

HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

CIVIL REVISION PETITION No.1117 of 2010

ORDER:

This Revision petition is filed challenging the order dated 18.09.2009 in I.A.No.204 of 2008 in O.S.No.840 of 2006 of the

I Senior Civil Judge, City Civil Court, Hyderabad.

2. The petitioners herein are defendants in the suit. The 1st petitioner died pending the Revision and subsequently the legal representative of the 1st petitioner has also been impleaded as a party.

3. The respondent/plaintiff filed the above suit against the petitioners for specific performance of an agreement of sale dated 18.02.2005 under which the respondent allegedly agreed to sell 115 sq. yards for Rs.5,80,000/- to him. The suit was filed on 05.05.2006 before the Vacation Civil Judge, City Civil Court, Hyderabad.

4. It appears that an ex parte ad interim injunction was granted in favour of the respondent on 05.05.2006.

5. Later the suit was numbered and allotted to the I Senior Civil Judge, City Civil Court, Hyderabad, fixing the date of appearance of the petitioners as 16.06.2006.

6. On that date, the petitioners were set ex parte and the suit was posted for ex parte evidence of the respondent on 10.07.2006.

7. After two more adjournments, on 29.09.2006 the

suit was decreed ex parte.

8. Thereafter, E.P.No.3 of 2007 was filed on 02.01.2007 for execution of the said decree. The notices in the E.P. were served on 08.07.2007.

9. Thereafter, I.A.No.204 of the 2008 was filed on 26.12.2007 by the petitioners under Section 5 of the Limitation Act, 1963 (for short, 'the Act') to condone the delay of 70 days in filing the petition to set aside the ex parte decree dated 29.09.2006 and also a separate application under Order IX Rule 13 C.P.C.

10. In the affidavit filed in support of the application for condonation of delay, the petitioners contended that they never executed the agreement of sale in favour of the respondent and they never received any notices or summons in the suit. They alleged that only after receiving the notices in E.P.No.3 of 2007, they got documents filed by the respondent in the suit, and then filed the present application. It is alleged that the respondent played fraud and obtained the said decree. They invoked Article 123 of the Act and contended that from the date of knowledge they have calculated the delay. It is also pleaded that the 1st petitioner, who was aged 75 years old, was physically weak and mentally imbalanced and that the 2nd petitioner was not able to see clearly because he had high blood sugar.

11. Counter-affidavit was filed by the respondent, opposing the condonation of delay. While denying the

petitioners' contention that summons were not received in the suit by the petitioners, he pleaded that the ex parte ad interim injunction was granted on 05.05.2006 and the same was sent to the petitioners by registered post; and therefore, he contended that the petitioners cannot claim ignorance of the suit proceedings. He also pleaded that the son of the 2nd petitioner was aware of the proceedings and there was no evidence of any illness suffered by petitioners. He further contended that the delay in filing the application is not 70 days, but it is 420 days.

12. By order dated 18.09.2009, the Court below dismissed the I.A.No.204 of 2008. It recorded that summons were received by the defendants. It also stated that provisions of Section 5 of the Act require that each day's delay should be explained by the petitioners and they failed to do so.

13. Learned counsel for the petitioners contends that it is not even the contention of the respondent that the summons in the suit were served on the petitioners. He contended that it is the respondent's contention that ex parte ad interim injunction orders issued on 05.05.2006 would have been served on the petitioners and that this amounts to service of summons in suit. Therefore, there is no basis for the Court to come to the conclusion that summons were served on the petitioners. He further contended that the understanding of the Court below that the Section 5 of the Act requires each day's delay to be

explained, is not correct.

14. Learned counsel for the respondent, on the other hand, reiterated his clients' contentions in Court below and asserted that the petitioners have not raised any plea that summons were not served on them.

15. A reading of the affidavit filed in support of I.A.No.204 of 2008 of the 2nd petitioner indicates that there is a specific plea in Paras 5 and 8 thereof that the petitioners have not received summons in the suit and they had no knowledge of the suit. In the counter-affidavit filed to the said I.A., no doubt, the respondent denied that the petitioners did not receive summons in the suit. But, it is his further case that ex parte ad interim injunction granted on 05.05.2006 was sent by registered post to the petitioners and therefore, they should be presumed to have knowledge of the proceedings in the suit. In view of this plea of respondent, it is not possible to accept the contention of the respondent that summons were served on the petitioners. If they were served, the respondent would have asserted in the counter-affidavit that the petitioners were served with the summons. There is no such assertion in the counter-affidavit filed by the respondent. In the absence of service of summons on the petitioners, it cannot be said that the petitioners were negligent in appearing before the Court on 16.06.2006, because they would not have had knowledge of either the suit or the fact that they were directed to appear before the

Court on that day.

16. Admittedly, the summons in the E.P.No.3 of 2007 were served on 08.07.2007. The application I.A.No.204 of 2008 was filed on 26.12.2007 and the delay in filing this application is occurred, because the petitioners had to secure the copies of the suit documents and then had to file the applications for condonation of delay and to set aside the ex parte decree. Therefore, I am of the opinion that the petitioners have shown sufficient cause for condonation of the delay in filing the application to set aside the ex parte decree.

17. I am also of the opinion that the period of delay will run from the date of knowledge of the decree in view of the Article 123 of the Limitation Act, and not from the date when the ex parte decree was passed.

18. Therefore, I reject the contention of the respondent that the delay in filing the application is not 70 days, but it is 420 days.

19. It is settled law that while considering the application for condonation of delay, the Court should focus on the reasons for the delay and not duration of the delay. (See **N. Balakrishnan v. M. Krishnamurthy**^[1]).

20. Therefore, I am of the opinion that the Court below has erred in dismissing the I.A.No.204 of 2008. The said order is, therefore, set aside and I.A.No.204 of 2008 is allowed.

21. Accordingly, the Civil Revision Petition is allowed.

No costs.

22. Miscellaneous Petitions pending, if any, shall stand closed.

M.S. RAMACHANDRA RAO, J

11th June 2015

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[\[1\]](#) AIR 1998 SC 3222