

HON'BLE SRI JUSTICE S. RAVI KUMAR

CIVIL REVISION PETITION No.4468 of 2011

ORDER:

This revision is filed against the order dated 19.09.2011 in I.A.No.707 of 2011 in O.S.No.190 of 2007 on the file of Principal Junior Civil Judge, Mangalagiri, Guntur, whereunder, trial judge dismissed the application filed under Section 5 of Limitation Act r/w Section 151 CPC which is filed to condone delay of 186 days in filing petition to set aside ex parte decree dated 21.02.2011.

2. Brief facts leading to this revision petition are as follows:

Revision petitioners herein are defendants in O.S.No.190 of 2007 and respondents herein filed suit for possession of plaint schedule property and defendants filed written statement and contesting the suit. While so, the trial was commenced on 08.02.2011, on which date, chief affidavit of PW.1 was filed, and as defendants were absent, defendants counsel endorsed on the chief affidavit of PW.1 that notice may be ordered to the party, the Court refused for such a request and proceeded further and finally by recording cross examination as 'NIL', closed the evidence of plaintiff and thereafter passed decree on 21.02.2011. Petitioner filed I.A.No.707 of 2011 contending that after the death of first plaintiff, the other

plaintiff did not receive any notice and he could not contact his advocate and also due to ill health, but subsequently one day prior to the filing of this affidavit, he visited Court premises on some other work and he came to know that they were set ex parte and ex parte decree was passed on 21.02.2011, and immediately, he changed his advocate and filed present petition, but in filing such petition, there was a delay and requested the Court to condone such delay.

3. Respondents counsel filed counter disputing the affidavit averments of petitioners and contended that respondents intentionally not proceeded with the trial and they have not assigned any reason for condoning delay in filing set aside petition and that advocate, who originally filed vakalat on behalf of petitioners is behind all the present petitions and petitioners have not approached the Court with clean hands and prayed for dismissal of the application. Considering these contentions, trial Court dismissed the application holding that petitioners have to be vigilant in prosecuting their case, as they are not vigilant, they are not entitled for the relief claimed. Aggrieved by dismissal of the petition, present revision is preferred.

4. Heard both sides.

5. Advocate for petitioners submitted that valuable rights are involved in immovable property and an

opportunity may be given to petitioners to prove their defence and no prejudice will be caused to the other side. He further submitted that as their previous counsel has not intimated about stage of the suit, they have no knowledge about filing of chief affidavit of PW.1 and also passing of ex parte decree on 21.02.2011 and their clients came to know only after receipt of notice in the execution proceedings and immediately they filed petition for condoning delay, but the Court below without looking into the reasons stated in the affidavit, dismissed the application holding that it would amount to second round of litigation and the petitioners are dodging the matter.

6. Advocate for respondents submitted that petitioners are well aware of all the proceedings and they are represented by counsel and their counsel has not reported no instructions to these parties and the decree passed by the Court below is not an ex parte decree and it is decided on merits and the remedy of petitioners is to file a regular appeal but not a petition to set aside ex parte decree.

7. I have perused the material papers filed along with revision and also copy of the judgment dated 21.02.2011, which is produced on behalf of respondents herein. Though advocate for respondents contended that judgment dated 21.02.2011 is an order on merits, as seen from the same, it cannot be treated as a judgment on

merits. There is no reference to any issues framed on pleadings and determination thereon. As seen from the material papers, as petitioners did not proceed with the trial of the suit, the lower Court passed a decree on 21.02.2011 and it has to be treated as only ex parte decree though it is decided under Order XVII Rule 3 CPC.

8. As seen from the material, when petitioners through affidavit assigned some reasons for the delay in filing petition to set aside the ex parte decree, no counter-affidavit is filed disputing such reasons and only counter is filed on behalf of respondents by their advocate disputing the reasons mentioned in the affidavit. The trial Court ought to have seen that when party stated on oath that too by way of affidavit asserting certain facts unless those facts are rebutted either by way of counter-affidavit or by way of verified counter signed by the party, those facts cannot be discarded on the ground of general denial. In the counter filed by respondents herein to the said I.A.No.707 of 2011, only general denial is made and no specific facts are pleaded showing that deponent has knowledge of proceedings from 08.02.2011 to 21.02.2011. As rightly pointed out by advocate for petitioners, the lower Court ought to have given an opportunity to petitioners to put forth their claim in respect of the suit schedule property as valuable rights of both parties are involved in the lis.

9. Considering these aspects, I feel that the lower Court has committed grave error while deciding the matter in I.A.No.707 of 2011, therefore the same has to be corrected. Both sides agreed even to consider the ex parte decree set aside petition as the same reasons are urged in it.

10. Since the suit is of the year 2007, trial is already commenced, I feel by directing the Principal Junior Civil Judge, Mangalagiri, Guntur to dispose of the main case by fixing some time schedule, this revision can be disposed of.

11. Accordingly, this Civil Revision Petition is allowed by setting aside the impugned order dated 21.02.2011. Principal Junior Civil Judge, Mangalagiri, Guntur is directed to take up petition to set aside ex parte decree dated 21.02.2011 number it and allow it and restore the suit and to proceed with the suit from the stage where it was left and to decide it within three (03) months from the date of receipt of this order by giving liberty to both parties for producing their respective witnesses. No costs.

Miscellaneous petitions, if any pending, in this revision petition shall stand closed.

S. RAVI KUMAR, J

Date: 16-02-2015

Note : C.C. two days.

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