HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

C.M.A.No.161 OF 2007

JUDGMENT

This Civil Miscellaneous Appeal is directed against the order dated 24.11.2006 passed in I.A.No.107 of 2006 in O.P.No.40 of 2004 by the Andhra Pradesh Co-operative Tribunal, Warangal.

O.P.No.40 of 2004 was filed for recovery of money. The appellant stood as guarantor to respondent No.1-A.Sanjeeva Kumar in the said OP. An *ex parte* decree was passed in the said O.P. on 28.6.2005 and for setting aside the same, the appellant herein filed I.A.No.107 of 2006 on 14.7.2006. In the affidavit filed in support of the application, it is stated that though no notice was served in the present proceedings, by way of substituted service, a notice was published in Andhra Jyothi Telugu Daily Newspaper, but the appellant did not see the same. When an order was communicated to the Drawing Officer on 21.5.2006 to withhold the salary, he came to know about the passing of the *ex parte* decree, and he filed the said application with a delay of 23 days. The said application was dismissed by the Tribunal on 24.11.2006 with the following observations:

"From the above factual circumstances it may be stated that the petitioner is very much aware of the money proceedings instituted by the Respondent Society and that he set up a case with no *bona fide* grounds. It is a fact on record that the notice sent to be served on the petitioner in the money recovery proceedings has not yet been returned to the sendor. It is not the case on record conclusively to say that the said notice sent by regd. post was not served on the petitioner. In the circumstances, it must be held that the petitioner was served with notice issued in the money recovery proceedings instituted by the Respondent Society. The instances also indicate the fact of the petitioner having gone through the entire record made available before the Tribunal before his proceeding to file an application for setting aside the exparte decree. He himself admitted in the petition that he came to know about the exparte decree in the matter only when his drawing and disbursing officer received the attachment orders from the Tribunal on 21.5.2006 to withhold 1/3rd of his salary. Having claimed so, the petitioner did not choose to file the present petition to set aside the exparte decree within the prescribed statutory period of limitation. On the other hand, he choose to file the present petition after a lapse of 23 days of the statutory period provided under law. Of course, the petitioner contended that as he had been suffering from chicken gunya fever he could not prefer to file the present application within the time and the delay of 23 days had occurred in filing the present petition. The facts remain in the instant case are that the principal borrower who did not challenge the *ex parte* decree passed in the original petition in spite of having acknowledged the receipt of notice sent is very much aware of the money proceedings instituted by the Respondent Society

against them and that there is every possibility of the petitioner having been informed about the money recovery proceedings pending before the Tribunal by the principal borrower i.e., Respondent No.1 in the main original petition. From these factual circumstances, it may be stated that the petitioner is aware of the money recovery proceedings already instituted by the Respondent Society against them and that in spite of having knowledge about the case he did not choose to take part in the matter and choose to remain *ex parte*. The conduct of the petitioner is such that he did not bother to file the present petition in time immediately even after he came to know about the money recovery proceedings when his Drawing and Disbursing Officer received on 21.05.2006 the orders of attachment to withhold 1/3rd of his salary. The plea of the petitioner that he suffered from chicken gunya fever on account of which he could not prefer to file the petition to set aside the *ex parte* decree cannot be held *bona fide*. Further the plea of the petitioner that he was not aware of money recovery proceedings instituted before the Tribunal by the Respondent Society is also not *bona fide*. The petitioner is very much aware of the money recovery proceedings against him and the principal borrower and yet he did not choose to take part in the proceedings deliberately and allowed the proceedings in *ex parte*."

In the absence of any contrary evidence, the Tribunal could not have come to the conclusion that the appellant was aware of the proceedings pending against him and the principal borrower, and therefore, in any event, an opportunity could have been given to the appellant.

In view of the same, I.A.No.107 of 2006 is allowed by setting aside the impugned order dated 24.11.2006 and the Tribunal is directed to take up O.P.No.40 of 2004 and dispose of the same in accordance with law within a period of six months from the date of receipt of a copy of this order. It is needless to observe that the appellant shall cooperate for disposal of the O.P. The appellant shall pay costs of Rs.1,000/- (Rupees one thousand only) to the decree holder.

Miscellaneous petitions, if any, pending shall stand closed.

JUSTICE A.RAMALINGESWARA RAO

3rd August, 2017
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