

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.1728 of 2015

ORDER:

This Civil Revision Petition under Section 115 of the Code of Civil Procedure, 1908, by the unsuccessful petitioner-defendant is directed against the order dated 22.12.2014 of the learned Principal Senior Civil Judge, Ranga Reddy District, passed in IA.no.807 of 2014 in OS.no.16 of 2012 filed by the GPA holder of the defendant under Section 5 of the Limitation Act, 1963, requesting to condone the delay of 459 days in filing the application to set aside the *ex parte* decree.

2. I have heard the submissions of Sri M.R.S. Srinivas, learned counsel for the revision petitioner-defendant ('the defendant', for brevity). Despite giving sufficient opportunities, no submissions are made on behalf of the respondent-plaintiff ('the plaintiff', for brevity). I have perused the material record.

3. The case of the defendant as stated in the affidavit of her GPA holder, in support of her request for condonation of delay, in brief, is as follows:

She is duly authorized by the defendant to act as her power of attorney vide registered power of attorney dated 23.05.2011 bearing document no.231 of 2011 duly registered in the office of the Joint Sub-Registrar-I, Visakhapatnam. The deponent is no other than the sister of the defendant. The plaintiff was her husband. However, the marriage between her and the plaintiff was dissolved vide a decree dated 09.09.2010 in OP.no.83 of 2008 on the file of the Family Court, Ranga Reddy. She is looking after the affairs of the defendant. On 28.04.2014, when she was in the corridor of the premises of the Principal Senior Civil Judge's Court, she noticed that the names of the parties to CMA.no.1 of 2014 on the file of the said Court were being called and that one of the names called was that of the plaintiff herein. She therefore

entertained a doubt and got verified the records and came to know that the plaintiff filed CMA.No.1 of 2014 to set aside the proceedings dated 20.01.2014 issued by the Sub-Registrar, Saroornagar, and to release a sale deed and for other reliefs. During further enquiry, she came to know that the plaintiff filed the above suit OS.no.16 of 2012 against the defendant herein for specific performance of an agreement dated 16.09.1999 in respect of Ac.0.20 guntas out of Ac.13.37 guntas in S.No.7/A of Sarroornagar and obtained an *ex parte* decree on 14.03.2013. She further came to know that the plaintiff filed EP.No.148 of 2013 for executing the said decree and that the Court was pleased to execute a sale deed in pursuance of the said decree and to send the same for registration, but, the Sub-Registrar kept the sale deed pending for want of stamp duty and directed the plaintiff to pay the deficit stamp duty and that therefore, the CMA has come to be filed. The above suit has been instituted by the plaintiff against the defendant showing her address as 'R/o.13-9-10, Dandu Bazaar, Visakhapatnam-2'. The suit summonses that were sent to the said address as well as to the other address with D.No.13-9-12, B-1, Dandu Bazaar, Visakhapatnam-2, were returned with postal endorsements 'no such door number'. It also appears from the Court record that the summonses sent through process server of the Court were also not served and returned with the same endorsement 'door number not found'. Without ascertaining the correct address of the defendant for service of fresh summonses, the plaintiff filed a petition seeking permission to serve notices/ summonses in the suit by substituted service, that is, by advertisement in a daily news paper, and the said request was considered by the Court and publication was ordered. On publication and production of a copy of the publication, the defendant was set *ex parte* on 14.3.2013 and the suit was decreed *ex parte* on the same day. No such sale agreement was ever executed by the defendant. In-fact, the plaintiff is one of the accused in case in Crime no.810 of 2008 on the file of Saroornagar Police Station and the said criminal case was registered for the offences under

Sections 418, 419, 464 to 468 IPC. Allegations of impersonation and conspiracy were made. As a counter blast, the plaintiff got registered case in Crime No.9 of 2008. The plaintiff is also an accused in case in Crime No.417 of 2008 registered for the offences under Sections 498-A, 307, 354 and 506 IPC and he is facing trial in S.C.No.215 of 2010 on the file of the IX Additional District Court, Ranga Reddy District. The plaintiff filed W.P.No.14421 of 2011 on the file of this Court in the name of the defendant without her consent and without information to her and by misusing a GPA dated 03.05.2002. Therefore, the defendant cancelled the said GPA vide registered cancellation deed dated 23.05.2011 and also executed the present GPA in favour of the deponent. This deponent entered appearance in the said WP as the GPA holder of the defendant and later the said WP was dismissed as withdrawn. In the said writ petition, there is no mention about the suit agreement of sale. Earlier, the plaintiff instituted a suit, O.S.no.513 of 2011, by mentioning the address of the defendant as house no.13-9-10, Dandu Bazaar, Visakhapatnam, and suit summonses sent to the defendant to the said address were returned with postal endorsement 'party vacated the house'. Having had knowledge of the said fact, the plaintiff furnished the same address in the instant suit with a *mala fide* and fraudulent intention to obtain *ex parte* decree and accordingly obtained an *ex parte* decree. The defendant came to know through this deponent-GPA holder about the *ex parte* decree and judgment in the present suit on 28.04.2014 and instructed the deponent to take necessary steps. Therefore, the present petition for condonation of delay and the other petition seeking to set aside the *ex parte* decree are filed. Substituted service under Order V Rule 20 of the Code shall not be deemed to be due service. Since there is no due service of notice, there is no delay in filing the petition seeking to set aside *ex parte* decree. However, for being on the safe side, the petition for condonation of delay is filed. The defendant's written statement is already

prepared and is filed along with the petition. In the circumstances, the delay may be condoned and the *ex parte* decree may be set aside.

4. The plaintiff filed a detailed counter denying each and every allegation in the affidavit of the deponent-GPA holder of the defendant. In the counter it is, *inter alia*, contended as follows: “The suit was decreed after due service of summons and after following the due procedure contemplated under the Code. Pursuant to the decree, execution petition was filed and a sale deed was executed in favour of the plaintiff by the Court; and the sale deed was also sent to the Sub-registrar’s office for registration. Till the cancellation of the GPA on 23.05.2011, the defendant used to reside in Dandu Bazaar, Visakhapatnam, is not correct. The said GPA cancellation deed mentions her residential address as H.No.13-9-10, Dandu Bazaar, Visakhapatnam. Nowhere is it mentioned as to where she is residing after cancellation of the GPA. The GPA holder of the defendant is hiding the defendant, who is her sister, out of fear that if let free she may contact the plaintiff and explain the threats being given by the GPA holder of the defendant. Even as on today, the whereabouts of the defendant are not known. By way of substituted serve public notice was given in local newspaper of Visakhapatnam. Therefore, the defendant was set *ex parte*. Later, the suit was decreed and the EP was filed and a sale deed was executed. Therefore, nothing remains to be done under the decree. The applications for condonation of delay and to set aside the *ex parte* decree are filed with bad motives and malicious intentions. The limitation starts from the date the *ex parte* decree was passed. The allegation that the application to set aside the *ex parte* decree was filed within time and that the present application for condonation of delay was filed only to be on safe side is incorrect. No petition seeking permission to represent the defendant is filed by the GPA Holder of the defendant.”



5. At the hearing before the trial Court, no oral and documentary evidence was adduced. The trial Court dismissed the petition, *inter alia*, observing that the GPA holder as well as the defendant are well acquainted with the litigation and also the orders in various litigations and that in various court proceedings her address was mentioned in the same manner as was mentioned in the present suit and that no grounds are made out for condonation of delay and that the GPA holder of the defendant did not seek permission by filing an appropriate application to represent the defendant in the present suit proceedings.

6. The contentions of the defendant are reiterated at the time of submissions. There is no need to re-state the contentions, which are stated supra, in detail. Dealing first with the contention of the plaintiff before the trial Court that the GPA holder of the defendant did not file an appropriate application and seek permission of the Court to represent the defendant, it is to be noted that in fact the defendant through her GPA holder filed an application under Rule 32 of the A.P. Civil Rules of Practice, 1980, seeking permission for the defendant's GPA holder to represent the defendant and also filed a copy of the GPA dated 23.05.2011 along with the said petition. The trial Court passed no orders rejecting the said application. The said application was assigned SR.no.7584 of 2014 on 31.05.2014. Therefore, the Court below was in error in observing that no application was filed by the GPA holder of the defendant to permit the defendant to be represented by the GPA holder. The fact that the trial Court assigned IA.no.807 of 2014 to the subject application is an indication that the Court permitted the GPA holder of the defendant to represent her. Be that as it may.

7. Coming to the requirement of the explanation for delay and the question as to whether or not sufficient cause was shown for condonation of delay, what is to be noted is that the defendant was admittedly not served with summonses

in the suit. The summonses sent to her two addresses by post and through Court were returned with the same endorsement 'no such door number'. Therefore, the trial Court ought to have directed the plaintiff to take fresh summonses to the defendant to her correct address. The plaintiff without requesting the Court to order fresh summonses to the defendant to be served on her present correct address, speciously sought permission of the Court to permit to serve summonses by advertising in a newspaper. Provision of law under Order V Rule 20 of the Code mandates that orders for service of notices by advertisement in a newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided shall be permitted if only the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reason, the summons cannot be served in the ordinary way. However, the trial Court permitted the plaintiff to serve summons by advertising in a newspaper even though there is no reason to believe in this case that the defendant is keeping out of the way for the purpose of avoiding service. Even according to the plaintiff the whereabouts of the defendant are not known and that the GPA holder of the defendant is not disclosing her place of stay subsequent to the cancellation of the GPA. Even then the plaintiff did not request the Court for permission to serve notices on the GPA holder of the defendant. Therefore, the very mode of service adopted by the trial Court for service of the suit summonses on the defendant is not correct as the requirements of Order V Rule 20 of the Code for permitting the plaintiff to serve notices by advertisement in newspaper are not satisfied in the case on hand. Article 123 of the Limitation Act, which deals with the period of limitation for filing an application to set aside the *ex parte* decree, provides 30 days as period of limitation from the date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree. The explanation appended to the Article reads as under: - 'For the

purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not be deemed to be due service.' In the light of the facts analysed supra and the legal position obtaining, the trial Court ought not to have refused to condone delay in seeking to set aside the *ex parte* decree. Accordingly, this Court finds that the order of the trial Court is not justified and is liable to be set aside, in the facts and circumstances of the case.

8. In the result, the Civil Revision Petition is allowed. Accordingly, the order dated 22.12.2014 of the learned Principal Senior Civil Judge, Ranga Reddy District, passed in IA.no.807 of 2014 in OS.no.16 of 2012 is set aside and the said application is allowed. As a sequel to these orders, the trial Court shall now pass appropriate consequential orders in the application filed to set aside the *ex parte* decree passed in the suit.

There shall be no order as to costs.

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

17<sup>th</sup> November, 2016  
Vjl

JUSTICE M. SEETHARAMA MURTI