that Section 5 of the Limitation Act did not apply to any of the applications arising under Order XXI of the Code. Order 21, Rule 106 of the Code expressly prescribed a limitation for setting aside an ex parte order for 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 27 of the Code.

8. It is pertinent to note that in the case before us, in the impugned judgment, the learned Judge of the executing Court observed that in accordance with the ratio laid down by the Supreme Court in *Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others*, the party cannot be denied its right at the threshold of the law of justice on a mere technical ground and by recording its satisfaction, the executing Court held that the petitioner had shown sufficient cause and, therefore, it was inclined to condone the delay of 48 days in filing the petition for review of the order passed in E.A. No. 42/95 dated 15-6-1995. The point indeed is well taken that at the threshold of a proceeding a right could not be denied to a party on mere technical grounds if the petitioner succeeded in showing sufficient cause for delay. However, the maintainability of the petition for condoning delay was not considered by the lower Court inasmuch as the lower Court did not examine whether it had jurisdiction to entertain the petition for condoning delay in filing review petition in view of the specific bar envisaged by Section 5 of the Limitation Act. In that view of the matter, therefore, in my opinion, notwithstanding the cause of rendering substantial justice, when the

jurisdiction is categorically and specifically excluded in a certain class of proceedings from consideration the petition for condoning delay, the impugned order passed by the lower Court condoning the delay of 48 days in filing the review petition for review of an order passed under Order 21, C.P.C. cannot be upheld mainly because the very jurisdiction to consider the petition for condoning the delay did not exist.

9. A Division Bench of this Court in *B. Santhamma v. B. Koti Reddy*. 1987 (2)APLJ 135 held as follows :--

"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 analagous 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, C.P.C."

There is no reason why any deviation need be made from the above decision of the Division Bench in the ruling cited above.

10. The same view is expressed by the Calcutta High Court in *Hemanta Kumar Dey Vs. Taramani Devi Tibriwalla*, .

11. While it is true that the decisions cited by the learned Counsel for the petitioner did not directly deal with the maintainability of a review petition for review of an order made under Order XXI, C.P.C. and the application for condoning delay in filing such review petition, there could be no denial of the proposition of law that any order passed under Order XXI. C.P.C., if excluded from the purview of Section 5 of the Limitation Act. any proceeding by way of an off-shoot of such order passed under Order XXI of C.P.C. cannot be treated differently from the main proceeding as far as procedural aspect thereof is concerned and. therefore. I am firmly of the opinion that the bar contemplated by Section 5 of Limitation Act covers not only the orders made under Order XXI. C.P.C. but also the proceedings which have originated from Order XXI and which are germane to any order passed in exercise of the powers conferred by Order XXI of the CPC by the executing Court.

12. On behalf of the respondent, the decision in the case of *Mohinder Singh and Others Vs. Teja Singh and Others*, was cited. However, the said decision deals with the powers of the Court u/s 152. C.P.C. to rectify clerical mistakes and errors arising from accidental slip, but not on the proposition with which we are confronted in this case and in that view of the matter, the decision cited by the learned Government Pleader for the respondent cannot be taken into consideration. Section 152, C.P.C. has no application in the facts and circumstances of the present case.

13. Same is the case with the decision of this High Court in Y. Yadaiah Vs. B. Balapershad, and the same cannot be invoked for the purpose of ascertaining whether any proceeding by way of an off-shoot passed under Order XXI of C.P.C. is covered by the bar envisaged u/s 5 of the Limitation Act.

14. Many other decisions were also cited by the learned Counsel for the rival parties touching the merits of the case. However, the question before us in the present case is limited to the impugned order passed by the executing Court on 26-10-1995 in E. A. No. 117/95 in E.A. No. 41/95 in E.P. No. 5/1992 in O.S. No. 1857/88, which only deals with the question whether delay in filing review petition against the order passed under Order XXI of C.P.C. could be considered or not in the light of the provision of Section 5 of the Limitation Act which excludes from its purview any order made under Order XXI of C.P.C. Even if the impugned order of the executing Court was upheld in this C.P.P. it would have produced the effect of enabling the executing Court to review the order in question and the same could not have been considered by this Court in the present Revision Petition. In that view of the matter, therefore, the authorities cited on the propositions other than the proposition whether the review petition was excluded from consideration u/s 5 of the Limitation Act. need not be considered in this Civil Revision Petition.

15. The principle being 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.

16. As a result, the Civil Revision Petition is allowed and the impugned order passed by the II Additional Judge, City Civil Court. Hyderabad condoning the delay of 48 days in filing the petition for review of the order passed by the lower Court in E.A. No. 41 of 1995 on 15-6-1995 is quashed and set aside. No costs.