

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITIN No.621 of 2015

ORDER:

The husband/respondent in IA.No.198 of 2013 in OP.No.1073 of 2011 filed this civil revision petition under Article 227 of the Constitution of India challenging the order dated 16.12.2014 of the learned Judge, Additional Family Court, Visakhapatnam, passed therein.

2. I have heard the submissions of *Sri N. Subba Rao*, learned counsel for the revision petitioner/husband and of *Sri Narasimha Rao Davuluri*, learned counsel for the respondent herein/wife. I have perused the material record.

3. The parties shall hereinafter be referred to as they are arrayed in the aforesaid interlocutory application for convenience and clarity.

4. The introductory facts, in brief, are as follows:

The respondent filed FCOP.No.1073 of 2011 on the file of the Additional Family Court at Visakhapatnam under Section 13(1)(ia)(ib) of the Hindu Marriage Act, 1955, for dissolving the marriage between the parties and granting a decree of divorce on the grounds of cruelty and desertion. The petitioner having entered appearance failed to file her counter and remained *ex parte*. Thereafter the respondent's OP was decreed as prayed for on 17.12.2012. Therefore, the petitioner filed the subject interlocutory application to set aside the *ex parte* decree and order.

The respondent resisted the said petition. On merits, the trial Court allowed the petition subject to payment of costs of Rs.500/- by the petitioner to the respondent on or before 06.01.2015. Aggrieved thereof the respondent filed this revision.

5. The case of the petitioner in support of her request to set aside the *ex parte* decree and order passed in the above FCOP, in brief, is as follows: - 'Her advocate informed her to come to his office for preparation of counter in the above FCOP; however, due to pregnancy she could not attend before the Court for six months and could not either instruct her counsel to prepare her counter or file her counter. Therefore, she was set *ex parte* and an *ex parte* decree and order were passed subsequently. The non filing of the counter and her failure to appear before the Court are only due to the above said reason but not due to wilful negligence or wanton reasons. She delivered a baby boy. He was 11 months old as on 10.01.2013, the date of filing of the petition to set aside the *ex parte* decree and order. She is now residing with her parents, along with the boy, at Kovvuru village of West Godavari District. She needed her parents' assistance to look after the baby boy during post pregnancy period. Hence, she could not meet her counsel and file her counter. She filed before the Court of the learned II Additional Judicial Magistrate of First Class, Kovvur a complaint against the respondent under Section 498-A and other provisions of the Indian Penal Code and also a Domestic Violence Case before the said Court. The respondent, who is attending the said cases before the said Court, knows that she is pregnant. But, he purposefully filed the FCOP in the Court at Visakhapatnam at a time when she was pregnant to deliberately cause loss to her and

make a gain for himself. As she was unable to attend FCOP filed before the Court at Visakhapatnam, she got filed a TOP before the High Court. However, as her counsel at the High Court went to a foreign country on his personal work, the said petition was not numbered. As non appearance before the Family Court and non filing of the counter in the FCOP filed by respondent is not intentional and not wilful but due to the above said reasons, the *ex parte* decree and order may be set aside and an opportunity may be given to contest the said original petition.'

6. The case of the respondent in his counter, in brief, is this: - The allegations that due to pregnancy, the petitioner could not attend before the Family Court for the last six months and could not file her counter for the said reason are false and invented. She did not give details as to when she became pregnant. She did not file medical certificate to show that she was not in a position to move and appear before the Court at Visakhapatnam. The mere ground that she is pregnant is not a convincing reason to allow her petition. Her allegations that she delivered a baby boy of 11 months and that she is residing at Kovvur with her parents and that she requires assistance of her parents to look after the boy during the post pregnancy period and for those reasons she could not meet her counsel and file her counter are not satisfactory and convincing reasons and the said allegations are not sufficient to substantiate the plea that she is not negligent. She filed a criminal case as well as a domestic violence case against the respondent before the Court of the learned II Additional Judicial First Class Magistrate, Kovvuru, and was attending before the said Court. The allegations that the respondent is aware that she is pregnant and

that he purposefully filed the FCOP to cause loss to the petitioner and make a wrongful gain for himself are false. He is not aware that she is pregnant. The allegations that she got filed Transfer Petition before this Court since she is finding it difficult to attend the Court at Visakhapatnam from Kovvur along with her baby boy and that due to the absence of her counsel from the country, her said case was not numbered are not correct. If the counsel engaged by her to represent her case in this Court went abroad, she ought to have engaged another counsel without waiting for his return. The petitioner is very much interested in cutting off her marital tie. Having kept quiet for a long time and after the petition for divorce is allowed and divorce is granted, she filed the present petition with lame excuses. If she was really interested in living with the respondent, she ought to have filed her counter and contested the OP. She filed the petition formally though she is not wholeheartedly interested in restoration of marital relationship between the spouses. After the OP was decreed *ex parte* on 17.12.2012 this respondent having waited for five months married again on 16.05.2013 and his said marriage was registered on 17.05.2013. By the time the notice in this application was served on 07.07.2014, this respondent is already married. The petition of the wife to set aside the *ex parte* decree and order passed in the OP has become infructuous. The petition may be dismissed.'

7. At the hearing before the trial Court no oral and documentary evidence was adduced. The trial court, as already noted, allowed the petition subject to payment of costs.

8. Learned counsel for the respondent, i.e., the revision petitioner, while reiterating the pleaded case in his counter vehemently contended that the petitioner-wife had attended the Court proceedings at Kovvuru Court during the relevant period but she purposefully did not attend the Court case at Visakhapatnam and that her conduct in attending the Court at Kovvuru but not in attending the Court at Visakhapatnam to file counter and resist the FCOP filed by the husband for grant of divorce lays bare that she is negligent and wantonly remained *ex parte*. In support of the said contention he produced copies of the proceeding sheet in the FCOP, copy of decree and order in IA.no.198 of 2011 in FCOP.no.1173 of 2011 and copy of chief examination and cross examination in the DVC case. He further submitted that the husband has re-married after obtaining an *ex parte* decree for divorce in the OP filed by him and that no cause much less sufficient cause was shown for setting aside the *ex parte* decree and that even if the *ex parte* decree and order are set aside, no useful purpose would be served as the husband has already remarried.

9. The learned counsel for the petitioner/wife while supporting the orders of the trial Court would contend that the wife was pregnant and that she delivered a baby boy are undisputed and that on account of her advanced pregnancy she could not undertake travel from Kovvur to Visakhapatnam, which is at a distant place, and that after the boy was born, she lived along with her parents at Kovvur along with the boy as she needed assistance of her parents and that in the circumstances she was placed she could not either approach her advocate at Visakhapatnam and

instruct him for drafting counter or file her counter and that therefore, it cannot be said that she is negligent and wantonly remained *ex parte* in the OP. He would also submit that no documents are produced before the trial Court to show that the wife attended the Court cases at Kovvur during the relevant period and that the material documents now filed also do not disclose that the wife attended the Court case at Kovvur during the relevant period and that the documents filed casually without an application to receive additional evidence cannot be looked into. He alternatively contended that even assuming for a moment that the wife attended the Court cases at Kovvur for one or two adjournments, which is her place of residence, it cannot be said that she could have attended the Court case at Visakhapatnam also as the said place is at a long distance and required travelling either by road or rail.

10. I have given earnest consideration to the facts and submissions. The wife was pregnant and delivered a baby boy is not in dispute. During the course of hearing the fact that the petitioner was pregnant and later she delivered a baby boy and that the baby boy was 11 months old as on 10.01.2013, the date of filing of the petition to set aside the *ex parte* decree, is not disputed. If we relate back from this date, it would appear that she delivered the child in February, 2012 or so. She was set *ex parte* in the OP on 07.11.2012 and *ex parte* decree was passed on 17.12.2012. Dealing with the contention of the respondent that the wife attended the Court cases at Kovvur during the relevant period, but, intentionally did not attend the Court case at Visakhapatnam and that she is negligent, it is to be noted that the

respondent pleaded that the petitioner attended her Court cases at Kovvur and produced the aforementioned documents before this Court. Though these documents are only filed as additional material papers and are not filed with a petition to receive additional evidence, yet a perusal of the said documents, particularly the copy of the proceeding sheets, do not support the contentions of the respondent that the petitioner attended the Court cases at Kovvuru during the relevant period. No particular date of attendance pointed out from the proceeding sheets is sufficient to accept the contention of the respondent/husband. Even assuming for a moment that she attended to her cases at Kovvur for one or two adjournments, the same is not going to advance the case of the respondent for the reason that she was residing at the very same place and hence, it is not difficult for a pregnant woman like her to travel a short distance and attend a local Court. Therefore, her contentions that on account of her advanced stage of pregnancy and later delivering of a child and having custody of the young child she could not attend before the Court and prosecute her defence can be accepted. Her specific contention is that after she delivered the child she needed assistance of her parents to look after the child and therefore she lived with her parents at Kovvuru and hence, she could not meet her counsel to instruct him to file counter and prosecute the defence and that therefore the *ex parte* order and decree have come to be passed.

11. The trial court, having considered her predicament and having observed that it is difficult for a mother of an young child to leave the said child with the parents and attend the Court at a

distant place, found favour with the wife for not attending the Court and suffering an *ex parte* decree, and hence has set aside the *ex parte* decree and order on payment of costs, *inter alia*, holding that she was neither negligent nor not diligent.

12. Having regard to the facts peculiar to this case, this Court is satisfied that the discretionary order whereby an opportunity was given to the petitioner to contest the OP filed by the husband, on merits, does not call for interference while exercising the jurisdiction under Article 227 of the Constitution of India.

13. On an overall consideration of the matter, this Court finds that there is no jurisdictional error or illegality in the order of the Court below calling for interference.

14. In the result, the Civil Revision Petition is dismissed confirming the order of the Court below.

Miscellaneous petitions, if any, pending in this revision petition shall stand closed. No order as to costs.

JUSTICE M. SEETHARAMA MURTI

17th November, 2016
Vjl