

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

CRP No.4726 of 2016

ORDER:

1. This Civil Revision Petition is filed by the petitioner/plaintiff aggrieved by the Order dt. 2.05.2016 in I.A.No.90 of 2015 in O.S.No.169 of 2012 passed by the learned IV Additional Junior Civil Judge, Kadapa, whereby the learned Judge allowed the petition filed by the respondent/defendant under Section 5 of Limitation Act to condone the delay of 775 days in filing a petition to set aside the *ex parte* decree dt. 28.11.2012.

2. In O.S.No.169 of 2012, the trial Court passed an *ex parte* decree on 28.11.2012. Aggrieved, the defendant in the suit filed a Petition under Order 9 Rule 13 CPC to set aside the *ex parte* decree. He also filed a separate application in I.A. No.90 of 2015 to condone the delay of 775 days in filing the set aside petition. His case is that till November, 2012, he had been in touch with his counsel and thereafter he fell sick with multiple diseases; firstly, Jaundice, and thereafter spinal card problem and then with ear pain etc., and therefore, he could not contact his counsel personally and whenever he contacted his counsel, he was being informed that his case was pending and hence, the respondent/defendant was under the impression that the trial proceedings were pending. While so, on 6.2.2015 when he visited the suit site, some men were moving there and when he questioned, they replied that they were the men of the plaintiff and

they came to show the site to some intended purchasers as the plaintiff wanted to sell away the suit site. When the respondent/defendant seriously objected, they showed him Photostat copy of the decree and judgment dt. 28.11.2012 and then the respondent/defendant came to know for the first time that the suit was decreed *ex parte*. Hence, the petition to set aside the *ex parte* decree.

3. The present petitioner/plaintiff filed Counter and opposed the petition. During enquiry in I.A.No.90 of 2015, Pws. 1 and 2 were examined and Exs. P.1 to P.16 were marked on behalf of respondent/defendant. No oral and documentary evidence was adduced on behalf of petitioner/plaintiff. The trial Court having regard to the oral and documentary evidence came to the conclusion that in view of multiple diseases, the respondent/defendant could not contact his counsel during the relevant period and whenever he contacted him, he was being informed by his counsel that trial proceedings were pending and therefore, he could show sufficient cause for the delay in filing the petition to set aside the *ex parte* decree and accordingly, it allowed I.A.No.90 of 2015 condoning the delay of 775 days on payment of costs of Rs.2000/-. Aggrieved, the petitioner/plaintiff filed the instant revision petition.

4. Heard Sri M. Srikanth, learned counsel for petitioner and Sri Karri Murali Krishna, learned counsel for respondent.

5. Fulminating the Order impugned, learned counsel for the petitioner argued that the respondent/defendant showed no diligence in participating the trial and therefore, the trial Court rightly set him *ex parte* and passed an *ex parte* decree and thereafter also, the respondent/defendant slept over the matter for two years and then leisurely filed the petition to set aside the *ex parte* decree and he could not show sufficient cause to condone the delay of 775 days. The medical record filed by him even if believed does not show that he suffered any severe ailment which incapacitated him totally so as not able to contact his counsel and further, the medical record do not cover the entire period of delay and therefore, the trial court ought not to have condoned the delay basing on the record produced by him.

6. Per contra, the learned counsel for respondent/defendant would submit that the defendant was always prudent and diligent in prosecuting the case and in fact he contacted his counsel till November, 2012 and whenever he contacted him, he was informed that the trial was pending and therefore, the defendant was hoping that he can approach the Court whenever he was being called by his counsel and after November, 2012, he suffered different diseases; firstly Jaundice, for which he took native treatment for some time and therefore, he suffered spinal card problem, for which he took treatment for a considerable period and then he suffered ear problem, for which, he underwent operation and finally he recouped his health and approached the suit site on 06.02.2015 and then he noticed

henchmen of the plaintiff showing the suit site to some 3rd parties to sell the suit site. Then, for the first time, the defendant came to know that he was set *ex parte* and an *ex parte* decree was passed and immediately he engaged another counsel and filed a petition to set aside the *ex parte* decree and also filed another petition to condone the delay in filing the *ex parte* set aside petition and in the whole process, he vehemently argued, neither there was wanton delay nor want of diligence on the part of respondent/defendant and having perused the medical record, the trial Court allowed the application. He, thus, prayed to dismiss the Revision Petition.

7. In the light of the above rival arguments, the point for determination is:

“ whether the respondent/defendant could show sufficient cause to condone the delay of 775 days in filing the petition to set aside the *ex parte* decree?”

8. **Point:** The respondent's case is that till November, 2012, he was in touch with his counsel, who was telling him that the trial was pending. Thereafter, he fell sick; firstly, due to Jaundice; later because of Spinal Card Problem and thereafter ear problem and for the aforesaid diseases, he took treatment for a considerable period. According to him, during this period, he could not contact his counsel personally, but when he contacted him by phone, he was being informed that the trial was pending. According to respondent, he

came to know about passing of the *ex parte* decree only on 6.2.2015, which fact was informed to him by the men of plaintiff when he approached the suit site.

9. The contention of the revision petitioner is that if really the respondent/defendant was in touch with his counsel till November, 2012, he must have known about passing of *ex parte* decree because such an *ex parte* decree was passed in the month of November, 2012 only and therefore, there was no reason for him not to file a petition to set aside the *ex parte* decree immediately thereafter. It is the further contention of the petitioner that the medical record is created for the purpose of the case. I find no much force in the contention of the learned counsel for petitioner.

10. When we carefully analyze the case of the respondent/defendant, he was in touch with his counsel till November, 2012, during which his counsel was informing him that suit was pending. Believing him, he did not make any other enquiry about the stage of the case. Thereafter, he fell sick due to various ailments and hence, he could not contact his counsel personally and when he used to contact him, he was informed by phone that the suit was pending. The medical record covered by Exs. P.1 to P.16 relates to the relevant period of delay and I see no reason to disbelieve the same. Therefore, the submission of learned counsel for respondent/defendant that between November, 2012 and February, 2015, he fell sick and he could not contract his

counsel personally can be accepted to be true. The factum of his engaging another counsel probabilize his version that his previous counsel has not guided him properly. In these circumstances, the trial Court rightly found that the respondent/defendant could show sufficient cause for condoning the delay. Therefore, I see no perversity in the Order passed by the learned Judge.

11. The Civil Revision Petition merits dismissal and the same is accordingly dismissed. No costs.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

Date: 26-12-2016

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U. DURGA PRASAD RAO, J

