

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.722 of 2014

ORDER:

The plaintiffs of O.S.No.116 of 2001 aggrieved by the order of the lower Court in I.A.No.280 of 2011 dated 31.10.2013 passed by the learned Senior Civil Judge, Miryalaguda, for the delay occurred of 851 days to condone under Section 5 of Limitation Act, I.A.No.280 of 2011 to entertain the unnumbered application under Order IX Rule 9 CPC since filed was ended in dismissal, preferred the revision petition, impugning the same.

The grounds of revision mainly are that the lower Court went wrong in observing in the impugned order Para 7 Page 4 end, as if, by no stretch of imagination it can be said delay of 851 days is condonable. It is contended that the lower Court totally went wrong in not considering the reasons assigned for the delay with supporting documents filed along with or subsequent to the application and before hearing, regarding the medical record of the 4th petitioner, who was suffering with ailments and undergoing treatment in several hospitals unable to file the petition earlier, despite knowing of her son/1st petitioner working as Panchayat Secretary, about the dismissal of suit for default and he was not able to prosecute because of his official duties.

The learned counsel for the revision petitioners reiterated the same in saying the trial Court having not considered the documents and not even adopted pragmatic approach required for condonation of delay and it is not the length of time that influence the mind of Court, but for to consider reasons or any lack of reasons for existence of sufficient cause or not within the wording of Section 5 of Limitation Act.

Whereas it is the contention of the learned counsel for the respondents, mainly the defendant Nos.3 & 5-cum-respondent Nos.3 & 5 that the trial Court's order is supported by reasons even not referred

each and every document for no ground showing any existence of sufficient cause to condone the delay and for this Court within the limited scope of revision, there is nothing to interfere, hence to dismiss the revision.

Heard and perused the material on record.

Even from the very affidavit of the 4th petitioner for the 851 days delay, it is not without knowing the dismissal of the suit for default in 2008, but for after her son/1st petitioner informed about it, she could not pursue by filing application as suffering from ailments and was undergoing treatment. Had there been any little truth, she could have been instructed her son, who is Panchayat Secretary earlier pursuing the matter and filed his chief affidavit having went to witness box in the suit initially, for his non-coming to face cross-examination, no doubt the trial Court ought to have closed his evidence by permitting any further evidence, dismissed the suit. Once such is the case, what are the documents and explanations tendered even out of pragmatic approach to be adopted, for subsequent to her knowing about the dismissal of the suit for default earlier taken place; for once she was unable to attend, she could have instructed any of the plaintiffs to file petition to restore the suit. Once such is the case, for any prudent person may have done that, her explanation is no way in favour of any of the plaintiffs to condone the delay, that too of 851 days, which lacks sufficient and reasonable explanation though not required of day-to-day explanation, if it is for the total period same ground of ill-health.

Having regard to the above, for this Court while sitting in the revision there is nothing to interfere and the civil revision petition is dismissed accordingly. However, it is made clear that the dismissal of the suit for partition for default will not preclude a fresh suit to maintain for the relief of partition though other reliefs regarding declaration and setting aside the gift deed etc., are barred by finality attained to the earlier suit lis; vide decision in **Cheedella Padmavathi (died) &**

Others Vs. Ch. Lakshminarasimha Rao (died) & Others^[1] at Paras

12(b)(ix) & (x)(a):

“12(b)(ix). Apart from no bar under Order XXIII Rules 1 and 3, even any principles of obiter or estoppel or waiver much less resjudicata have no application for the partition suit between co-owners from the recurring cause of action even there is withdrawal of earlier suit, on the subsequent suit for partition; when such is the case, from deletion of the item No.2 for either to set aside the deletion order to restore or for its re-inclusion-vide decisions-**P.Paul James @ palus Vs P.Jesudsu Syri**^[2] relying upon **Vearmachatteiar Vs Kothapudayar**^[3] & **Subbarao Vs Jagannadha Rao**^[4] that any compromise is not a decision by the Court by its acceptance to something in which parties had agreed which merely sets the seal of the Court on the agreement of parties and Court does not decide anything nor give it up stating that a decision of the Court implicit in it.

12(b)(x)(a). It is also apt to refer what is held by our High Court in **P.Subbalaxmi Vs P.Ramya**^[5] at para-29 that ***the rights of the parties are no doubt to be decided according to the relevant principles of law. However, in the matter of moulding the reliefs, the Court cannot remain oblivious to the facts mentioned alone but also to other attending facts and circumstances of the case.*** Same is also the position of law with regard to the appellate court powers under Order 41 Rule 33 CPC not only to pass an order or decree that the trial court ought to have passed, but also while sitting in appeal against, irrespective of the appeal filed is challenging even part of the order or decree of the trial court, to grant any further decree or order within the scope of relief, though not beyond, as the case may require within the facts and circumstances, which include subsequent events to take note of in so moulding the reliefs-Vide-**S.Nazeer Ahmed Vs State Bank of Mysore**^[6].”

Thereby while confirming the order of the lower Court concession is given to enable the plaintiffs to file a fresh suit for partition, if any.

Consequently, miscellaneous petitions, if any shall stand dismissed. No costs.

Date: 20.07.2016
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[1] 2015 (5) ALT 634
[2] 1996 AIHC 1462(Madras)
[3] AIR 1934 Madras 485
[4] AIR 1967 SC 591
[5] 2011 (1) ALT 256
[6] 2001 (11) SCC 75