

HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

CIVIL REVISION PETITION No. 916 of 2016

ORDER:

This Civil Revision Petition arises out of dismissal of a petition for condonation of delay in filing an application for setting aside the *ex parte* decree in a suit for specific performance.

2. Heard Mr. K.S. Murthy, learned counsel for the petitioners, and Mr. C. Raghu, learned counsel for the respondent.

3. The respondent filed a suit in O.S.No.221 of 2004 on the file of the Principal Senior Civil Judge, Machilipatnam, for specific performance of an agreement of sale. The petitioners, who were the defendants in the suit, appear to have engaged a counsel to contest the suit. The said counsel died, after filing the written statement. Thereafter, the petitioners appear to have engaged another counsel.

4. But eventually, the suit was decreed by a judgment dated 12.06.2013, granting a decree in favour of the

respondent for specific performance.

5. Contending that their non-representation before the Court was not willful and that they came to know about the decree only when a notice was served by the Amin in the execution proceedings, the petitioners filed two applications, one under Order 9 Rule 13 of the Civil Procedure Code and another under Section 5 of the Limitation Act. The petition under Section 5 of the Limitation Act was dismissed by the Court below, by an order dated 15.12.2015. Therefore, the petitioners are before this Court.

6. It is seen from the original judgment delivered in the civil suit that though the Court below proceeded to pronounce a judgment on the merits, the same was done after recording the fact that the learned counsel on both sides did not advance any arguments, and that the defendants did not let in any oral or documentary evidence. Therefore, the case would not fall under the explanation to Rule 2 of Order 17, but would fall under the substantial part of Rule 2 of Order 17.

7. Therefore, the petitioners were right in taking it as an *ex parte* decision and filing an application for setting aside the same. Once this is clear, the next thing to be seen is as to whether the delay was properly explained or not.

8. In paragraphs 3 and 4 of the affidavit in support of their application for condonation of the delay, the petitioners have stated that they engaged a counsel, by name,

N. Subrahmanyam. But, he died after filing of the written statement and, hence, the petitioners entrusted the case to another counsel, by name, Tagaram Kiran Babu. But, it appears that after taking the signatures of the petitioners in a vakalat, the said counsel had engaged another advocate, by name,

K. Ravi Kiran Kumar. It was this counsel who absented himself in the Court proceedings. The petitioners have claimed in paragraph 4 of the affidavit that they had not even met this counsel.

9. The above averments were not suspected by the Court below to be a make belief affair. But, the Court below proceeded on the footing that the

counsel engaged by the parties have a duty to perform. The Court below found fault with the petitioners for not proving that they actually engaged another advocate, by name, Tagaram Kiran Babu. The Court below was unduly influenced by the fact that the vakalat filed by the advocate, K. Ravi Kiran Kumar, contained the signatures of all the four petitioners herein.

10. But, I am unable to appreciate the reasons recorded by the Court below in paragraphs 9 and 10 of the order impugned in the revision. What the Court is obliged to see in a petition of this nature is as to whether the delay is explained properly or not. The Court need not have been carried away by the so-called allegations made by the petitioners against their Advocate, K. Ravi Kiran Kumar.

11. Unfortunately, the Court below has not examined the question of condonation of the delay from the right perspective. Therefore, I am of the considered view that the order of the Court below requires to be set aside. As a matter of fact, the suit was actually for specific performance of an agreement of sale. The respondent/plaintiff had also

prayed for an alternative relief of recovery of the advance sale consideration. The Court below, while decreeing the suit, did not even take up for consideration the question as to whether the discretionary relief of specific performance could be granted or whether the grant of refund of advance money was sufficient.

12. Thus, injustice appears to have been caused to the petitioners. Therefore, the Civil Revision Petition is allowed and the order of the Court below is set aside. The application for condonation of the delay is allowed. The Court below shall take up the application under Order 9 Rule 13 and deal with the same, in accordance with law.

Consequently, miscellaneous petitions if any pending in the revision shall stand closed. There shall be no order as to costs.

V. RAMASUBRAMANIAN, J

1st July, 2016
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