

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

CIVIL REVISION PETITION No.4910 of 2014

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ORDER:

This Civil Revision Petition is filed under Section 115 CPC challenging the order dt.14-03-2013 in I.A.No.363 of 2011 in O.S.No.271 of 2002 of the Principal Junior Civil Judge at Tenali.

2. The petitioner herein is the legal representative of the deceased 1st defendant in the suit by name Kammela Srilakshmi.

3. The said suit was filed by 1st respondent against Kammela Srilakshmi and 2nd respondent for perpetual injunction restraining them from entering into the plaint schedule property.

4. Summons were issued in the suit, which were served on Kammela Srilakshmi. She also filed a written statement after engaging an Advocate. On 04-01-2006, she was set *ex parte* and an *ex parte* decree was passed on the same day against her.

5. On 21-03-2011, she filed I.A.No.363 of 2011 under Section 5 of the Limitation Act, 1963 to condone the delay of 5 years and 75 days in filing the petition to set aside the

ex parte decree dt.04-01-2006.

6. In the affidavit filed in support of the said application, she contended that she is a Senior citizen and suffering from old age and related illnesses and her previous Advocate told her that she need not attend Court on each and every adjournment and assured her that he would inform her whenever her presence is required. She further stated that she suffered from paralytic stroke and was admitted in Lalitha Super Specialty Hospital, Kothapet, Guntur on 24-12-2002 and after obtaining treatment for paralysis, she was discharged from there on 06-01-2003. She alleged that left side of her body was paralyzed and she has been bedridden since then. She also stated that again on 27-02-2003 she was admitted in the same hospital since she was suffering heart disease and was discharged from the said hospital on 17-03-2003. She also claimed that her memory was impaired on account of old age and the illnesses mentioned above. She contended that she could not attend the Court when the matter was posted for cross-examination of P.W.1 and her Advocate did not inform her about the adjournment in the suit or about the *ex parte* decree. She claimed that on 18-03-2011 the 1st respondent sent a Police Constable to her and the said Constable demanded her to hand over possession of the plaint schedule property and gave her a

copy of the *ex parte* decree. She, however, admitted that she did not have any hospital records except a medical prescription dt.24-03-2009. She also filed a medical certificate issued by Neurologist of the same hospital certifying that she was suffering from Cerebro Vascular disease and Hypertension and she was under regular treatment from March, 2009. She claimed that the hospital records for the previous period were not available and the hospital refused to give any certificate for the period prior to 2006.

7. Counter affidavit was filed by 1st respondent opposing this application. He stated that if the petitioner did not have any medical record, she could not have stated the joining dates and discharge dates from the above hospital and this shows that these averments are false. He also alleged that she executed a gift deed in favour of her son i.e. petitioner herein on 28-01-2011 and this fact was suppressed by her. He denied that he sent a Police Constable to the 1st defendant on 18-03-2011 or that the said Constable demanded her to handover possession of the property by giving her a copy of the *ex parte* decree and till then she was unaware of that. He also contended that the application has been filed on 21-03-2011 and on that day, the

1st defendant had no right, title or interest in the property since she executed a gift deed in favour of her son i.e. petitioner herein

dt.28-01-2011. It is also alleged that there is no documentary evidence to show that the deceased had suffered paralytic stroke or had heart disease.

8. Pending the said I.A., the 1st defendant died and the petitioner herein was impleaded as her legal representative by order dt.27-02-2012 in I.A.No.815 of 2011.

9. By order dt.14-03-2013, the Court below dismissed the said application. It held that *ex parte* decree was passed on 04-01-2006 but her alleged illness on account of paralysis was from 24-12-2002 to 06-01-2003 and her hospitalization was alleged to be from 27-02-2003 to 17-03-2003 and there is a gap of 3 years between those dates and the date of passing of the *ex parte* decree. It further held that the execution of the gift deed in the year 2011 by her in favour of petitioner shows that she was hale and healthy and her plea that she suffered paralysis and consequent loss of memory, is false. It held that 1st defendant ought to have contested the matter since she was aware of the proceedings in the suit and delay in filing the application under Order IX Rule

13 CPC of 5 years 75 days is not properly explained.

10. Challenging the same, this Revision is filed.

11. Heard Sri Ch.Ravindra Babu, learned counsel for petitioner and Sri N.Nanda Kishore, learned counsel for 1st respondent.

12. Learned counsel for petitioner contended that the Court below erred in dismissing the application for condonation of delay; that powers under Section 5 of the Limitation Act, 1963 are to be liberally exercised; only on account of old age and illness of petitioner, she could not contest the suit or filed the application to set aside the *ex parte* decree; and therefore the impugned order be set aside.

13. The facts narrated above indicate that 1st defendant in the suit had received summons in the suit, engaged an Advocate and also filed a written statement. She or her Advocate did not appear when the matter was posted for cross-examination of P.W.1. Therefore she was set *ex parte* and *ex parte* decree was passed on 04-01-2006. The petition to set aside the *ex parte* decree was admittedly filed on 21-03-2011 by her. Even according to her, paralytic stroke and heart disease was suffered by her in 2003 but not after the *ex parte* decree. The

deceased 1st defendant therefore has no valid explanation for the delay in filing the application to set aside the *ex parte* decree for the period of 5 years 75 days. No hospital record had been filed by her except the medical prescription dt.24-03-2009 and even the medical certificate filed by her only indicates that she was suffering from Hypertension and Cerebro Vascular disease from March, 2009. In the absence of any medical record or evidence any doctor to establish her state of physical health between 2006 and 2011, it is not possible to accept her plea that she was prevented by illness from filing the application to set aside the *ex parte* decree within the time permitted by law. Admittedly, she had a son, to whom she had gifted the plaint schedule property in January, 2011. Nothing prevented the 1st defendant to get an application under Order IX Rule 13 CPC filed through her son by instructing her counsel through him either by telephone or by post or by sending her son.

14. In view of these circumstances, I am of the opinion that

1st defendant had been negligent in defending the suit and that her explanation for the delay in filing the application to set aside the *ex parte* decree, is not *bonafide*.

15. Therefore, I do not find any merit in the Civil Revision Petition and it is accordingly dismissed. No costs.

16. As a sequel, miscellaneous petitions pending, if any, shall stand disposed of.

JUSTICE M.S. RAMACHANDRA RAO

Date: 29-06-2015

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