

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.5043 of 2012

ORDER:

This Civil Revision Petition under Article 227 of the Constitution of India by the unsuccessful defendants is directed against the orders dated 07.03.2011 of the learned Junior Civil Judge, Kalyandurg of Anantapur District passed in I.A.no.428 of 2010 in I.A.no.214 of 2008 in O.S.no.225 of 2003.

2. I have heard the submissions of the learned counsel for the defendants/petitioners ('the defendants' for brevity) and the learned counsel for the respondent/plaintiff ('the plaintiff' for brevity). I have perused the material record.

3. The facts, as stated by the learned counsel for the defendants and the facts necessary for consideration, in brief, are as follows:

The sole plaintiff brought a suit against the defendants for partition and allotment of 1/5th share to her in the plaint schedule property. The defendants had filed a written statement resisting the suit. After the evidence was adduced on the side of the plaintiff, the suit was posted to 15.11.2006 for adducing evidence on the side of the defendants. The 5th defendant who was unwell on account of swelling of his left lower limb including foot could not meet his advocate and get ready to adduce evidence on the side of the defendants. On that day, the learned counsel had filed affidavit in lieu of examination-in-chief of the 5th defendant. The 5th defendant who was a professional driver on a Tata Sumo vehicle used to go on tours and even long distant tours. As he had failed to be present for cross-examination, the suit was decreed on 24.03.2007 *ex parte*. The 5th defendant is looking after the litigation on behalf of the defendants. Since he was unwell, he could not meet his counsel and prosecute the defence. He had undergone treatment for his ill-health at different places and was taking rest. When he had

received summons from the trial court in I.A.no.743 of 2007, he had consulted his Advocate and came to know that the suit was decreed *ex parte* on 24.03.2007. Hence, the 5th defendant had filed an application in I.A.no 215 of 2008 for setting aside the *ex parte* decree passed on 24.03.2007. Further, as there was a delay of 228 days in seeking to set aside the *ex parte* decree, the defendants had filed I.A.no.214 of 2008 under Section 5 of the Limitation Act for condonation of the said delay. As there was no representation for the petitioners and the petitioners were called absent on 18.06.2010, the trial Court had dismissed both the said petitions on 18.06.2010. In the stated circumstances, I.A.no.428 of 2010 was filed by the defendants/petitioners to set aside the order of dismissal for default made in I.A.no.214 of 2008 on 18.06.2010 and to restore the said petition. Since the 5th defendant had died, that application was filed by the other defendants. Though I.A.no.214 of 2008 was posted to 18.06.2010, as the 5th defendant was bed ridden, he could not either contact his counsel or appear before the trial Court. Subsequently, the 5th defendant had died. The learned counsel for the defendants wrote several letters to the deceased 5th defendant. However, as he was bed ridden, he could not inform the same to the other defendants. About two days prior to 17.07.2010, the 9th defendant had met the counsel. The learned counsel had informed that the petition in I.A.no.214 of 2008 was dismissed for default on 18.06.2010. The absence of the 9th defendant before the trial Court on 18.06.2010 to which date I.A.no.214 of 2008 was adjourned is neither willful nor wanton. In the said circumstances, the trial Court ought to have allowed I.A.no.428 of 2010 and ought to have set aside the dismissal order for default dated 18.06.2010 passed in I.A.no.214 of 2008 and ought to have restored the said petition.

4. The case of the plaintiff and the submissions made on her behalf, in brief, are as under:

The suit for partition filed by the plaintiff was adjourned to 15.11.2006 for adduction of evidence of the defendants. On 12.12.2006, the 5th defendant had filed his affidavit in lieu of examination-in-chief. In that

affidavit, he had stated that he had filed the said affidavit on behalf of all the defendants. Thereafter, the 5th defendant did not appear before the trial court and did not submit himself for cross-examination. He had also not filed any documents to substantiate the defence. The defendants did not adduce any evidence on their side, though number of adjournments were granted and the suit was finally adjourned. Therefore, the trial Court closed the evidence on the side of the defendants and posted the suit for judgment; and, in the end the trial Court decreed the suit and had granted a preliminary decree on 24.03.2007 in favour of the respondent/plaintiff. The judgment was pronounced in the suit on merits and the decree is not an *ex parte* decree. The allegations about the ill-health of the 5th defendant are all false. The 5th defendant underwent treatment for his alleged ailment and took rest are all false. The plaintiff had filed an application for determination of mesne profits and passing of a final decree. Thereafter, a petition was filed by the 5th defendant to set aside the *ex parte* decree. Along with that application, the application in IA 214 of 2008 was filed for condonation of delay. Even that petition was not prosecuted with diligence; therefore, the said petition was dismissed on 18.06.2010 for default. Thereafter, the application in I.A.no.428 of 2010 was filed requesting to set aside the order passed in I.A.no.214 of 2008 and restore the said application. Even in the affidavit filed in support of the petition, the 9th defendant made false allegations that the 5th defendant, who is his uncle, was unwell. The allegation that though the counsel had written letters to the 5th defendant, he did not either respond or inform the other defendants, due to ill health, is false. The 9th defendant alleged that when he met their counsel, he was informed that the application in I.A.no.214 of 2008 was dismissed for default. The chronology of events would show that the defendants had deliberately remained *ex parte* as they have no tenable defence in the suit. In the facts and circumstances of the case, the order of the trial Court needs no interference.

5. The learned counsel for the defendants/petitioners had submitted as follows: “The trial Court, in the order impugned, had erroneously held that the

decree that was granted in favour of the plaintiff was a decree granted on merits, though no evidence was adduced on the side of the defendants. The decree was only an *ex parte* decree. When the learned counsel reported no instructions in I.A.no.214 of 2008, the Court adjourned the matter to 18.06.2010 and dismissed the said application on that day noting that there is no representation and the defendants are called absent. The trial Court did not issue notices to the defendants by registered post with acknowledgement due when the counsel reported no instructions. When a counsel pleads before the Court that he has no instructions from the party, and withdraws from the case without informing the party, then according to the settled legal position in the decision in **Tahilram Issardas Sadarangani v. Ramchand Issardas Sadarangani**^[1], a fresh notice ought to be issued by the Court to the party concerned. Therefore, the dismissal order passed in I.A.no.214 of 2008 without issuing a notice to the defendants on their counsel withdrawing from the case is illegal and, hence, the said order is liable to be set aside.

6. I have bestowed my attention to the facts and the submissions.

7.1 In a suit for partition filed by the sole plaintiff, the defendants did not adduce any evidence; and, the 5th defendant, who is admittedly looking after the litigation on behalf of the defendants, having filed his affidavit in lieu of examination-in-chief before the trial Court had failed to appear before the court and did not respond to the letters written by his counsel. The 5th defendant at one breath had pleaded that he was unwell and that he was taking treatment for the swelling of his left lower limb including foot. At another breath, he had stated that he is a professional driver on a Tata Sumo and that he often goes on tours and even long distant tours. Why the other defendants could not pursue the matter in his absence is not stated. After the suit was decreed *ex parte*, the 5th defendant had filed two applications one for setting aside the *ex parte* decree and the other for condonation of delay in seeking to set aside the *ex parte* decree. Those applications were also not pursued with diligence and, hence, those petitions were dismissed for default on 18.06.2010. Even those applications were filed after the 5th defendant

received notices in I.A.no.743 of 2007 filed by the plaintiff for determination of mesne profits and passing of a final decree. No doubt, as per the explanation appended to Rule 2 of Order XVII of the Code, when evidence or substantial portion of evidence of any party has already been recorded and such party fails to appear on any day to which the hearing of the suit is adjourned, the Court may proceed with the case as if such party was present. Since no evidence was adduced on the side of the defendants, the observation of the trial Court in the impugned order that the decree that was granted was a decree granted on merits, but not an *ex parte* decree is incorrect. However, the said fact is not going to advance the case of the defendants/petitioners any further for the reason that even the petition to set aside the *ex parte* decree was not filed within a reasonable time and the application filed for condonation of delay was dismissed for default, i.e., for non-prosecution. Even though I.A.no.214 of 2008 was of the year 2008, the defendants did not show any interest to have the application disposed of within a reasonable time; and, ultimately that application was dismissed in June 2010 for default. Later, on the death of the 5th defendant, the remaining defendants filed the application in I.A.no.428 of 2010 with the supporting affidavit of the 9th defendant. In the said affidavit, it is categorically stated that though the counsel wrote letters to the 5th defendant, who is uncle of the 9th defendant, the 5th defendant, who is bed ridden could not inform the same to the other defendants. Therefore, from the material on record, i.e., the admissions of the defendants, it is clear that the counsel before withdrawing from the case had written letters and gave due intimation to the 5th defendant, who was by then alive. Though the counsel for the defendants had withdrawn from the case, there was no requirement for issuing notices to them by the Court as the Counsel had admittedly written letters before withdrawing from the case for want of instructions from the defendants. Therefore, the decision of the High Court of Madhya Pradesh in **Smt. Benibai v. Smt. Champabai**^[2], wherein the decision of the Supreme Court mentioned supra was referred to, does not advance the case of the defendants any further. When the defendants are not

diligent throughout and when none of the defendants had shown interest to prosecute their defence in the suit for partition, which was decreed in the year 2003, this Court does not find any reasons, much less valid and sufficient reasons, calling for interference with the order of the trial Court. The case on hand is not a fit case to show any indulgence to the defendants, that too at this distance of time. Viewed thus, this Court finds that the order impugned needs no interference.

7. In the result, the Civil Revision Petition is dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

18th February 2016
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[\[1\]](#) AIR 1993 SC 1182

[\[2\]](#) AIR 1996 MADHYA PRADESH 243