

(2004) 07 AP CK 0050

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No's. 523 and 524 of 1999

State Bank of India

APPELLANT

Vs

Sri Muffar Ali Khan and Others

RESPONDENT

Date of Decision : 08-07-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 105, Order 21 Rule 106, Order 21 Rule 106(3), Order 21 Rule 106(4), Order 9 Rule 9
Limitation Act, 1963 — Section 5

Citation : (2004) 5 ALD 92 : (2004) 6 ALT 17

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : A. Manisha, for the Appellant;

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—These two C.R.Ps., arise out of same set of facts and in the same proceedings. Hence, they are disposed of through a common order.

2. The petitioner filed O.S. No. 393 of 1976 in the Court of II Additional Judge, City Civil Court, Hyderabad, for recovery of certain amount covered by mortgage from the respondents. An ex parte preliminary decree was passed on 24-11-1976. Final decree was passed on 24-12-1980. The petitioner did not initiate execution proceedings immediately. It is stated that the respondents approached them for settlement. Ultimately, it filed E.P. No. 49 of 1990. The E.P. was dismissed for non-payment of batta on 9-8-1991.

3. The petitioner filed E.A.(SR). No. 1960 of 1992, under Order 21 Rule 106 CPC, to set aside the order of dismissal for default. Since there was delay of 256 days in filing the application, it filed E.A. No. 59 of 1994 for condonation of delay. Through a common order dated 3-9-1996, the executing Court dismissed both the applications. C.R.P. No. 523 of 1999 is filed against the order in E.A.(SR). No. 1960 of 1992 and C.R.P. No. 524 of 1999 is filed against the order in E.A. No. 59 of 1994.

4. Though substituted service was effected on the respondents, they have not chosen to appear in person or through advocate. Heard the learned counsel for the petitioner.

5. The decree obtained by the petitioner against the respondents in O.S. No. 393 of 1976, became final. It filed E.P. No. 49 of 1990. The E.P. was dismissed for non-payment of batta. The petitioner filed an application under Rule 106 of Order 21 CPC, for setting aside the order of dismissal. Since there was delay in filing the application, it filed E.A. No. 59 of 1994 u/s 5 of the Limitation Act (hereinafter referred to as "the Act"), to condone the delay of 256 days.

6. The Executing Court has undertaken extensive discussion of the matter, with specific reference to the question of limitation. It took the view that from a bare reading of it, Section 5 of the Act indicates that it does not apply to proceedings initiated under Order 21 CPC, and in that view of the matter, E.A. No. 59 of 2004 cannot be entertained at all. It is true that Section 5 of the Act, in terms, excludes its application to the proceedings initiated under Order 21 CPC, and that Rule 106 of Order 21 CPC stipulates 30 days time for filing of application to set aside the ex parte orders passed under Rule 105 of Order 21 CPC. If this were to have been the law, no exception can be taken to the order under revision. However, the various amendments that were effected to these provisions were not taken note of.

7. So far as the State of A.P. is concerned, Rule 106 of Order 21 CPC was amended through a notification published in Gazette, dated 30-11-1992. Sub-Rule (4) was added to Rule 106 CPC, which reads as under:

"Provisions of Section 5 of the Limitation Act, 1963, shall apply to all applications under Sub-Rule (3)".

8. With that amendment, Section 5 of the Act became applicable in respect of the applications referred to in Rule 106 CPC. In *Sale Ranga Swamy Vs. Special Collector-cum-Land Acquisition Officer, S.S.P.*, an extensive discussion was undertaken by this Court and it was ultimately held that it is permissible for an Executing Court to condone delay in filing applications to set aside the ex parte orders, passed under Rule 105 CPC, if it is satisfied about the explanation offered by the parties. This important aspect was not brought to the notice of the Executing Court.

9. From the foregoing discussion, it is evident that it was competent for the Executing Court to entertain applications filed u/s 5 of the Act, while dealing with those filed for setting aside ex parte orders, passed under Rule 105 CPC. In the normal course of things, the matter needs to be remanded to the Executing Court, for consideration of the matter, in the light of the amended provisions and the precedent referred to above, and to decide whether the delay deserves to be condoned. However, in view of the fact that the learned counsel himself filed an affidavit, narrating the circumstances under which the default in payment of batta occurred, and the delay is only 256 days, this Court is of the view that the

E.A. can straightaway be allowed. Further, ordering of applications filed under Order 9 Rule 9 CPC, or those under Order 21 Rule 106 CPC, are matters of course, once the delay is condoned. The E.P. itself was filed in the year 1990, too for execution of decree passed in 1980. It cannot be further delayed. Hence, it is directed that the application-E.A.(SR). No. 1960 of 1992, shall also stand ordered.

10. The C.R.Ps. are allowed and E.P. No. 49 of 1990 shall stand restored to file.