

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

C.R.P. No.1351 of 2015

ORDER :

This Civil Revision Petition is filed under Section 115 of Civil Procedure Code, 1908 challenging the order dt.09.02.2015 in I.A.No.1486 of 2014 in O.S.No.388 of 2011 of the Senior Civil Judge, Proddatur.

2. Petitioners herein are defendants in the above suit. The respondent/plaintiff filed the said suit for specific performance of an agreement of sale against the petitioners. No written statement was filed by the petitioners. So an ex-parte decree was passed in the suit on 28.09.2012.

3. In July, 2014 petitioners filed I.A.No.1486 of 2014 to condone the delay of 624 days in seeking to set aside the ex-parte decree dt.28.09.2012 passed against the petitioners and also filed another I.A. to set aside the ex-parte decree.

4. In the affidavit filed in support of this application, petitioners contended that after the suit was filed, Court Process-Attender came to the house of 1st petitioner for service of process and at that time 1st petitioner's wife was present and requested him to come in the evening as the 1st petitioner was on duty. According to 1st petitioner, the Process-Attender did not oblige and made an endorsement of refusal on the summons in collusion with the respondent. It is contended that the Process-Attender went to the house of the 2nd petitioner and she told him that her son was not in the house and that she did not know any court procedure and asked him to come on the next day so that her son would be present and he can be delivered the summons. According to the petitioners, again the Process-Attender made an endorsement as refusal of the summons in connivance of the respondent by taking money.

5. Petitioners alleged that they had no knowledge of Court proceedings and they were under the impression that the Court Attender will again come and serve summons on them. They allege that in the second week of April, 2013 when they received notices in E.P.No.27 of 2013, they consulted an advocate at Proddatur two days prior to the hearing date i.e., on 24.04.2013 and handed over the EP case papers received by them to him. Their counsel informed them about passing of the ex-parte decree which shocked them. They contended that they engaged a counsel, who filed vakalat in the EP and sought time to file counter.

6. According to the petitioner the Presiding Officer of the Senior Civil Judge's Court at Proddatur had been transferred on 30.04.2013 and no Presiding Officer was appointed till March, 2014 and the EP was getting adjourned from time to time. They allege that they were under the impression that there is no need to file petition to set aside the ex-parte decree along with the written statement and that such petition has to be filed only when a regular Presiding Officer is appointed and so they did not consult their advocate. They allege that they have no legal knowledge or knowledge of Court proceedings and after the Presiding Officer was appointed to the above Court in March, 2014, on 14.07.2015 instructions were given to the counsel to prepare written statement and also other petitions.

7. Certain allegations on merits of the case were also made in the said applications, including a plea that the suit agreement of sale was fabricated on certain papers on which the signature of the 2nd petitioner was obtained by coercion by certain third parties. The petitioners therefore prayed that the delay be condoned and application to set aside the ex-parte decree be allowed and they be allowed to contest the suit.

8. Counter affidavit was filed by the respondent opposing the said

application. He denied the contents of the affidavit filed by the petitioners and alleged that they were all false and invented. He alleged that the petitioners fully knew about the contents of the suit summons and intentionally refused to receive them. He pointed out that the petitioners, after coming to know about the ex-parte decree, admittedly consulted an advocate and engaged him by giving him vakalat in the EP, but did not take steps to file a petition to set aside the ex-parte decree immediately and the reasons given thereof, cannot be accepted. He contended that there are no bonafides on the part of the petitioners, that they filed the above petition only to drag on the matter and that there was no sufficient cause shown by the petitioners warranting condonation of inordinate long delay of 624 days in filing the petition to set aside the ex-parte decree.

9. By order dt.09.02.2015 the Court below dismissed the I.A.No.1486 of 2014.

10. It held that even as per the averments of the petitioners they have received notices in the EP in the 2nd week of April, 2013 asking them to appear before the court on 24.04.2013; they engaged a counsel then and filed vakalat in the EP proceedings but waited till July, 2014 for filing the I.A.No.1486 of 2014. It rejected their plea that they were under the impression that after transfer of the Presiding Officer, till a newly appointed regular Presiding Officer takes charge of the Court, they need not file a petition to set aside the ex-parte decree. It held that the petitioners had knowledge about the passing of ex-parte decree, but neglected to file a petition within 30 days from the date of their knowledge and therefore the delay cannot be condoned.

11. Challenging the same, this Revision is filed.

12. Counsel for the petitioners contended that the petitioners have an excellent case on merits but due to the reasons set out in the

affidavit filed in support of the I.A.No.1486 of 2014, they could not approach the Court to file a petition to set aside the ex-parte decree within the time permitted by law.

13. Counsel for the respondent however refuted the said allegations and contended that the story set up by the petitioners in the affidavit filed in support of the application is a false and invented story and was rightly rejected by the Court below.

14. Under Article 123 of Limitation Act, 1963 an application to set aside the ex-parte decree has to be filed within 30 days from the date of decree or where the summons or notices were not duly served, when the applicant had knowledge of the decree. Therefore, the date of knowledge of the decree becomes relevant only if there is no service of summons in the suit.

15. In the present case even according to the petitioners, the process server came to the house of the 1st petitioner to serve summons in the suit, but his wife asked him to come in the evening, since the 1st petitioner was away on work. Further when the process server went to the house of the 2nd petitioner to serve summons, the 2nd petitioner also asked him to come on another day, because her son was not there.

16. Order 5 Rule 15 CPC states that if in any suit, the defendant is absent from his residence at the time when the service of summons is sought to be affected on him at his residence, service may be made on any adult member of the family, whether male or female, who is residing with him.

17. Even according to the contention of the petitioners, the process server did attempt to serve summons on the wife of the 1st petitioner and on the 2nd petitioner, but they evaded to receive it by giving the

above excuses. Therefore, no exception can be taken to the act of the process server in returning the summons endorsing that the petitioners had refused to receive it. In such circumstances, the summons have to be presumed to be served.

18. Therefore, the period of limitation for filing an application to set aside the ex-parte decree should be counted from the date of decree but not from the date of knowledge of the petitioners i.e., after they received summons in the E.P.

19. The Hon'ble Supreme Court in **G.P.Srivastava v.**

R.K.Raizada^[1] considered the manner of exercise of power under Order 9 Rule 13 CPC. It held that:

“Under Order 9 Rule 13 CPC an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any “sufficient cause” from appearing when the suit was called on for hearing. Unless “sufficient cause” is shown for non-appearance of the defendant in the case on the date of hearing, the Court has no power to set aside an ex parte decree. The words “was prevented by any sufficient cause from appearing” must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. The “sufficient cause” for non-appearance refers to the date on which the absence was made a ground for proceeding ex parte and cannot be stretched to rely upon other circumstances anterior in time. If “sufficient cause” is made out for non-appearance of the defendant on the date fixed for hearing when ex parte proceedings were initiated against him, he cannot be penalized for his previous negligence which had been overlooked and thereby condoned earlier. In a case where the defendant approaches the court immediately and within the statutory time specified, the discretion is normally exercised in his favour, provided the absence was not mala fide or intentional. For the absence of a party in the case the other side can be compensated by adequate costs and the lis

decided on merits.”

20. If the above parameters are applied to the present case, it cannot be held that the petitioners were able to show sufficient cause for condoning the inordinate long delay of 624 days in filing the petition to set aside the ex-parte decree dt.28.09.2012 in the suit. Even according to the petitioners, they had received notices in the E.P. in April, 2013 but till 14.07.2014 they did not take any steps to seek to set aside the ex parte decree. Their plea that there was no Presiding Officer in the Court of the Senior Civil Judge, Proddatur cannot be accepted because there would be an incharge officer who would be taking care of the cases pending the said Court till posting of a regular officer in the Court. Therefore, I do not find any merits in this Revision.

21. Accordingly, this Civil Revision Petition is dismissed. There shall be no order as to costs.

22. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.

M.S.RAMACHANDRA RAO, J

15th July, 2014
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[\[1\]](#) 2000(3) SCC 54