

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.4301 of 2015

ORDER:

-

This revision petition under Section 115 of the Code of Civil Procedure by the unsuccessful respondent is directed against the orders dated 30.06.2015 of the learned Principal District Judge, Vizianagaram passed in IA.no.956 of 2014 in DOP.no.329 of 2012. The above said interlocutory application was filed by the respondent herein under Section 5 of the Indian Limitation Act read with Section 151 of the Code of Civil Procedure requesting to condone the delay of 102 days in filing the application to set aside the *ex parte* decree.

2. I have heard the submissions of the learned counsel for the revision petitioner and the learned counsel for the respondent. I have perused the material record. The parties shall hereinafter be referred to as they are arraigned in this revision petition.

3. The case of the respondent in support of her request for condonation of delay, in brief, is as follows:

The petitioner had filed the DOP against the respondent seeking restitution of conjugal rights. The respondent having filed her counter is resisting the DOP. On 24.01.2013, the DOP was dismissed for default, as the petitioner was absent. The same was informed to her by her advocate. Subsequently, there was no information from her advocate with regard to any further proceedings in the matter. While so, she had received, a few days back, a notice in DOP no. 344 of 2014 filed under Section 10(x) of the Divorce Act, 1869 by the petitioner against her seeking divorce. On a perusal of the contents of the said petition, she came to know that an *ex parte* decree was passed against her in the DOP.no.329 of 2012 on 28.01.2014. On enquiry, she came to know that the petitioner had filed IA.no.255 of 2013 seeking to set aside the default order dated 24.01.2013 passed in the said

DOP and that her former advocate had received a notice on the said application filed by the petitioner and that later the said petition was allowed on 04.06.2013 and that thereafter the matter underwent several adjournments and ultimately an *ex parte* decree was passed on 28.01.2014. The respondent was not informed about the filing of IA.no.255 of 2013 or the subsequent proceedings. Till she had received the notice in DOP.no.344 of 2014, she has no knowledge about the passing of the *ex parte* decree in the DOP.no.329 of 2012. She had got tenable contest in the matter and had already filed her counter. As there was no information, she could not file a petition to set aside the *ex parte* decree in time and as such the delay of 102 days had occasioned in filing the petition to set aside the *ex parte* decree. The delay had occasioned for the reasons stated above but, not due to intentional and wilful reasons. If the delay is not condoned and the *ex parte* decree dated 28.01.2014 in DOP.no.329 of 2012 is not set aside, she would suffer serious and irreparable loss.

4. The case of the petitioner, in brief, is as follows:

The material allegations in the affidavit filed by the respondent in support of the petition are false. The allegation that the counsel of the respondent has not informed about the restoration petition filed by the petitioner is false. In-fact even though her counsel informed her, she did not respond. As such, she did not obtain and file before the Court, the affidavit of her counsel. The allegation that she came to know about the setting aside of the order of dismissal for default in DOP no. 329 of 2012 only when she had received the notice in DOP.no.344 of 2014 is false. In fact, on 26.02.2014, the petitioner had sent a legal notice to the respondent stating the facts and requesting her to join him immediately within 15 days. The receipt of the said notice was acknowledged on 28.02.2014 by the respondent, but, she had failed to respond to the notice of the petitioner. Therefore, the respondent is having knowledge of passing of the *ex parte* decree by 28.02.2014 since she had received notice sent by the petitioner. The photostat copy of the notice and the acknowledgement are filed into Court. The number of days of delay shown as 102 days is not correct. She had got knowledge about the passing

of the *ex parte* decree by 28.02.2014. Since the respondent is having knowledge even by the month of February 2014 itself and as she had intentionally and deliberately failed to approach the Court in time and suppressed the fact that she had knowledge of the *ex parte* decree, the delay cannot be condoned and the *ex parte* decree cannot be set aside. The petition is liable for dismissal with exemplary costs.

5. On merits, the trial Court had allowed the petition filed by the respondent. Therefore, the revision petitioner, who is the aggrieved respondent, had had filed this revision.

6. At the hearing, while reiterating the pleaded case of the petitioner, the learned counsel for the petitioner would further contend as follows:

The Court below ought to have seen that the respondent had knowledge of the orders dated 28.01.2014 in DOP.no.329 of 2012 through the legal notice issued by the revision petitioner asking her to join him. The Court below ought to have seen that the respondent having admitted the receipt of the legal notice sent to her in the month of February 2014, had pleaded falsely that she came to know about the *ex parte* orders on the receipt of the notice in DOP.no.344 of 2014. The Court below ought to have seen that no reasonable and justifiable cause was shown by the respondent for condonation of the delay of 102 days and that the cause that was shown is unreasonable and unjustified. The Court below ought not to have ignored the principle that mistake of law is no excuse. The Court below had erred in believing the false statement of the respondent simply because it was made on oath. The Court below erred in holding that there is a deficiency of professional service on the part of the advocate of the respondent. The Court below ought to have conducted an enquiry to determine the deficiency in service on the part of the advocate. The Court below ought to have seen that in spite of setting aside the *ex parte* decree dated 28.01.2014, the cause in DOP.no.329 of 2012 does not survive. The Court below ought not to have condoned the delay of 102 days on fictitious and unreasonable grounds raised by the respondent. The Court below ought to have given sound

reasons while condoning the delay of 102 days, as condonation of the delay causes prejudice to the rights of the petitioner.

7. *Per contra*, the learned counsel for the respondent while reiterating the pleaded case of the respondent and while supporting the orders of the Court below had contended as follows:

The court below had considered the facts correctly and recorded a finding that there appears to be some deficiency of professional service on the part of the Advocate in keeping the client/the respondent in dark about the restoration petition and that for the said reason the respondent cannot be subjected to hardship and that, therefore, it is a fit case to condone the delay and give an opportunity to the respondent to contest the DOP. The Court below having adverted to the contentions and appreciated the facts had also held that no personal notice was served on the respondent on the application under Order IX Rule 9 of the Code filed by the petitioner seeking restoration of DOP.no.329 of 2012 and that a notice was only given to her previous counsel, and that he did not inform her about the filing of the said application to set aside the order of dismissal for default. There are no circumstances calling for interference with the orders of the Court below. The revision is devoid of merit and is liable to be dismissed.

8. I have bestowed my attention to the facts and given earnest consideration to the submissions.

9. The specific case of the respondent is that she is not informed by her previous counsel about the filing of the application by the petitioner for restoration of the DOP, which was dismissed for default and hence, she could not appear before the Court below and resist either the said application or the main DOP after its restoration and that, therefore, an *ex parte* decree came to be passed against her and that on the receipt of the notice in DOP.no.344 of 2014 only she came to know about the passing of the *ex parte* decree in DOP.no.329 of 2012 and that, therefore, she had immediately filed the petition for condonation of delay and also the application to set aside the *ex parte* decree and that in the circumstances stated the delay had occasioned

in seeking to set aside the *ex parte* decree and that the said delay is neither wilful nor wanton. It is also pointed out that after restoration of the DOP no fresh notice was ordered to the respondent and that therefore, the *ex parte* order is a nullity. Per contra, the case of the petitioner is that the respondent had intentionally and deliberately not approached the Court in time, inspite of having knowledge about the *ex parte* decree granted in DOP.no.329 of 2012 through the legal notice issued by the petitioner on 26.02.2014.

10. The court below had observed in its orders that the petitioner stated on oath that her advocate did not inform her about the restoration application filed by the petitioner and hence, she had changed her advocate and filed the present application to condone the delay. The Court below had recorded categorical findings that no personal notice was served on the petitioner on the application filed for restoration and that notice was only given to her previous counsel, but, he did not inform her about the filing of the said application and that, therefore, there appears some deficiency of professional service on the part of the advocate, in keeping the respondent in dark about the restoration proceedings, and that therefore the respondent cannot be subjected to hardship. On a consideration of all the facts and the circumstances borne out by the record, this Court is satisfied that the well reasoned order of the Court below does not warrant interference. When the court below had exercised the discretion judiciously and had allowed the petition for condonation of delay by recording valid reasons, this Court while exercising the Revisional jurisdiction will generally not interfere with such discretion. In the case on hand there are no circumstances, much less exceptional circumstances, warranting interference with the order of the Court below, which is a well considered order. Therefore, it follows that the order impugned does not brook interference.

11. Viewed thus, this court finds that the well reasoned order of the court below is sustainable both under facts and in law and that in the facts and circumstances of the case the court below is justified in allowing the petition filed by the respondent and in condoning the delay in seeking to set aside the *ex parte* decree.

12. In the result, the Civil Revision Petition is dismissed confirming the orders of the court below. There shall be no order as to costs.

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

JUSTICE M. SEETHARAMA MURTI

22nd July, 2016
Vjl