

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA  
RAO**

**C.R.P.No.2735 of 2014**

**ORDER:**

This Revision Petition is filed challenging the order dt.01-05-2014 in I.A.No.17 of 2014 in O.P.No.43 of 2007 of the Senior Civil Judge, Peddapalli.

2. The petitioner and the respondent had been married to each other. The petitioner herein had filed O.P.No.43 of 2007 against the respondent under Section 13 (1) (a) of the Hindu Marriage Act, 1955 seeking dissolution of the marriage between them.

3. An *ex parte* decree was passed on 24-10-2008 by the Senior Civil Judge, Peddapalli.

4. However while the O.P. was pending, the respondent had filed a transfer application before this Court to transfer the O.P. from the Court of the Senior Civil Judge, Peddapalli to the Court of the Senior Civil Judge at Razole, East Godavai District. The said application was numbered as Transfer C.M.P.No.344 of 2007. Stay of proceedings in the Transfer O.P. was granted in Tr.C.M.P.M.P.No.43 of 2007 by this Court on 06-08-2007 till 24-09-2007. The said orders appear to have been continued subsequently thereto also.

5. Ultimately on 23-10-2008, the Tr.C.M.P

No.344 of 2007 was allowed and O.P.No.43 of 2007 was withdrawn from the Senior Civil Judge's Court at Peddapalli, Karimnagar District and transferred to the Court of Senior Civil Judge, Razole, East Godavari District for disposal according to law.

6. From the above facts, it is clear that while the High Court on 23-10-2008 withdrew the O.P.No.43 of 2007 from the Court of Senior Civil Judge, Peddapalli and transferred it to the Senior Civil Judge, Razole, East Godavari District, on the very next day, i.e 24-10-2008, the O.P. was allowed by the Senior Civil Judge, Peddapalli, Karimnagar District. It appears that neither party apprised the Senior Civil Judge at Peddapalli that on the previous day, the Transfer C.M.P. was allowed and the O.P. had been withdrawn from that Court and transferred to the Senior Civil Judge, Razole, East Godavari District.

7. These events had occurred in the year 2008.

8. 5 ½ years later i.e. on 18-01-2014, the respondent herein filed I.A.No.17 of 2014 before the Senior Civil Judge at Peddapalli under Order IX Rule 13 CPC to set aside the *ex parte* decree dt.24-10-2008 granting divorce in favour of the petitioner.

9. In the said application, she stated that after she obtained orders in the Transfer C.M.P.No.344 of 2007

on 23-10-2008, that she had handed over those copies to her earlier counsel who was representing her in O.P., and was anxious to receive notices likely to be issued by the Senior Civil Judge, Razole pursuant to the orders passed by the High Court in the Transfer C.M.P ;that since she did not receive any summons or notices from the Senior Civil Judge, Razole in respect of the O.P. and since it had come to the notice of the respondent that the petitioner was making attempts to marry another woman, she enquired into the matter and came to know that there was *ex parte* decree granted by the Senior Civil Judge, Peddapalli, Karimnagar District suppressing the facts. She claimed that one week prior to the filing of the I.A.No.17 of 2014, she made efforts and came to know that the *ex parte* decree was passed on 24-10-2008 against her and the said order was passed suppressing the order passed in Transfer C.M.P. by this Court. It was contended that the Senior Civil Judge, Peddapalli had become *functus officio* as on the date of passing of *ex parte*, that the petitioner played fraud on the Court and obtained *ex parte* orders without disclosing the orders passed by the High Court and therefore, the *ex parte* decree be set aside.

10. Counter was filed to this application by the petitioner contending that he waited for three years after getting the *ex parte* in the O.P. from the Senior Civil Judge, Peddapalli and then underwent a second marriage

on 05-10-2011; that the respondent had engaged an advocate and it was her duty to inform the Senior Civil Judge, Peddapalli with regard to orders passed by the High Court; and neither she nor her counsel informed the said Court about either the stay of the proceedings or the orders passed in the Transfer C.M.P. He contended that the plea of the respondent that she handed over the orders in Transfer C.M.P. to her earlier counsel is not correct and that the said counsel would not keep quiet if he had such orders with him; it should therefore be inferred that she had not contacted the counsel and informed him about the orders in the Transfer C.M.P. It was also pointed out that an application under Order IX Rule 13 C.P.C. should have been filed within 30 days from the passing of the *ex parte* in the O.P. Here *ex parte* decree was passed on 24-10-2008 but the application under Order IX Rule 13 has been filed on 18-01-2014, more than 5 years later only to harass him. He also denied that he suppressed from the Court of the Senior Civil Judge, Peddapalli about the orders in the Transfer C.M.P. He also contended that no stay order was communicated to the said Court when the decree in O.P.No.43 of 2007 was passed on 24-10-2008 by the respondent.

11. On 01-05-2014, the Court below allowed I.A.No.17 of 2014. It noticed that the respondent had not filed any application under Section 5 of the Limitation Act,

1963 to set aside the *ex parte* decree passed on 24-10-2008 and that she had filed I.A.No.17 of 2014 after a gap of 5 years and 3 months; that the I.A. was numbered by the Court on the ground that the respondent mentioned in it that she had knowledge of the *ex parte* decree only on 10-01-2014; this fact was not mentioned in the copy furnished to the petitioner's counsel and was written in blue ink pen and that this undoubtedly caused prejudice to the petitioner since the respondent had knowledge of the transfer petition being allowed on 23-10-2008. It also noted that one D.V.Ramana Reddy, Advocate offered the memo of vakalat on 08-08-2007 on behalf of the respondent, that she was set *ex parte* on 19-02-2008 for not filing vakalat and counter, that although the interim stay granted in Transfer C.M.P.No.344 of 2007 was communicated on 30-08-2007, the Presiding Officer was on earned leave and the same was not endorsed on the file of the Court; therefore the *ex parte* decree was passed on 24-10-2008 and thereafter, the order in the Transfer C.M.P. was received on 20-12-2008. It also observed that the contention of the respondent's counsel that the order passed on 23-10-2008 by the Court regarding transfer has to be intimated by the petitioner's counsel to the Court of the Senior Civil Judge Peddapalli would not arise since the O.P. was posted finally on 17-10-2008 and the orders were pronounced on 24-10-2008 by the Judge, Full Additional Charge (FAC) at

Manthani. Having recorded the above findings, it however rejected the contention of the petitioner that after three years, he underwent second marriage and that lady's valuable rights were also involved, on the ground that public would lose confidence in Court decrees and the petitioner was bound by the law declared by the High Court in the Transfer CMP since he was aware of the order passed by the High Court as he had engaged a counsel in the High Court, and that the Senior Civil Judge, Peddapalli had no alternative but to obey the order of the High Court and set aside the *ex parte* decree.

12. Challenging the same, this Civil Revision Petition is filed under Art.227 of the Constitution of India.

13. Heard Sri T.Ramulu, learned counsel for the petitioner and Sri T.V.S.Prabhakar, learned counsel for the respondent.

14. Learned counsel for the petitioner contended that the respondent was aware of the pendency of the O.P. since she herself sought for transfer of the O.P. from the Court of the Senior Civil Judge, Peddapalli where it was filed by petitioner to the Court of the Senior Civil Judge, Razole; she had admittedly instructed one D.V.Ramana Reddy, Advocate, Peddapalli, who offered the memo of Vakalat on 08-08-2007 on her behalf; it was therefore incumbent on the part of the respondent to have ensured communication of the order passed by this Court

in Transfer C.M.P.No.344 of 2007 on 23-10-2008 itself; the respondent was negligent in not enquiring about the status of the O.P. before the Senior Civil Judge, Peddapalli, Karimnagar District from 2007 till January 2014 ; and her plea in the affidavit filed in support of the I.A.No.17 of 2014 that she came to know about it only on 10-01-2014 cannot be accepted. He contended that admittedly notice in the O.P. had been served on the respondent to appear before the Senior Civil Judge, Peddapalli; and since the petitioner had got remarried on 05-10-2011, without taking into account this fact, the Court below erred in setting aside the *ex parte* decree by the impugned order. He pointed out that the application to set aside the *ex parte* decree was filed admittedly on 18-01-2014, 5 years 3 months after the *ex parte* decree was passed; and without an application under Section 5 of the Limitation Act, 1963, the Court below ought not to have entertained it and it should have dismissed it.

15. Learned counsel for the respondent on the other hand contended that even though notice in the O.P. was served on petitioner, the petitioner had not engaged any counsel in the Court of the Senior Civil Judge, Peddapalli since she was staying at Razole; she filed Transfer C.M.P.No.344 of 2007 in the High Court and on 06-08-2007, interim stay of proceedings in the O.P. was granted and ultimately the O.P. was allowed on 23-10-2008. He contended that the respondent was waiting to

receive a notice from the Court of the Senior Civil Judge, Razole and only when the respondent came to know that the petitioner was making attempts to marry another person, she came to know about the passing of the *ex parte* decree on

24-10-2008 by the Senior Civil Judge, Peddapalli after the Transfer C.M.P. was allowed on 23-10-2008. He contended that once Transfer C.M.P. was allowed on 23-10-2008 by this Court, the Senior Civil Judge, Peddapalli became *functus officio* and could not have passed *ex parte* decree on 24-10-2008 in the O.P. He therefore contended that there is no error of jurisdiction in the order passed by the Court below in setting aside the *ex parte* decree and the Revision Petition be dismissed.

16. From the facts narrated above, it is clear that O.P.No.43 of 2007 was filed by the petitioner before the Senior Civil Judge, Peddapalli, Karimnagar District seeking divorce against the respondent. Notice in the O.P. was served on the respondent. Although counsel for respondent contended that respondent did not engage any counsel, this contention is not correct. In the impugned order the Court below has verified the record and noted that a counsel Sri D.V.Ramana Reddy was instructed by her and she offered Vakalat through him before the Senior Civil Judge, Peddapalli and a memo to that effect was filed on 08-08-2007. So the respondent cannot say that she could not communicate the order in

the Tr.C.M.P to the Senior Civil Judge, Peddapalli. She ought to have contacted the said counsel and instructed him of the order passed in the Tr.C.M.P on the day it happened.

17. It is no doubt true that after she received summons in the O.P., the respondent filed Transfer C.M.P. No.344 of 2007 before this Court and obtained stay of proceedings in the O.P. The petitioner was also served in the Transfer C.M.P. and he also engaged counsel to defend him in the Transfer C.M.P. The Transfer C.M.P. was allowed on 23-10-2008 and the O.P.No.43 of 2007 was withdrawn from the Court of the Senior Civil Judge, Peddapalli, Karimnagar District jurisdiction to the Court of the Senior Civil Judge, Razole, East Godavari District.

18. This order of the High Court came to be communicated to the Court below only on 20-12-2008, by which date, the O.P. had been heard by the Senior Civil Judge, Manthani who was holding Full Additional Charge of the Court of the Senior Civil Judge, Peddapalli and he passed an *ex parte* decree on 24-10-2008. Neither the respondent who succeeded in the Transfer C.M.P. nor the petitioner apprised the said court about the order in the Transfer C.M.P.

19. It is shocking that the respondent who succeeded in the Transfer C.M.P. kept quiet for a period

of 5 years 3 months without enquiring about what transpired in the O.P. No.43 of 2007 before the Peddapalli Court by contacting the counsel Sri D.V.Ramana Reddy whom she had instructed to offer to file vakalat on 08-08-2007 or by engaging another counsel. This negligence on the part of the respondent cannot be countenanced for any reason.

20. If the respondent had acted within a reasonable time after succeeding in the Transfer C.M.P.No.344 of 2007, by taking steps to find out about the O.P and filed a review petition before the Senior Civil Judge, Peddapalli to set aside his order or to set aside the *ex parte* decree, it would have been proper. Admittedly she did not do so.

21. Unfortunately for her, after waiting for 3 years after the *ex parte* decree was passed on 24.10.2008, the petitioner had remarried on 05-10-2011 and has been living with the person he remarried since then, for almost 3 years 9 months by now. So it was travesty of justice on the part of the Senior Civil Judge, Peddapalli to set aside the *ex parte* decree passed by the said Court on 24-10-2008 in these circumstances.

22. As per Art.123 of the Limitation Act, 1963, the application for setting aside an *ex parte* decree shall be filed within 30 days from the date of the decree or if summons or notice was not served, from the date of

knowledge of the decree.

23. Since the respondent had admittedly received summons in the O.P., and had neglected to engage a counsel in the Court of the Senior Civil Judge, Peddapalli in spite of having instructed an advocate D.V.Ramana Reddy to offer to file Vakalat on her behalf, or to take steps to set aside the decree within a reasonable time, she has no right to invoke the jurisdiction of the Court of the Senior Civil Judge, Peddapalli under Order IX Rule 13 CPC to set it aside without filing an application under Sec.5 of the Limitation Act, 1963.

24. In my opinion, she ought to have filed an application under Sec.5 of the Limitation Act, 1963 and sought condonation of delay of 5 years and 3 months in filing the petition under Or.IX R.13 CPC. Her plea that she came to know about the fate of the O.P only in January, 2014 cannot be accepted and so her application under Or.IX R.13 CPC is therefore time barred since it is filed in January 2014.

25. In **Manick Chandra Nandy v. Debdas**

**Nandy**<sup>[1]</sup>, the Supreme Court held :

*“Under Article 123 in the Schedule to the Limitation Act, 1963, the period of limitation for making an application to set aside a decree passed ex parte is thirty days from the date of the decree or when the summons or notice was not duly served, when the applicant had knowledge of the decree. The question of knowledge of the decree by the applicant only arises where the summons or notice was not been duly served.”*

26. In **Chapala Pedda Thayana v. Chapala China Thayanna and others**<sup>[2]</sup>, this Court has held that if summons were served on the defendant, and he did not attend the Court and suffered an *ex parte* decree, he cannot count the period of limitation of 30 days for seeking to set aside the *ex parte* decree from the date of knowledge of the decree but the period is to be counted from the date of the decree. It relied on the language of Art.123 of the Limitation Act, 1963 in this regard.

27. In **N. Balakrishnan v. M. Krishnamurthy**<sup>[3]</sup>, the Supreme Court held:

*“It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory.”*

28. Even if such application for condonation of delay had been filed, the same could not have been allowed since there is no valid explanation from the respondent for the delay of 5 years 3 months in filing the petition under Or.IX R.13 CPC, and such delay is fatal to her case.

29. It may be that on the day when the Court of the Senior Civil Judge, Peddapalli passed the *ex parte*

decree i.e 24-10-2008, the said Court was *functus officio* in view of the order dt.23-10-2008 in Transfer C.M.P.No.344 of 2007. Still in view of the facts narrated supra, and particularly taking into account the fact that the petitioner had remarried 3 years and 9 months back, it would be a travesty of justice to allow the impugned order to stand.

30. In **Ramesh Chandra Sankla v. Vikram Cement**<sup>[4]</sup>, the Supreme Court has held that exercise of jurisdiction under Art.227 of the Constitution of India is discretionary and it should exercise its discretion to promote justice and equity. It observed:

*“ 98. ... powers under Articles 226 and 227 are discretionary and equitable and are required to be exercised in the larger interest of justice. While granting relief in favour of the applicant, the court must take into account the balancing of interests and equities. It can mould relief considering the facts of the case. It can pass an appropriate order which justice may demand and equities may project. As observed by this Court in Shiv Shankar Dal Mills v. State of Haryana<sup>28</sup> courts of equity should go much further both to give and refuse relief in furtherance of public interest. Granting or withholding of relief may properly be dependent upon considerations of justice, equity and good conscience.”*

*(emphasis supplied)*

31. In **Achutananda Baidya v. Prafulla Kumar Gayen**<sup>[5]</sup> also the Court reiterated that powers under Art.227 of the Constitution of India can be exercised if the orders impugned result in manifest injustice. The

Court observed:

*“The power of superintendence of the High Court under Article 227 of the Constitution is not confined to administrative superintendence only but such power includes within its sweep the power of judicial review. The power and duty of the High Court under Article 227 is essentially to ensure that the courts and tribunals, inferior to High Court, have done what they were required to do. Law is well settled by various decisions of this Court that the High Court can interfere under Article 227 of the Constitution in cases of erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving at a finding which is perverse or based on no material, or resulting in manifest injustice.”*

*(emphasis supplied)*

32. Therefore, since this Court is of the view that the order passed by the Court below setting aside the *ex parte* decree has resulted in manifest injustice to the petitioner who had remarried almost 3 years after passing of the decree by the trial court on 24.10.2008 and the respondent had not taken any action for 5 years and 3 months till January 2014 to set it aside, the Civil Revision Petition is allowed. The impugned order dt.01-05-2014 in I.A.No.17 of 2014 in O.P.No.43 of 2007 is set aside and the said I.A. is dismissed. No costs.

33. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

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**JUSTICE M.S.RAMACHANDRA RAO**

Date: 06-07-2015  
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[\[1\]](#) (1986) 1 SCC 512

[\[2\]](#) 2012(1)ALD 652

[\[3\]](#) (1998) 7 SCC 123

[\[4\]](#) (2008) 14 SCC 58

[\[5\]](#) (1997) 5 SCC 76