

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.3263 of 2016

ORDER:-

This Civil Revision Petition, under Section 115 of the Code of Civil Procedure, 1908, is filed by the unsuccessful petitioner/defendant challenging the order dated 18.04.2016, passed in I.A.No.1740 of 2011 in O.S.No.1311 of 1999 by the I Senior Civil Judge, City Civil Court, Hyderabad, whereby, the petition filed by defendant for condonation of delay of 2124 days in filing petition to set aside the *ex parte* decree was dismissed.

2. Petitioner filed the petition before the Court below to condone delay of 2124 days in filing petition to set aside the *ex parte* decree contending that the respondent filed a fictitious suit for specific performance; though petitioner was regularly attending the Court, respondent conveniently escaped his cross-examination on various dates of adjournment; on that, Court below appointed an Advocate Commissioner to record his cross-examination and since respondent did not cooperate with Advocate Commissioner, he returned the warrant; petitioner had no legal knowledge. Due to financial problems, petitioner paid meager amount to his counsel on record at the time of filing vakalat and subsequently, said counsel shifted his practice to High Court and instructed his junior to attend the case of petitioner and since then, junior colleagues of petitioner's advocate on record were attending the case; when the case was posted for further cross-examination of P.W.1, he was called absent and on that, the Court below dismissed the suit against P.W.1; when petitioner enquired about the status of case, junior counsel informed that suit was dismissed against P.W.1 and asked petitioner to meet his advocate on record and pay Rs.5,000/- towards professional fee; due to financial problems,

petitioner could not meet his advocate on record; petitioner went to USA to attend his daughter due to her ill-health; on enquiry, petitioner was informed that *ex parte* decree was passed in favour of respondent

He further contended that the Court below posted the case for further evidence of respondent on 14.06.2005 though he was not present; thereafter, Court below closed the evidence of respondent and posted the matter for petitioner's evidence on 13.07.2005; since petitioner was under the impression that suit was dismissed, he could not appear before the Court below for his evidence; Thereafter, I.A.No.1427 of 2005 was filed to re-open the evidence of respondent and the same was allowed and evidence of P.W.2 was closed on 08.11.2005; The Court below posted the matter to 23.11.2005 for arguments on which date, petitioner's counsel filed a memo reporting 'no instructions from the defendant'; The Court below recorded the same and posted the case for judgment to 25.11.2005; Finally, The Court below passed judgment and decree on 26.11.2005 decreeing the suit *ex parte*.

Thus, the main ground urged are as follows:-

- (a)** When the advocate on record for a party reports no instructions from his client, the Court below is under obligation to order notice to the party;
- (b)** No opportunity was given to further cross-examine P.W.1 to full extent;
- (c)** The Court below neither forfeited the right of further cross-examination of P.W.1 nor eschewed his evidence;
- (d)** The Court below passed *ex parte* decree on the basis of incomplete evidence of P.W.1;
- (e)** Passing of any decree basing on incomplete evidence of a witness is illegal;

(f) Though P.W.2's evidence is available on record, nothing has been discussed about his evidence;

(g) The delay caused is neither intentional nor wanton, but for the circumstances beyond his control.

3. Respondent filed counter resisting the petition raising various contentions, mainly contending that there are no grounds to condone abnormal delay of 2124 days; Ignorance of law is no excuse to condone abnormal delay; on every occasion, sufficient opportunity was afforded to petitioner to contest the matter, but petitioner did not appear before Court on various occasions and his counsel reported 'no instructions' after cross-examination of P.W.1 at length; petitioner did not produce any material to establish that he left to USA to visit his daughter who was suffering from ill-health and even after receiving summons from Court below, he did not appear before the Court below and finally, suit was decreed on 22.07.2000; Thereafter, petitioner filed I.A.No.1296 of 2000 for setting aside *ex parte* decree and the same was allowed giving one more opportunity to petitioner to contest the matter; though petitioner filed written statement, he never appeared before the Court nor was diligent to prosecute the matter; petitioner executed a GPA in favour of his wife authorizing her to represent various cases pending against him which itself shows that he has legal knowledge; petitioner has several properties and was receiving rental income apart from his own business and therefore, allegation that petitioner was facing financial problems is false and created only to gain sympathy from the Court; a perusal of material on record would show that substantial cross-examination on material issues was already completed by petitioner's counsel and in such circumstance, evidence on record cannot be eschewed; Court below has merely closed the evidence of P.W.1 and it was for the concerned party who was aggrieved to seek

reopening of evidence, which was admittedly not done; petitioner found fault with Court but he did not explain laches on his part; legal position as to what recourse the Court should adopt when a counsel reports 'no instructions' on behalf of a party is absolutely irrelevant and has no bearing to the facts of the case and since petitioner was aware about the progress of trial in the matter, issuance of further notice to him is a superfluous and unnecessary act; the allegation of miscommunication is false and abnormal delay of 2124 days has not been satisfactorily explained; petition is *de void* of merits and is liable to be dismissed.

4. The Court below, upon hearing arguments of both the learned counsel, dismissed the petition, assigning reasons declining to condone abnormal delay of 2124 days in filing the petition to set aside the *ex parte* decree.

5. Aggrieved by the said order passed by the Court below, present revision is filed raising several contentions.

6. During hearing, the prime contention of learned counsel for petitioner is twofold, viz., **(a)** When the advocate on record for petitioner before the Court below reported no instructions, the Court below is under obligation to order notice to petitioner to appear before the Court, but without ordering any notices, Court below passed an *ex parte* decree against petitioner; and **(b)** Court below did not consider the explanation offered by petitioner for delay that occurred in filing petition to set aside *ex parte* decree and committed an error.

7. *Per contra*, learned counsel for respondent submitted that petitioner was afforded sufficient opportunity to contest the matter and on an earlier occasion, petitioner, having appeared before the Court

below, remained *ex parte* and filed a petition to set aside *ex parte* decree and the Court below allowed the said application affording another opportunity to contest the matter, but even thereafter, petitioner did not prosecute the proceedings diligently and conveniently avoided to meet his advocate, which lead him to report 'no instructions'. He would further submit that even after receiving notices in the petition filed to re-open the evidence of respondent, petitioner did not appear before the Court and therefore, he is totally negligent in prosecuting the proceedings and filed the present petition to condone abnormal delay of 2124 days in filing petition to set aside *ex parte* decree, after a long lapse of time from the date of decree and there are no *bona fides* to condone abnormal delay of 2124 days and as such, the revision petition is liable to be dismissed.

8. Considering the rival contentions of the learned counsel, the points that arise for consideration are as follows:-

(1) Whether issuance of notice is mandatory to the party (petitioner herein) when his advocate on record reported 'no instructions'?

(2) Whether petitioner has shown sufficient cause for condonation of abnormal delay of 2124 days in filling petition to set aside *ex parte* decree dated 26.11.2005? And if so, the order passed by the Court below is vitiated by any irregularity or illegality and liable to be set aside.

In Re: Point No.1:-

9. Undisputedly, advocate on record for petitioner before the Court below has cross-examined respondent on one occasion up to 05:15 PM and further cross-examination was differed at request. But on the next date of adjournment, advocate on record for petitioner reported 'no instructions' from his client and refused to further cross-examine the

respondent. It is the specific contention of learned counsel for petitioner that when the advocate on record for petitioner before the Court below reported 'no instructions', the Court is under obligation to issue notice to the party/petitioner herein, informing him to appear before the Court to adjudicate the matter judiciously. In support of this contention, learned counsel placed reliance on ***Tahil Ram Issardas Sadarangani and others Vs. Ramchand Issardas Sadarangani and another***¹, ***Malkait Singh and another Vs. Joginder Singh and others***², ***Nalla Lalchaiah Vs. Abdul Razak***³, ***N.Balakrishnan Vs. M.Krishnamurthy***⁴.

10. In all these judgments, the Apex Court and this Court held that it is in the interest of justice to issue notice to a party, when his/her counsel on record reports 'no instructions' on their behalf. It has to be seen that the Apex Court and this Court, in the above referred decisions, did not specifically held that issuance of notice is mandatory to a party when his/her advocate on record reports 'no instructions' from his client, but only held that "it is in the interest of justice" that notice is required to be issued to the party. In the present case, advocate on record for petitioner reported no instructions from his client in the midway of trial.

11. Even otherwise, if the ratio in above referred judgments is accepted, it is for the Court to meet the expenditure for service of notice to the parties, on their counsel reporting 'no instructions'. But it is an admitted fact that no separate budget is allocated to the Courts for such purpose. On the other hand, neither the Code of Civil Procedure, 1908, nor the Civil Rules of Practice prevailing in the state of Telangana

¹ 1993 Supp (3) Supreme Court Cases 256

² AIR 1998 Supreme Court 258

³ Laws (APH)-2004-2-62

⁴ AIR 1998 Supreme Court 3222

and the state of Andhra Pradesh permit the Court to send notices to the parties without deposit of process fee by the concerned parties. Similarly, Finance Code of the Courts do not permit any officer of Court to utilize any amount allocated under a particular head for any other purpose.

12. This Court, in ***Bathini Erikalappa Vs. Gurugurla Nagamma and another***⁵, advertent to ***Malkait Singh***'s case (2 *supra*), discussed the obligation and impact of ordering notice through Court on a party whose counsel reports 'no instructions' and concluded as follows:-

“Malkait Singh’s case (1 supra) relied on by the learned counsel for the revision petitioner arose from the judgment of the Punjab & Haryana High Court. I am not aware of the Rules of procedure in the High Court and subordinate Courts in the states of Punjab and Haryana. But suffice to say that in this state Civil Rules of Practice applicable to trial of cases and hearing of appeals in the Courts subordinate to this Court are not exactly similar to the appellate Rules of this Court. That apart, High Court being the highest Court in state, may not feel hide bound by the rules of procedure, and may order notice to the party, if his counsel in this Court reports ‘no instructions’ though there is no such provision either in CPC or the appellate side Rules of this Court. In the trial Court, parties are expected to be present in Court for every hearing, and trial Courts are also bound by the Civil Rules of Practice and the financial code and so those Courts cannot utilize the funds allotted to it without sanction of a rule of instructions issued by the High Court, Courts subordinate to this Court in this State are bound by the Process Fee Rules. So, notices to parties in civil proceedings before the trial Courts can be sent only on deposit of process. All parties to proceedings before trial Court may not be residents of the places within its territorial jurisdiction for the Court to depute a process server to serve notice on a party, even without payment of process fees. Service postage also cannot be utilized for sending notice without payment of process. So if a notice has to be sent to the party, on his counsel reporting no instructions in a civil proceeding, some

⁵ (2006) 1 APLJ 478 (AP)

one has to deposit process fees for that purpose. All this apart it should be kept in view that if the Advocate, who is but an agent of the party concerned, reports 'no instructions' in the trial Court without notice to the client, it is a matter between the client and the advocate concerned. If due to the act of the advocate, his client has suffered some damage or loss, that is a matter between his client and the advocate concerned but the other side cannot be put to a disadvantage. Since Courts subordinate to the High Court cannot act de hors the provisions of CPC and the Civil Rules of Practice and also cannot by utilizing the funds allotted to it, a trial Court sending notice to the concerned party, after his counsel reports 'no instructions' is a practice unknown in this State. This Court can take judicial notice of the fact that advocates in trial Court usually report want of instructions when clients do not respond to the letters written by them. Moreover, Court being asked to send notice to the party, as and when his counsel reports no instructions would add to the delay in disposal of cases because unscrupulous litigants can always make a request to their counsel to report no instructions so that the Court would send a notice to him and thus gain an adjournment time and again. Therefore, the Court below did not commit an error in not sending a notice to the revision petitioner when his counsel reported no instructions."

13. As observed by this Court in the above referred judgment, when the parties are not interested to give instructions to their advocate, either to drag the matter or avoid trial, it may be boon for them for some time taking advantage of the situation when the advocates reported no instructions. But such an act would add to the delay in disposal of cases by the Courts, which is a mind-boggling issue in the judicial institutions. On the other hand, such a practice would amount to extending a helping hand to unscrupulous litigants who are avoiding trial of cases by instructing their advocate to report no instructions so that the matter can be delayed. Therefore, in the absence of any specific budgetary allocation or specific head of expenditure for issuing notices to the parties whose advocates no instructions on behalf of their

clients, it is unjust to direct the trial Courts to order notices to the parties whose advocate reports 'no instructions'.

14. Therefore, by applying the principle laid down in **Bathini Erikalappa's** case (5 *supra*), I hold that there is no obligation on the part of the Court below to send notice to the party (defendant) whose advocate reports no instructions. Accordingly this point is answered.

In Re: Point No.2:-

15. Other contention of learned counsel for petitioner is that petitioner was prevented by a valid and sufficient cause, as his advocate did not give information about the stage of suit. Admittedly, junior counsel of petitioner's advocate on record informed, on enquiry, that the suit was dismissed, and later demanded petitioner to pay fees to the counsel on record, but petitioner did not meet his advocate due to financial problems. It has to be seen that it is the duty of a party to approach his counsel and give instructions. Petitioner, even after receiving notices in Interlocutory Application filed for re-opening the evidence of respondent, did not appear before the Court below or at least meet his counsel to give instructions to prosecute the proceedings diligently.

16. In paragraph No.17 of the affidavit filed by petitioner, a specific allegation is made that on 27.01.2008, respondent filed memo with someone's signature stating that 'notice is served' and got allowed the said petition. But, petitioner did not specifically deny that it is not his signature but merely alleged that some one has signed on memo. In fact, memo was filed along with postal acknowledgement and no signature was obtained on memo filed before the Court on 27.01.2008 and, therefore, it is for the Court to record that notice was sent by

Registered Post with Acknowledgement Due to the correct address of petitioner. It is not the case of petitioner that notice was not sent to the correct address. Therefore, by drawing presumption under Section 27 of the General Clauses Act, it is presumed that notice was served on petitioner by postal authorities and the acts of postal authorities are presumed to be true in view of Section 114 of the Indian Evidence Act, 1872, unless the said presumption is rebutted. But, petitioner did not rebut the said presumption by letting in any evidence, more particularly, to establish that he was not residing at the address mentioned on postal cover. In such circumstances, a presumption shall be drawn that notice was duly served on petitioner in Interlocutory Application filed for re-opening the evidence of respondent, though petitioner did not appear before the Court below and allegedly visited USA for some time, without producing the passport to show the period of his visit to USA.

17. Petitioner also pleaded his incapacity to pay fees to his advocate due to financial problems. Petitioner, on the one hand pleaded his incapacity to pay Rs.5,000/- to his counsel on record due to financial problems, on the other hand contended that he went to USA to attend his daughter who was suffering from ill health. This Court is unable to understand as to how a person, pleading financial incapacity to pay Rs.5,000/- to his advocate, can afford to visit a foreign country. This circumstance shows the conduct and intention of petitioner as to how he conveniently escaped to meet his counsel and prosecute the proceedings before the Court below. Taking into consideration the totality of circumstances, more particularly the conduct of petitioner, it is difficult to hold that petitioner was prevented by valid and sufficient reason to file petition within the period of limitation.

18. Yet another circumstance is that initially, petitioner appeared before the Court below through his counsel and remained *ex parte* later; and, without filing written statement, he filed a petition to set aside *ex parte* decree which was allowed by the Court below affording another opportunity to him to contest the suit. But still, he did not prosecute the proceedings diligently and as such there are no *bona fides* in the petition filed for condonation of delay. The benefit under Section 5 of the Limitation Act, 1963, cannot be extended to such a party who is not diligent in prosecuting the proceedings. Thus, the Court below rightly disbelieved the causes pleaded by petitioner and refused to condone delay.

19. For these reasons, this Court finds that the Court below rightly dismissed the petition refusing to condone abnormal delay of 2124 days in filing petition to set aside *ex parte* decree and the order under challenge warrants no interference by this Court by exercising revisional jurisdiction under Section 115 of the Code of Civil Procedure, 1908. The CRP is liable to be dismissed, being *de void* of merit.

20. 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 dismissed.

M. SATYANARAYANA MURTHY, J

20th September, 2016
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