

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.No.4116 of 2014

ORDER :

This Revision is filed under Article 227 of the Constitution of India challenging the order dt.21.10.2014 in IA.No.626 of 2013 in OS.No.137 of 2012 on the file of the Principal, Junior Civil Judge, Kadapa.

2. The petitioner herein is the plaintiff in the above suit.

3. He filed the suit against respondent for a perpetual injunction restraining him from interfering with his possession and enjoyment of the subject property.

4. Summons in the suit were served on respondent, but he did not appear. So he was set *ex parte* on 16.04.2012. Evidence of petitioner was taken and an *ex parte* decree was passed on 20.07.2012.

5. On 09.07.2013, the respondent filed IA.No.626 of 2013 under Section 5 of the Limitation Act, 1963 to condone the delay of (323) days in filing the application under Order IX Rule 13 C.P.C., for setting aside the *ex parte* decree dt.20.07.2012 in the suit.

6. In the affidavit filed in support of this application, the respondent contended that he was suffering from

chronic heart ailment and systemic hyper tension from 2006; that he was undergoing treatment continuously at different hospitals at Kadapa, Chennai and Bangalore; in March, 2012, he seriously fell sick and obtained treatment f r o m Manipal Heart Institute, Bangalore and Dr. K. Peddanna, Civil Surgeon, Kadapa; in view of his sickness he was not able to move out except for treatment purpose; he came to know about passing of the *ex parte* decree against him by the Court; that he has sound defence in the suit and the documents relied upon by petitioner are fabricated; and therefore, the delay in seeking to set aside the *ex parte* decree be condoned and the *ex parte* decree be set aside.

7. Counter-affidavit was filed by petitioner to the said application denying allegations of petitioner. He contended that documents filed along with IA.No.626 of 2013 by the respondent were fabricated, and that even if taken to be true, they indicate only preliminary investigations; the document issued by Dr. K. Pedanna was issued in collusion with the respondent without any material; the respondent is hale and healthy since 2006 and was attending to his activities; that he went for tours for ten days to Nepal in August, 2013, to Varanasi for seven days in 2012, and also to Gujarat for eleven days on 16.07.2013; that the delay is on account of dilatory tactics; and there are no bona fides in the petition.

8. The respondent was examined as PW.1 and it was elicited in his cross-examination that he went to Nepal, Gujarat and Varanasi for treatment by a local doctor and that he could not give the names or addresses of the hospitals where he was treated. He also admitted that he did not have any documents to prove that he underwent medical treatment at Nepal, Gujarat and Varanasi.

9. By order dt.21.10.2014, the Court below allowed IA.No.626 of 2013. It held that the Echo Cardiography report issued by the Manipal Hospital, Bangalore filed along with the said IA indicated that out of four valves in the heart of the respondent three valves were normal and the fourth valve appeared to be Sclerosed; that the Court below was not well-versed with medical knowledge to say that the petitioner is a chronic heart patient, but at the same time by seeing the Echo Cardiography report one cannot say that petitioner is hale and healthy and not suffering from any disease; that even though details of treatment at Nepal, Gujarat and Varanasi were not given by respondent, he did deny the suggestion that he visited those places only on pilgrimage and not for treatment; and there was no documentary evidence adduced by petitioner to show that respondent went on pilgrimage to those places; and that the discretion under Section 5 of the Limitation Act, 1963 ought to be exercised liberally

and a fair opportunity should be given to a party to defend himself in the legal proceedings.

10. Questioning the same, this Revision is filed.

11. Heard Sri M. Balaji, counsel for petitioner and Sri K. Vijay Bhaskar Reddy, counsel for respondent.

12. The counsel for petitioner contended that the findings of Court below are perverse; that the court below ought to have noticed that respondent is a resident of Kadapa City and the suit is also pending in a court in the same city; summons were served on respondent and he did not appear because of which he was set *ex parte* on 16.04.2012 and subsequently, the suit was decreed *ex parte* on 20.07.2012; that the application was filed to condone the delay of (323) days in filing the application under Order IX Rule 13 CPC citing ill-health; and in the absence of any evidence given by respondent to show that he visited Nepal, Varanasi and Gujarat for medical treatment, the Court below ought to have held that he was hale and healthy during those visits which took place one year prior to giving his evidence on 26.09.2014, and his plea that he was continuously sick cannot be accepted. He contended that Echo Cardiography report dt.07.10.2012 filed by respondent indicated that he underwent only certain tests at Manipal Hospital and was prescribed some medication; the certificate dt.03.07.2013 issued by Dr. K. Peddanna cannot be accepted; that the

other two certificates, viz., certificate dt.13.12.2006 issued by Jaya Heart Foundation Vijaya Hospital, Chennai, no doubt, indicated that he was suffering from *systemic hypertension*, but in view of respondent's ability to travel to Nepal, Gujarat and Varanasi subsequently, it has to be presumed that the respondent was fit; that the other certificate dt.06.01.2009 issued by Dr. P. Murali Madhav, Kadapa was only for *gastritis*; and, in any event, the certificates dt.13.12.2006 and 06.01.2009 cannot be taken into account since they are much prior to 16.04.2012 when the respondent was set *ex parte* and on 20.07.2012 when an *ex parte* decree was passed.

13. The counsel for respondent, on the other hand, contended that on account of certain anxiety, may be the respondent had not correctly given evidence, but the fact remains that that he was suffering from hyper tension; the court below had also noticed his demeanor when he gave evidence on 26.09.2014 that he was unable to walk properly and was walking with the aid of a stick; that this indicated that the health of respondent was not good; since serious rights to valuable property in Kadapa down were in issue in the suit, he should be given an opportunity to contest the suit on merits by condoning the delay in seeking to set aside the *ex parte* decree and by setting aside the same.

14. I have noted the submissions of both sides.

15. The suit OS.No.137 of 2012 was filed by petitioner against respondent seeking a perpetual injunction in respect of his property. The summons in the suit were served on the respondent, but he did not appear either in person or through an Advocate before the said Court. He was set *ex parte* on 16.04.2012 and an *ex parte* decree was subsequently passed on 20.07.2012.

16. The present application is filed on 09.07.2013 to condone the delay of (323) days in seeking to set aside the *ex parte* decree dt.20.07.2012. Along with this application, the respondent filed four certificates (a) Medical Discharge Summary dt.13.12.2006 issued by Vijaya Heart Foundation, Vijaya Hospital, Chennai; (b) certificate issued by Dr. P. Murali Madhav dt.06.01.2009; (c) Medical record issued by Manipal Hospital dt.07.10.2012; and (d) Medical Certificate issued by Dr. K. Peddanna dt.03.07.2013.

17. The respondent examined himself as PW.1 in this I.A.

18. In his cross-examination, he stated that he went to Varanasi from Kadapa one year prior to the date he was giving evidence and stayed for a week there, that he went to Nepal in August, 2013 and stayed there for five days and he did not specifically state when he went to Gujarat. Although he claimed to have undergone treatment in Varanasi, Nepal and Gujarat, he could not give the name

of the doctor or the address of the hospitals where he underwent treatment in the three places. He also did not mention what treatment he underwent in these three places. Even though he denied that he went to these places only on pilgrimage, and in the absence of any evidence to show that he went to these places from Kadapa for medical treatment, it has to be presumed that he went there only for pilgrimage.

19. The court below, in my opinion, acted perversely in holding that the petitioner herein should establish that respondent had gone to these places for pilgrimage instead of holding that the respondent had failed to prove that he went to these places for treatment. The medical certificate issued by the Vijaya Hospital, Chennai is of the year 2006 and cannot be taken into account in respect of the events in the suit which have transpired in 2012. The certificate issued by Dr. P. Murali Madhav is dated 06.01.2009 and mentions that the respondent was suffering from gastritis. This certificate also therefore cannot show that the petitioner was ill in the year 2012. The Echo Cardiography report dt.07.10.2012 issued by Manipal Hospital, Bangalore only shows that the petitioner underwent this investigative test in October, 2012 and was prescribed certain medication. The certificate issued by Dr. K. Peddanna dt.03.07.2013 claiming that he examined respondent and the respondent was suffering

from 01.03.2012 for heart disease appears to be doubtful since there is no reference to any investigation on the basis of which the certificate is issued and the said

Dr.K. Peddanna has also not been examined by respondent as a witness. Even the observation of the Court that the respondent is unable to walk properly and is walking with the aid of a stick (while recording the cross-examination of respondent) suggests that the respondent probably had an injury to his leg and was, therefore, unable to walk properly or he was deliberately walking in that manner to impress the court that he was sick though not actually sick. From this observation of court below, it cannot be presumed that the inability of the respondent to walk properly is on account of heart disease only. It is to be noted that the respondent is a resident of Kadapa city and the suit is filed in a Court within the same city. If the respondent is fit enough to travel to Nepal, Gujarat and Varanasi and also to Bangalore, it is difficult to believe that he could not attend the local court or engage a lawyer locally to represent him in the suit.

20. It is settled that the discretion under Section 5 of the Limitation Act, 1963 is to be exercised keeping in view the reason for the delay in filing the application and not necessarily basing on the period of delay. If the reason given for seeking condonation of delay does not appear to be bona fide, the power under Section 5 of the Limitation

Act, 1963 cannot be invoked in favour of the party seeking condonation of delay. (See **N . Balakrishnan v. M. Krishna Murthy**^[1])

21. In view of this legal position and the reasoning given above, I am of the opinion, that the court below acted perversely in not properly considering the material evidence on record and in allowing the IA.No.626 of 2013.

22. Therefore, the Civil Revision Petition is allowed and the order dt.21.10.2014 in IA.No.626 of 2013 in OS.No.137 of 2012 on the file of the Principal, Junior Civil Judge, Kadapa is set aside and the said I.A. is dismissed. No order as to costs.

23. As a sequel, miscellaneous petitions pending, if any in this Revision, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 23-01-2015
Ndr/*

^[1] 1998 (3) SCC 123