THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.4364 & 4487 of 2014

COMMON ORDER:

These two civil revision petitions under Article 227 of the Constitution of India are filed by the petitioner-wife assailing the two separate orders both dated 09.06.2014 of the learned Judge, Family Court, Hyderabad passed in I.A.No.694 of 2012 and IA.no.292 of 2014 in FCOP 1423 of 2010.

2. I have heard the submissions of the learned counsel for the revision petitioner/wife and the learned counsel for the respondent-husband. I have perused the material record.

3. The facts necessary for consideration as borne out by the record and as per the submissions made before this Court, in brief, are as follows:

The petitioner/wife brought the aforementioned original petition [OP] against the respondent/husband claiming a half share in the petition schedule property and for recovery of possession of such share and for other reliefs. The said OP was dismissed for default on 14.08.2012 for non-appearance of the wife. Therefore, the wife had filed I.A.no.694 of 2012 seeking restoration of the OP, which was dismissed for default. On merits, the learned Judge, Family Court had allowed the petition, by orders dated 15.05.2014, subject to the condition that the petitioner/wife shall pay costs of Rs.500/- and also file her affidavit in lieu of examination-in-chief by 09.06.2014. The condition insofar as payment of costs was complied with within the time granted by the Court below. However, since the petitioner is a resident of USA, instead of filing her affidavit, her father's affidavit in lieu of examination-in-chief is filed. Since the said 2nd condition is not complied with, the consequential order was passed on 09.06.2014 dismissing the petition for non compliance of the conditional orders. On passing of the above said orders by the trial Court, the wife had filed the other I.A.no.292 of 2014 under Section 148 of the Code seeking extension of time to comply with the conditional orders dated 15.05.2014 passed in I.A.no.694 of 2012. The

said petition was also dismissed by a cryptic order dated 09.06.2014 solely on the ground that the affidavit of the advocate is filed in support of the petition, but not that of the party. Therefore, the aggrieved petitioner/wife is before this Court.

4. The learned counsel for the petitioner-wife while narrating the above facts would submit as follows: "Since the wife is the resident of USA, the condition insofar as filing of her affidavit in lieu of examination-in-chief could not be complied with and that therefore, the affidavit of her father in lieu of examination-in-chief is filed. A petition was also filed seeking extension of time for filing the chief affidavit of the wife; but, the Court below had erroneously dismissed both the petitions, one for non-compliance of the conditional order and the other for filing the affidavit of the advocate and not that of the party concerned. Both the orders are unsustainable under facts and in law. If an opportunity is not given by granting the reliefs as prayed for by the petitioner/wife, the substantive rights in respect of immovable property would be defeated. Therefore, it would be in the interests of justice to allow the revisions and give an opportunity to the wife to have her cause decided on merits."

5. The learned counsel for the respondent-husband, while bringing to the notice of this Court the conduct of the wife and the fact that divorce has already been granted, would contend as follows: "The wife is staying abroad. The present OP claiming a share in the property of the husband is filed only to harass him. Though the OP is pending since 2010, the petitioner was never ready. Therefore, the Court below had rightly dismissed the OP for default. When the petition for restoration was allowed subject to conditions, admittedly, the 2nd condition in regard to filing of the affidavit in lieu of examination-in-chief of the wife was not complied with. Therefore, the conditional order has become operative and as a sequel the order dismissing the OP became final. Therefore, the trial Court was right in dismissing the subsequent petition filed seeking extension of time for filing the affidavit of the party. Therefore, the impugned orders need no interference."

6. I have bestowed my attention to the facts and I have given detailed and thoughtful consideration to the submissions.

7. The facts and contentions, which are already stated supra, need no further dilation. As already noted, the OP is filed by the wife against the husband claiming a half share in the schedule immovable property. Therefore, in the OP substantive rights in regard to immovable property are involved. On dismissal of the OP for default, a petition was filed seeking restoration of the OP. The trial Court, while allowing the said application had imposed certain conditions. The 1st condition regarding payment of costs was complied with and the 2nd condition in regard to filing of the affidavit of the wife in lieu of examination in chief was not complied with for the reason that she was staying abroad. However, the affidavit of her father was filed before the Court below. Since there was no substantial compliance of the order, consequential orders were passed dismissing the said application seeking restoration of the OP for non-compliance of the conditional order insofar as filing of the affidavit of the petitioner-wife. Therefore, the wife had filed another petition in I.A.no.292 of 2014 seeking extension of time for compliance of the conditional order insofar as the condition in regard to the filing of her affidavit in lieu of examination in chief. That application was dismissed only on the ground that the affidavit of the Advocate was filed in support of the application, but, not that of the party. In the well-considered view of this Court, the advocate who is an agent of the party, may, under certain circumstances, file his affidavit in support of an interlocutory application filed on behalf of the party. Moreover, the trial Court ought not to have dismissed the petition by a cryptic order without considering the merits of the matter. Further, under Section 148 of the Code, an application for extension of time can be filed and entertained even though the original time granted may have expired. Therefore, the trial Court ought to have entertained I.A.no.292 of 2014 and ought to have decided the said application on merits after giving an opportunity to the respondent/husband to file a counter. Since the order passed in I.A.no.292 of 2014, which is

assailed in C.R.P.no.4487 of 2014, is an order unsupported by reasons, the said order is liable to be set aside, in the well considered view of this Court. Viewed thus, this Court finds that these revisions can be disposed of with appropriate and necessary directions.

8. Having regard to the reasons and the findings, both the revisions are disposed of with the following directions:-

(i) C.R.P.No.4487 of 2014 is allowed and the order dated 09.06.2014 of the learned Judge, Family Court passed in I.A.no.292 of 2014 is set aside and the said petition is remitted to the Court below for fresh disposal in accordance with the procedure established by law after giving an opportunity to the husband to file his counter;

(ii) The petitioner-wife is given liberty to file an application to recall the consequential order passed in I.A.no.694 of 2012 on 09.06.2014 as in the well considered view of this Court, such an application is necessarily to be considered while considering the application for extension of time. On filing of such application by the petitioner/ wife, as directed in these orders, the said application and the application in I.A.no.292 of 2014 which is now remitted to the Court below for fresh disposal are directed to be heard and disposed of simultaneously by the Court below in accordance with the procedure established by law;

(iii) C.R.P.no.4364 of 2014 stands disposed of accordingly;

(iv) The petitioner/wife is directed to file an application as directed within twenty days from the date of the receipt of a copy of this common order.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, in these revisions shall stand closed.

M. SEETHARAMA MURTI, J

01st April, 2016

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