

HON'BLE SRI JUSTICE CHALLA KODANDA RAM

C.R.P.No.2821 of 2016

ORDER:

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Aggrieved by order dated 18-04-2016 in I.A.No.36 of 2016 in O.S.No.148 of 2005 on the file of the I Additional Senior Civil Judge, Nellore, the present Civil Revision Petition is filed by the 3rd defendant.

The facts not in dispute are that the 1st respondent/plaintiff filed the suit for declaration and injunction with respect to the suit schedule property based on unregistered Will, dated 11-07-1997. The suit was filed in the year 2005. The petitioner, who was arrayed as 3rd defendant, did not choose to participate in the suit proceedings and thereby he was set ex-parte on 25-08-2005.

I.A.No.36 of 2016 was filed by the petitioner under Order IX Rule 7 CPC seeking to set aside the ex-parte order, dated 25-08-2005. It is the case of petitioner that the mother of the plaintiff and defendants had executed a registered Will dated 04-01-1997. The property in Item No.3 was bequeathed to 2nd defendant to the extent of life interest with absolute rights to the petitioner as the successor in interest of 2nd defendant.

The suit is filed based on a forged will and the 1st defendant has remained ex-parte. The 2nd defendant died. As against the 4th defendant, the plaintiff/1st respondent is not pressing the suit. Thereby, there is none to contest the suit. In those circumstances, the petitioner seeks to set aside the ex-parte order. The Court below, having taken into consideration that the ex-parte order was made on 25-08-2005 not being satisfied with the reason of ill-health pleaded by the petitioner dismissed the I.A.

The reasons stated by the petitioner for remaining ex-parte is that he suffered from Cervical Spondylosis (back neck pain) and diabetic neuropathy and has underwent surgery on 12-01-2012 in NIMS, Hyderabad. Another plea which was taken by the petitioner is that he came to be aware of the suit

only through his sister's son Rajesh. Another plea, which the petitioner has taken is that the 1st respondent had cheated him and obtained a registered settlement deed while purporting to get executed a mortgage deed and he has not attended the Court only on account of ill-health and trusting the words of other defendants. After considering the respective submissions, the Court below found that there is no explanation for the period from 25-08-2005 till 12-01-2012, the date on which the petitioner underwent surgery at NIMS. In other words, there was no explanation whatsoever with respect to his keeping silent for about seven years. Thereafter, D5 to D7 were also added as party defendants. The sum and substance of the order of the court below is that the petitioner was sitting on the fence and observing the proceedings. It is only when all the defendants have given up their claim and stopped contesting the suit, he filed the I.A. seeking to set aside the ex-parte order, dated 25-08-2005.

As can be seen from the facts narrated above, it is an undisputed fact that from 2005 i.e., the year in which the suit was initiated till 2016 the petitioner having received summons had chosen to remain ex-parte and did not participate in the suit proceedings. The suit is at the stage of arguments. The argument of the learned counsel for the petitioner is that by virtue of the registered will dated 04-01-1997 the petitioner would be entitled to succeed to the property, which was admittedly bequeathed to the 2nd defendant-his younger brother, who died on 23-03-2014. Inasmuch as the petitioner acquired right only subsequent to death of second defendant, he is required to contest the suit which was filed by the plaintiff/1st respondent. This argument of the learned counsel for petitioner is liable to be rejected even on merits because the petitioner had independent right, he is required to contest the suit right from the beginning.

As the reasons stated by the petitioner for the remaining ex-parte are not satisfactory and particularly as there is no explanation for the period 2005 to 2012 and even for the subsequent period, the Court below, has rightly dismissed the I.A. filed seeking to set aside the ex-parte order dated 25-08-2005. However, one aspect of the matter which requires consideration is that

while the petitioner may not be entitled to reopen the proceedings prior to filing of the I.A. seeking to set aside ex-parte order, however, after his appearance before the Court, he would certainly be entitled to participate in the proceedings from the stage at which the proceedings are on the date of his application seeking to set aside the ex-parte order. This aspect of the matter is not being disputed even by the learned counsel appearing for plaintiff/1st respondent herein. Further, this aspect is also noticed by this Court in ***K.ALIVELAMMA Vs. K.SURYANARAYANA AND OTHERS***^[1] as well as in ***BADINENI POCHIAH AND OTHERS Vs. GATLA AKKAPALLI AND OTHERS***^[2].

In the light of the above, the order of the Court below is modified to the extent that the petitioner shall be allowed to participate in the suit proceedings from the stage prevailing as on the date of petitioner filing application in I.a.No.36 of 2016 before the court below i.e., 05-01-2016.

Subject to the above, the Civil Revision Petition is disposed of. No order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

CHALLA KODANDA RAM, J

Date: 29.07.2016
Prv

HON'BLE SRI JUSTICE CHALLA KODANDA RAM

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[\[1\]](#) 2007 (4) ALT 430

[\[2\]](#) 1990 (1) (HC) 472