

THE HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Civil Revision Petition No.5929 of 2016

ORDER :

This Civil Revision Petition has been filed by the petitioner-defendant aggrieved by the order, dated 13.6.2016 in I.A. No.539 of 2015 in O.S.No.331 of 2011 on the file of the Senior Civil Judge, Proddatur, whereby the said Court dismissed the petition filed by the petitioner-defendant under Section 5 of Limitation Act to condone the delay of 186 days in filing the petition under Order 9 Rule 13 of C.P.C. to set aside the *ex parte* decree passed against him on 31.05.2014.

2. The respondent-plaintiff filed O.S.No.331 of 2011 against the petitioner-defendant seeking specific performance of suit agreement to sell in respect of the plaint schedule property. The petitioner-defendant filed written statement and contesting the suit. While so, when the matter came up for cross-examination of P.W.1 on 31.5.2014, as there was no representation on behalf of the petitioner-defendant, the trial Court set the defendant *ex parte* and thereafter passed an *ex parte* decree. While filing a petition to set aside *ex parte* decree, there was a delay of 186 days and hence petitioner-defendant filed I.A.No.539 of 2015 to condone the said delay. The petitioner-defendant's version in I.A.No.539 of 2015 was

that on 31.5.2014, when the matter was posted for cross-examination of P.W.1, it was true that he was not present, however, he engaged a counsel to defend his case and he could not contact his counsel in-time, because he was an illiterate and further, he did not know when the Court would call him, as the post of Senior Civil Judge was vacant for so many days and in those circumstances, he was not aware when the suit would be taken up. Further, during the relevant period, he was suffering from fever and jaundice and he was taking ayurvedic treatment and on that ground also he could not contact his counsel to give instructions within time for cross-examination of P.W.1. He thus prayed to condone the delay of 186 days and allow the petition to set aside the *ex parte* decree.

3. The respondent-plaintiff filed counter opposing the aforesaid petition *inter alia* contending that the averments made in the petition were false and the petitioner-defendant was not suffering from any ill-health and the petitioner failed to produce any medical certificate in proof of his suffering from ill-health and therefore, there were no merits in his petition. It was contended that the petitioner purposefully did not attend the Court as he has no case and therefore, his petition cannot be considered. It was further contended that pursuant to decree, respondent-plaintiff had already deposited the balance of sale consideration of Rs.2,28,000/- in C.C.D. account on 9.7.2014 and the said amount was lying with the Court and he also filed E.P.No.163 of 2014 for registration of the regular sale deed and

notice was ordered to the petitioner-defendant in the said execution petition. After receiving the said notice, it appeared, the petitioner-defendant filed the petition to set aside the *ex parte* decree with inordinate delay of 180 days without any plausible cause. On these contentions, the respondent-plaintiff sought for dismissal of the petition.

4. Perusal of the impugned order would show that the trial Court agreed with the contention of the respondent-plaintiff and having observed that the petitioner in proof of his alleged ill-health, did not file any medical reports and delay was inordinate one and decree was already passed and E.P. No.163 of 2014 was filed and pending, dismissed I.A. No.539 of 2015. Hence, the instant Civil Revision Petition at the instance of the petitioner-defendant.

5. Heard learned counsel for the petitioner Sri J.Seshagiri Rao and learned counsel for the respondent Sri G.Ramachandra Reddy and with their consent, this Civil Revision Petition is disposed of at the admission stage.

6. The submission of the learned counsel for the petitioner is that the petitioner-defendant was diligently contesting the suit as he timely filed written statement and taking valid pleas questioning the very agreement to sell itself as is evident from the written statement, a copy of which is filed along with the material papers and in that view, it cannot be said that he was not diligently pursuing his case.

Learned counsel further submits that during the relevant period the post of Senior Civil Judge, Proddatur was vacant for some time and as the petitioner was illiterate, he could not contact his counsel to know when the suit would be taken up and in those circumstances, on the date of cross-examination i.e., 31.5.2014, he could not attend the Court to give the instructions to his counsel to cross-examine the P.W.1 (plaintiff) which was not his fault and further during the relevant period, he was suffering from fever and jaundice for which he was taking a native treatment from ayurvedic Doctor, for that reason also he could not attend the Court and therefore, in those circumstances, there was no negligence, much less wilful negligence on his part in pursuing his suit and considering the same, an opportunity ought to have been given by the trial Court permitting him to contest the suit as he had valid plea in his written statement. Learned counsel would submit that the petitioner would abide by the terms, if imposed to allow his petition.

7. Per contra, learned counsel for the respondent-plaintiff would submit that except filing written statement, the defendant thereafter did not evince any interest in participating the trial and when the matter came up for cross-examination of P.W.1, he was not present in the Court. Therefore, the trial Court was constrained to set him *ex parte* and thereafter the plaintiff proved his case and trial Court granted decree in his favour and the plaintiff pursuant to the said decree, deposited Rs.2,28,000/- towards balance of sale consideration,

which is lying in the Court and he also filed Execution Petition No.163 of 2014, which is also pending and in those circumstances, there are absolutely no merits in the Civil Revision Petition and hence, the same may be dismissed.

8. As can be seen from the record, the petitioner-defendant filed written statement opposing the suit. His case is that he was an illiterate barber and believing the version of the plaintiff, as if he was securing a third party purchaser, entered into an agreement. That is how, he challenged the agreement to sell, dated 26.3.2011. Be that as it may, the fact remains that the plaintiff was examined in the suit as P.W.1 and matter was coming up for his cross-examination on 31.5.2014 on which date the petitioner-defendant was absent and therefore, the trial Court set him *ex parte* and proceeded with the matter and ultimately decreed the suit and it appears E.P. was also filed at the instance of the respondent-plaintiff and the balance of sale consideration was also deposited in the Court. When the entire facts of the case as narrated supra are taken into consideration, it cannot be said that the petitioner-defendant was negligent right from the beginning, as, he filed the written statement and participated to some extent. The petitioner narrated himself as an illiterate barber in his written statement. Having regard to his social & educational status and considering that he has taken a strong plea in his written statement, which has to be determined in the trial, and also considering that valuable rights are at stake as it is a specific

performance suit, an opportunity should be given to the petitioner-defendant to contest the suit, but of course, since delay being substantial one, by imposing costs and suitable terms.

9. In the result, this Civil Revision Petition is allowed setting aside the impugned order, dated 13.6.2016 in I.A.No.539 of 2015 in O.S. No. 331 of 2011 and consequently, I.A. No.539 of 2015 is allowed and delay of 186 days in filing the petition to set aside the *ex parte* decree is condoned on the condition of the petitioner-defendant paying a cost of Rs.2,000/- to the respondent-plaintiff within three weeks from the date of this order. In that event, the trial Court is directed to decide the Interlocutory Application filed by the petitioner-defendant to set aside the *ex parte* decree, on merits, within four weeks from the date of receipt of a copy of this order.

10. The learned counsel for the respondent-plaintiff would submit that since the respondent-plaintiff had already deposited the balance of sale consideration into the Court long back, he may be permitted to withdraw at least the interest portion, as the said amount has been lying in the Court since long without any fault of the respondent-plaintiff. This Court finds it appropriate to give an opportunity to the respondent-plaintiff to take such a plea during the course of enquiry conducted by the trial Court in Order 9 Rule 13 C.P.C. petition and the trial Court to pass appropriate orders thereon. No order as to costs.

11. Consequently, Miscellaneous Petitions pending, if any, in the Civil Revision Petition shall stand closed.

U.DURGA PRASAD RAO, J.

23rd February, 2017

Note : Issue C.C. by 1.3.2017.

B/O
skmr

