

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.3700 of 2015

ORDER:

This civil revision petition under Section 115 of the Code of Civil Procedure, 1908 by the petitioner/defendant is directed against the orders dated 15.04.2015 of the learned II Additional Senior Civil Judge, Vijayawada passed in IA.no.174 of 2014 in OS.no.727 of 2010 filed under Section 5 of the Limitation Act requesting to condone the delay of (239) days in presenting the application filed under Order IX Rule 13 to set aside the *ex parte* decree dated 30.09.2010 passed in the suit.

2. I have heard the submissions of the learned counsel for the revision petitioner/defendant ('the defendant', for brevity) and the learned counsel for the respondent/plaintiff ('the plaintiff', for brevity). I have perused the material record.

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

The plaintiff brought the suit for recovery of money. The suit was decreed *ex parte* on 30.09.2010. The case of the defendant is that he received the notices in the execution petition on 25.07.2013 and that on enquiries he came to know that the suit was decreed *ex parte* even without service of summons upon him and that he is not aware of the suit until the notices in the EP are received and hence, he is constrained to file the petition to set aside the *ex parte* decree. His further submission is that since at the relevant point of time the advocates are boycotting the Courts and abstaining from Court work, he could not file the petition in time and in the circumstances, the delay of (239) days had occasioned in filing an application to set aside the *ex parte* decree and that, therefore, he seeks condonation of the said delay. The plaintiff filed a counter denying the averments in the pleadings of the defendant and *inter alia* contending that the defendant is served with suit summons and that for his failure to enter

appearance and contest the suit, the *ex parte* decree was passed and that he is admittedly served with notice in the execution petition on 25.07.2013 but, this petition is belatedly filed on 16.04.2014 and that the long delay of (239) days is not explained and that, therefore, the petition is liable to be dismissed. It is *inter alia* contended in the counter that if the defendant has got good grounds to succeed in the suit proceedings a direction be given to the defendant to deposit the decretal debt with interest till date and permit the defendant to contest the suit; and that in-fact after the decree the defendant had approached the plaintiff and had promised to pay the amount; but, having failed to keep up the promise, he has filed the present application after the EP has been filed. The trial Court by the orders impugned had dismissed the petition and refused to condone the delay. Therefore, the defendant is before this Court.

4. The learned counsel for the defendant while reiterating the case pleaded by the defendant, which is already stated *supra*, would contend that though the defendant has urged in his affidavit before the trial Court that the summons in the suit are not served, the trial Court did not advert to the said aspect and had not recorded a finding as to whether the suit summons were served on the defendant or not and that for not answering the core issue in the impugned order, the order is liable to be set aside. He would alternatively contend that the defendant is prepared to deposit to the credit of the suit before the trial Court, 1/4th of the entire decree debt with interest and also costs provided an opportunity is given to contest the suit on merits as the defendant is having tenable defence in the suit.

5. The learned counsel for the plaintiff while supporting the orders of the Court below would submit that the defendant had failed to explain the delay much less by giving valid reasons and that, therefore, the court below is justified in dismissing the petition.

6. I have bestowed my attention to the facts and the submissions. I have given detailed and thoughtful consideration to the core issue involved in the matter. As rightly pointed by the learned counsel for the defendant, when the

defendant had raised a plea that the suit summons were not served in the suit, before the *ex parte* decree was passed, the trial Court ought to have examined the said aspect and ought to have recorded a finding as to whether the suit summons were served on the defendant or not; but, the trial Court had failed to examine the said aspect and dismissed the petition purely on the ground that the delay from 25.07.2013 to 16.04.2014 is not properly explained and that the defendant had failed to show sufficient cause for condonation of delay. In the well considered view of this Court, the trial Court, which had failed to examine the core issue, was in error in dismissing the petition on extraneous considerations and for non explanation of the delay. It is to be noted that in all fairness the trial Court ought to have examined the vital aspect as to whether the summons were served or not, as the law is well settled that any decree passed without service of summons on the defendant would be a nullity and *non est* in the eye of law. Had the said question been examined and answered by the trial Court, this Court would have been in a position to go into the merits of the matter and the further aspect as to whether the delay deserves to be condoned or not. For the trial Court not adverting to the core issue involved in the matter, this Court is of the well considered view that the order impugned is unsustainable. However, the learned counsel for the defendant fairly submits that if the delay is condoned and *ex parte* decree is set aside and an opportunity is given, the defendant is prepared to deposit reasonable amount to the credit of the suit and contest the suit.

7. Having regard to the facts, this Court is satisfied that the revision petition can be disposed of with appropriate directions.

8. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, IA no. 174 of 2014 is allowed and the delay in filing an application to set aside the *ex parte* decree is condoned subject to the condition that the defendant shall deposit, to the credit of the suit before the trial Court, 50% of the decree debt including interest besides suit costs as taxed in the decree within eight (08) weeks from the date of the receipt of a copy of this order; failing which, the petition shall stand dismissed

without further reference for any further orders of this Court. However, on the defendant complying with the condition now imposed in these orders within the timeframe, the trial Court shall take up the petition to set aside the *ex parte* decree and dispose of the same keeping in view the orders of this Court and give an opportunity to the defendant to file written statement and contest the suit and dispose of the suit in strict accordance with the procedure established by law. On setting aside the *ex parte* decree, the trial Court shall entertain the application, if any to be filed by the plaintiff for receipt of the suit costs and permit the plaintiff to receive the same without furnishing any security as the said request is not resisted by the defendant before this Court.

There shall be no order as to costs.

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

M. SEETHARAMA MURTI, J

22nd April, 2016

Vjl