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

C.R.P.No.5694 of 2010

ORDER:

Heard Sri K.B.Ramanna Dora, learned counsel for the petitioner and Sri Srinivas Emani, learned counsel for the respondent Nos.2 to 5.

2. This Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.22-09-2010 in I.A.No.3120 of 2006 in I.A.No.112 of 2006 in O.S.No.1259 of 2004 of the I Additional Junior Civil Judge, Eluru.

3. Petitioner herein is the defendant in the above suit. The suit was filed against the petitioner by 1st respondent herein who is her own sister for partition of the plaint schedule property and for allotment of half share to her.

4. The petitioner received the suit summons and also engaged an Advocate by name Sri K.Mohan Chand to defend her in the suit. However, she did not file written statement. So she was set *ex parte* and an *ex parte* preliminary decree was passed in favour of 1st respondent on 15-09-2005.

5. The petitioner thereafter filed I.A.No.112 of 2006 under Section 5 of the Limitation Act, 1963 to

condone the delay of 52 days in filing the petition to set aside the *ex parte* decree and another petition under Order IX Rule 13 CPC to set aside the *ex parte* decree.

6. While the said petitions were pending, the learned counsel for 1st respondent filed a memo on 04-03-2008 stating that 1st respondent was died. The Court below directed the petitioner to take steps to bring on record the legal representatives of the deceased 1st respondent, but the petitioner did not do so. After waiting for eight months, on 26-11-2008, the Court below dismissed I.A.no.112 of 2006 as abated.

7. Thereafter, the respondent Nos.2 to 5 filed I.A.No.1303 of 2009 to bring them on record as legal representatives of the deceased 1st respondent in the final decree petition stating that 2nd respondent is the husband of deceased 1st respondent and respondent Nos.3 to 5 are the sons of the deceased 1st respondent.

8. The petitioner then filed I.A.No.3120 of 2006 under Section 5 of the Limitation Act, 1963 to condone the delay of 329 days in filing the petition to set aside the order dt.26-11-2008 passed in I.A.No.112 of 2006.

9. In the affidavit filed in support of this application, the petitioner stated that although she engaged an advocate to defend her in the suit, since written statement was not filed in time, *ex parte* decree

was passed therein on 15-09-2005; the petitioner was unable to contest the matter due to lack of knowledge about legal proceedings as well as lack of communication between herself and her counsel; after 1st respondent died, on 04-03-2008 a memo to that effect was filed by the counsel for 1st respondent; although in I.A.No.112 of 2006, the petitioner admitted that her counsel asked her to furnish details of legal representatives of the deceased 1st respondent, she claimed that she suffered from severe jaundice and underwent treatment for a very long time and so she could not furnish the details of the legal representatives of the deceased 1st respondent on account of mistake and by oversight. She stated that she is the absolute owner of the plaint schedule property, that the respondents having nothing to do with the plaint schedule property, that she has a strong case to succeed in the main suit and so she may be offered an opportunity to contest the main suit. She claimed that there are no willful laches or negligence on her part in not filing I.A.No.1303 of 2009 earlier or for her failure to bring legal representatives of 1st respondent in I.A.No.112 of 2006.

10. The respondent Nos.2 to 5 filed a counter opposing this application contending that petitioner has acted negligently and her story that she was suffering from jaundice cannot be accepted.

11. By order dt.22-09-2010, the Court below

dismissed I.A.No.3120 of 2006. It held that the petitioner had received the summons in the suit and engaged an advocate to defend her case to file written statement; in spite of the fact that sufficient time for that purpose was granted by the Court, she did not file it; and such conduct on the part of the petitioner indicates her negligence. It held that initially, the petitioner had committed default in filing written statement in the main suit and secondly, even after filing petition under Section 5 of the Limitation Act, 1963, to condone the delay of 52 days in filing the application under Order 9 Rule 13 CPC, she did not proceed further and cause delay of 329 days in filing the present petition; and therefore such conduct does not entitle him to the indulgence of the Court for condonation of the delay of 329 days in filing petition to set aside the Order dt.26-11-2008 passed in I.A.No.112 of 2006.

12. Challenging the same, this Revision Petition is filed.

13. Learned counsel for the petitioner contended that the petitioner has not acted in a negligent manner; that since she was suffering from jaundice, she could not give details of legal representatives of 1st respondent to her counsel within time and therefore delay of 329 days in filing petition to set aside the order dt.26-08-2008 in I.A.No.112 of 2006 occurred and it may be condoned. Learned counsel for the petitioner further contended that the suit is for partition, substantial stakes of parties are

involved and on account of certain laches on the part of the petitioner, the petitioner cannot be denied an opportunity to contest the suit on merits.

14. Learned counsel for the respondents on the other hand contended that the order passed by the Court below is correct and that the petitioner having been negligent, the Court below had rightly dismissed the said I.A.

15. The facts narrated above indicate that the petitioner received summons in the suit, engaged an advocate but did not file written statement. *Ex parte* decree was therefore passed on 15-09-2005. She filed I.A.No.112 of 2006 under Section 5 of the Limitation Act, 1965 to condone delay of 52 days in filing the petition to set aside the *ex parte* decree and another application to set aside the *ex parte* decree. Pending the said application, 1st respondent died and a memo to that effect was filed on 04-03-2008.

16. Even according to the petitioner, opportunity was given to the petitioner to take steps to bring on record the legal representatives of the deceased 1st respondent and her own counsel advised her to furnish details of the legal representatives of the deceased 1st respondent. Admittedly, these details were not furnished. The plea taken by the petitioner is that she was suffering from severe jaundice and therefore could not inform her lawyer

about these details. The petitioner has not adduced any oral or documentary evidence in support of her plea that she was suffering from jaundice at the time when I.A.No.112 of 2006 was pending and she was undergoing treatment. The petitioner is a married lady and the information sought by her counsel could have been furnished by the petitioner herself in person or by post, or on telephone or by sending her own family members to the advocate with the details of the legal representatives of the deceased 1st respondent, who is none other than the sister of the petitioner. The Court below therefore dismissed I.A.No.112 of 2006 on 26-11-2008 on the ground that the said I.A. abated since the legal representatives of the deceased 1st respondent were not impleaded as parties therein. Long afterwards, on 21-11-2009, she filed I.A.No.3120 of 2009 to condone the delay of 329 days in filing petition to set aside the order dt.26-11-2008 dismissing I.A.No.112 of 2006.

17. In the absence of any material placed by the petitioner to establish that she had suffered from severe jaundice and she or her family member were unable to contact her advocate and furnish information about the legal representatives of 1st respondent in time, it cannot be said that the petitioner had not been negligent or that she had acted in a *bona fide* manner.

18. Since the petitioner is negligent in furnish

details of the legal representatives of the deceased 1st respondent in spite of having been asked by her advocate to give such information, petitioner is not entitled to seek any indulgence from the Court below.

19. Therefore, the Court below did not commit any error in dismissing I.ANo.3120 of 2006 in O.S.No.1259 of 2004. I therefore, do not find any merit in the Revision Petition and it is accordingly dismissed. No costs.

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

JUSTICE M.S.RAMACHANDRA RAO

Date: 24-06-2015
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