

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 4164 OF 2016

ORDER:

1) The petitioners, who are defendants 5, 7 to 11, filed the present Civil Revision Petition under Section 115 of the code of Civil Procedure (for short "the C.P.C.") aggrieved by an order dated 04.08.2016 passed in I.A.No.869 of 2011 in O.S.No.122 of 2007 on the file of the Additional Senior Civil Judge, Tirupati, wherein an application filed under Section 5 of the Limitation Act to condone the delay of 536 days in filing a petition to set-aside the exparte decree was dismissed.

2) For the sake of convenience, the parties hereinafter be referred to as arrayed in O.S.

3) The facts in issue are as under :-

The plaintiffs filed O.S.No.122 of 2007 seeking declaration to declare the plaintiffs as absolute owners of the plaint "B" schedule property; to grant permanent injunction restraining the defendants, their men, agents, assignees or anybody claiming through them from interfering with their peaceful possession and enjoyment; direct the defendants to remove the temporary sheds and surrender the vacant possession of the "B" schedule property to the plaintiffs by way of mandatory injunction; and also direct the defendants to pay damages of Rs.500/- per month for 12 months at Rs.6,000/- for their illegal

occupation of the "B" schedule property. All the defendants appeared through their counsel and filed written statement. Subsequently, defendants failed to appear and remained *exparte*. After considering the oral and documentary evidence produced by the plaintiffs, the trial Court granted *exparte* decree on 19.11.2009. Two years thereafter, defendants 5, 7 to 11 filed I.A.No.869 of 2011 under Section 5 of the Limitation Act to condone the delay of 536 days in filing set-aside *exparte* decree petition. After analyzing the evidence available on record, the trial Court dismissed the said petition. Challenging the same, the present Civil Revision Petition is filed.

4) Heard learned counsel for the petitioners and learned counsel for the respondents.

5) Learned counsel for the petitioners/defendants 5,7 to 11 submit that the petitioners after receiving summons in the suit, filed written statements and entrusted the matter to the 1st defendant to look after the proceedings, who intturn assured them that he will attend and prosecute the case. Later the 1st defendant is alleged to have colluded with the plaintiffs and facilitated the plaintiffs to obtain *exparte* decree. The petitioners came to know about the said fact only after receiving notices in execution petition. Immediately thereafter they filed a petition to set aside the *exparte* decree along with an application under Section 5 of the Limitation Act petition to condone the delay of 536 days in filing the said petition.

6) Per contra, the learned counsel for the respondents opposes the same contending that there is absolutely no explanation to condone the delay of 536 in filing the application. Relying upon the judgments of this Court in **Smt. Emani Sundara Janaki v. Smt. K.Sri Lakshmi**¹, the learned counsel for the respondents would contend that where the delay is found to be on account of gross negligence or deliberate inaction or lack of bonafides, the delay cannot be condoned.

7) The short question that arise for consideration is "Whether the delay of 536 days in filing the petition to set-aside the exparte decree can be condoned under Section 5 of the Limitation Act in the absence of any explaining day to day's delay?"

8) As seen from the record, the petitioners, who are the defendants in the said suit, filed their written statement along with Defendant No.1. Thereafter they are alleged to have entrusted the matter to Defendant No.1, to prosecute the same. The suit, which was instituted in the year 2007, was decreed on 19.11.2009 and I.A. to set-aside the exparte order came to be filed on 13.06.2011. It is also to be noted that E.P.56 of 2011 was also filed and the respondents therein, who are the petitioners herein, were directed to appear before the Court on 03.06.2011. As such, from 2011 to 2016 the matter has been prolonged on one pretext or the other. It is urged

¹ 2006(3) APLJ 100(HC)

by the learned counsel for the petitioners/defendants that the respondents/plaintiffs have evinced no interest for disposal of the petition since 2011, but however no material is placed to establish the same. On 17.08.2016, E.P.No.56 of 2011 filed for execution of the decree was allowed directing the J.Drs., to vacate the E.P. schedule property and deliver the property to D.Hr., within three months from the date of the order, failing which the D.Hrs., were directed to take the vacant possession with police aid. It is to be noted that the order to condone the delay of 536 days in setting-aside *exparte* decree came to be passed on 04.08.2016 and within two weeks thereafter the order in E.P. came to be passed. But, it appears that no steps are taken by the J.Drs., in getting their E.P. stayed, in view of the applications filed by them to set-aside the *exparte* order.

9) The learned counsel for the petitioners relied upon a judgment of this Court in **R.Krishna @ Kistaiah v. R.Bala Narasaiah (died) per L.Rs., and others²**. It was a case where the defendants engaged a counsel and through him the written statement was filed in the year 2007. The counsel is said to have told them that he would call them as and when their presence is required, but neither did so nor did he represent the case on 17.02.2010. Accordingly, the defendants were set *exparte* on 03.02.2010. Long thereafter they came to know about the *exparte* decree, which lead to filing of an application to set-aside the *exparte* decree. Having regard to the circumstances under which

² 2014(2) ALD 297

the *exparte* decree came to be passed, the Court below allowed the same with a delay of 502 days on payment of costs, which was upheld by this Court. The said judgment, in my view, may not apply to the case on hand as the *exparte* decree came to be passed because of laches on the part of the counsel in not informing the defendants about the case.

10) It is nodoubt true that the judicial discretion conferred under Section 5 of the Limitation Act to condone the delay shall be exercised liberally to advance substantial justice to the parties and to decide the dispute on merits. But, where the delay is found to be on account of gross negligence or deliberate inaction or lack of bona fides, sufficient cause cannot be said to be made out within the meaning of Section 5 of the Limitation Act. The said view of mine is fortified by a judgment of this Court in **Emani Sundara Janaki's case (one supra)**. A situation identical to the case on hand, came up for consideration before this Court, in the said case. It was also a case where the suit was filed for recovery of money against the defendants and an *exparte* decree was passed. On the basis of the said decree, the plaintiff filed E.P., for issuance of sale notice and to settle the terms of sale of immovable properties, which were already attached pending the suit. On receiving the notice in E.P., the defendant filed an application under Order 9 Rule 13 C.P.C., to set-aside the *exparte* decree along with the application to condone the

delay of 969 days. The said application was dismissed, which was confirmed by this Court holding that the explanation offered by the defendant shows that there was inaction, indifference and casualness in the approach of the petitioner in prosecuting the suit proceedings. It was held to be a case of gross negligence which cannot be construed as sufficient cause.

11) Even in the present case, when the petitioners/defendants adopted the Written Statement filed by D-1, they cannot now take plea that they are not aware about the proceedings before the Court. They should have been vigilant enough to find out the position of their case. They cannot, now, get away with their latches stating that the matter was entrusted to D-1, who colluded with the plaintiff, for which there is no basis. Moreover, no steps were taken by the petitioners, till date, to set-aside the orders passed in E.P. Taking into consideration the facts and circumstances of the case and in view of the judgment referred to above, I see no merits in the present petition and the same is liable to be dismissed.

12) Accordingly, the C.R.P. is dismissed. No costs. As a sequel to it, miscellaneous petitions pending if any in this C.R.P. shall stand closed.

C. PRAVEEN KUMAR, J

Date: 02.11.2016
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