

THE HON'BLE SRI JUSTICE G. SHYAM PRASAD

CIVIL REVISION PETITION No.5037 OF 2016

ORDER:

This Civil Revision Petition is arising out of the order, dated 29.07.2016, rejecting memo in GR.No.5830 which was filed for setting aside the *ex parte* order dated 15.12.2008 in I.A.No.1079 of 2008 in O.S.No.229 of 2008 on the file of the Court of the Senior Civil Judge at Vizianagaram (for short, trial Court).

2. Heard Sri K.Jyothi Prasad, learned counsel for the petitioner and Sri N.Ashwani Kumar, learned counsel for the first respondent. None appeared on behalf of respondent Nos.2 to 6.

3. The revision petitioner is the second defendant in O.S.No.229 of 2008. He filed a memo in GR No.5830 dated 29.07.2016 in O.S.No.229 of 2008 with a request to dispose of the earlier GR No.6734 dated 29.12.2008 filed under Order IX Rule 7 CPC for setting aside the *ex parte* order passed against them in O.S.No.229 of 2008.

4. The trial Court passed an order in GR.No.5830 dated 29.07.2016 observing that defendant Nos.2 and 6 have filed GR.No.6764 dated 29.12.2008 for setting aside the *ex parte* order dated 15.12.2008 in I.A.No.1079 of 2009. It is observed by the trial Court that the said application was not put up before the then officer by the then Ministerial staff. It was

further observed that on perusal of the records, he came to know that defendant Nos.2 and 6 did not remain *ex parte* either in main suit O.S.No.229 of 2008 or in I.A.No.1079 of 2008 prior to either on 29.12.2008 or on 15.12.2008. The trial Court also presumes that since the unnumbered application was filed after 7 years 7 months, it is liable to be rejected as not maintainable. The trial Court observed that since the suit was dismissed for default on 19.03.2012, the application of defendant Nos.2 and 6 is deemed to have been closed as infructuous.

5. The presumptions of the trial Court are not correct. On one hand, the trial Court clearly admits that defendant Nos.2 and 6 have filed a memo in GR.No.6764 dated 29.12.2008. They have filed a petition under Order 9 Rule 7 CPC for setting aside the *ex parte* order dated 15.12.2008 passed against them. On the other hand, the trial Court observes that as the Ministerial staff did not place that file before the concerned officer, it was not considered. The trial Court further observes that, since the application was filed after 7 years 7 months, it is not maintainable. On these grounds, the trial Court rejected the application in GR.No.6734 filed for setting aside the *ex parte* order by defendant Nos.2 and 6. The trial Court came to the conclusion that as the suit was dismissed for default on 19.03.2012, all the applications pending in the suit are deemed to have been closed. But, since the suit is pending now, the application filed by

defendant Nos.2 and 6 for setting aside the *ex parte* order against them, also would have automatically revived, along with the revival of the suit.

6. The trial Court also observes that all the defendants in the suit were set *ex parte* on 11.02.2015. Defendants 1, 3 to 5 have filed petitions to set aside *ex parte* orders passed against them, vide I.A.No.869 of 2015 on 01.04.2015, they were allowed. The trial Court ignored the GR filed by defendant Nos.2 and 6 for setting aside the *ex parte* orders in 2008 itself. But it is obvious that defendant Nos.2 and 6 have come up with a memo to restore their GR.No.6764 dated 29.12.2008 to set aside the *ex parte* orders passed against them.

7. The rejection of the memo in GR.No.5830 is unreasonable. The trial Court has clearly stated in its order that, defendant Nos.2 and 6 have filed a memo vide GR.No.6764 dated 29.12.2008 under Order IX Rule 7 CPC for setting aside the *ex parte* order dated 15.12.2008 against them in I.A.No.1079 of 2008. The reason stated by the trial Court that the Ministerial staff did not place the said record cannot be accepted. The trial Court ought to have given an opportunity to defendant No.2 for prosecuting the case. In this regard, there is no plausible explanation by the trial Court for not considering the application filed by defendant Nos.2 and 6 for setting *ex parte* order against them.

8. Defendant No.2 has only come forward with the present revision. Therefore, the order of the trial Court dated 29.07.2016 is set aside. The trial Court is directed to hear the revision petitioner/defendant No.2, in GR.No.5830 dated 29.07.2016, and pass appropriate orders in the matter in accordance with law and dispose of the suit as expeditiously as possible.

9. The civil revision petition is allowed with the above directions.

10. In consequence, miscellaneous petitions, if any, pending in this Revision shall stand dismissed as infructuous.

Date: 16-12-2016.
TJMR

G. SHYAM PRASAD, J

