

THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH
(Special Original Jurisdiction)

FRIDAY THIS THE THIRTEENTH DAY OF MARCH
TWO THOUSAND AND FIFTEEN

PRESENT

**THE HON'BLE MR JUSTICE A.RAMALINGESWARA
RAO**

-
CIVIL REVISION PETITION Nos.2783 & 3262 of 2014

Between:

Kanmanthareddy Narayana Reddy

..... PETITIONER

AND

Kanmanthareddy Venkatram Reddy and 5 others

.....RESPONDENTS

The Court made the following:

**THE HON'BLE SRI JUSTICE A.RAMALINGESWARA
RAO**

CIVIL REVISION PETITION Nos.2783 & 3262 of 2014

COMMON ORDER:

These two civil revision petitions arise out of the common order dated 14.02.2014 passed I.A.Nos.1453 & 1454 of 2009 in O.S.No.104 of 2004 on the file of the Senior Civil Judge, Bhongir.

The 2nd defendant in the suit filed the said two applications. I.A.No.1453/2009 was filed seeking condonation of delay of 455 days in filing the petition under Order 9 Rule 13 CPC for setting aside the *ex parte* decree dated 03.07.2008. I.A.No.1454/2009 was filed seeking to set aside the *ex parte* decree dated 03.07.2008.

The case of the 2nd defendant is that the suit summons were not served to him as the plaintiff, the petitioner herein, had shown wrong address, as if, he was residing in Addagudur village of Mothkur Mandal, while in fact he was working in Vijayawada. He came to know about the passing of the decree only when the notice was received in I.A.No.977/2008 for passing final decree. Though the plaintiff got published the notice in "Eenadu Telugu Daily, Nalgonda District Edition" on 20.09.2005 by way of substituted service, he could not see the same as he was working in Vijayawada. Accordingly, he filed the above two applications.

A counter was filed by the plaintiff/petitioner herein stating that though the 2nd defendant was working in Vijayawada, now and then he was coming to the village and looking after his agricultural operations. In fact, the notice in I.A.No.977/2008 was received in the village only. Since the suit summons were not received by the 2nd respondent, he got published the notice in "Eenadu Telugu Daily" as the 2nd defendant was evading to receive the summons. The suit was contested by the 3rd defendant, brother of the 2nd defendant and no prejudice is caused to the 2nd defendant.

The trial Court, by order dated 14.02.2014, allowed both the applications with the following observations:

“As per Article 123 of Limitation Act and as per the explanation thereunder, the substituted service shall not be deemed to be due service. The petitioner filed the above said applications to condone the delay of 455 days along with another application to set aside the decree dated 03.07.2008, on 30.10.2009. His case is that he received notice in I.A.No.977 of 2008 in the first week of October 2009. Having regard to the same the petitioner moved the said applications within a period of one month. As a matter of fact, there is no delay in filing the application in I.A.No.1454 of 2009 to set aside the decree.

As seen from the proceedings, the main suit was contested by the respondent/defendant No.3 only and judgment was delivered on 03.07.2008. However, the above said judgment and decree delivered by this court, though it is passed on merits, being an *ex parte* decree to the petitioner herein.

Having regard to the above said reasons and discussion, an opportunity shall be given to the petitioner enabling him to contest the matter. The main suit is filed by the first respondent seeking partition of the alleged ancestral and joint family properties. Thus the valuable rights of the petitioner are involved in it. Hence, I am inclined to allow the above said applications.”

The suit was filed for partition seeking 1/5th share by the plaintiff. Defendant No.1 is the father, Defendants Nos.2 & 3 are the brothers of the plaintiff, and defendants Nos.4 & 5 are the son and daughter of his sister. The 1st defendant married second wife after the death of his first wife and the plaintiff was born to her. The relationship was not disputed by the 3rd defendant. The suit was hotly contested by the 3rd defendant mainly on the ground of earlier family settlement dated 18.03.2001. The suit was of the year 2004 and the 2nd defendant is not prevented from filing an appeal against the decree, if he is aggrieved by the preliminary decree. The 3rd defendant, who

contested the suit, did not file any appeal against the decree. Now the commissioner is appointed for dividing the property by metes and bounds. In the application filed for passing of final decree in I.A.No.977/2008, it is the case of the plaintiff that the property is in possession of defendants Nos.2 & 3 and the present applications were filed by the 2nd defendant only to drag on the proceedings.

The trial Court by relying on explanation under Article 123 of Limitation Act held that the substituted service shall not be deemed to be due service. The explanation clearly says that the substituted service cannot be deemed to be due service only for the purpose of the said Article. Even if we ignore the application seeking condonation of the delay, no reason was assigned by the trial Court for setting aside the *ex parte* decree. The plaintiff has taken out substituted service as suit summons were not served on the 2nd defendant and he was set *ex parte* and an *ex parte* decree was passed on 03.07.2008.

Taking overall circumstances into consideration and in the absence of the prejudice to the right of the 2nd defendant, I set aside the common order passed by the trial Court in I.A.Nos.1453 & 1454 of 2009, dated 14.02.2014 and allow these two civil revision petitions. However, this order will not prevent any of the aggrieved parties from going in appeal against the original decree. No order as to costs.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

A.RAMALINGESWARA RAO,J

Date: 13.03.2015

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