

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

CIVIL REVISION PETITION NO.1480 OF 2017

DATED:16-06-2017

Between:

Mandem Swarup Kumar ... Petitioner

And

Mandem Suvarnamma
and others ... Respondents

COUNSEL FOR THE PETITIONER: Mr. Srinivas Ambati

COUNSEL FOR THE RESPONDENTS: -



THE COURT MADE THE FOLLOWING:

ORDER:

The petitioner has filed O.S. No.1273 of 2005 before the Court of the VI Additional Senior Civil Judge, Visakhapatnam, for partition against the respondents. The said suit was dismissed for default on 09.2.2011. Seeking setting aside of the said default order and restoration of the suit, the petitioner filed I.A. No.761 of 2011 under Order IX Rule 9 of CPC. As there was delay of 146 days in filing the said application, the petitioner also filed I.A. No.760 of 2011 for condonation of the delay. By the aforementioned order, the lower Court has dismissed I.A. No.760 of 2011 only on the ground that as the suit was dismissed for non-appearance of the petitioner/plaintiff for further cross-examination, the burden lies on him to explain the cause for his non-appearance on the date of hearing and that the Advocate who filed affidavit explaining reasons was not competent to do so.

Though notices were served on the respondents, they have not entered appearance either in person or through a counsel.

At the hearing, learned counsel for the petitioner relied upon a Division Bench judgment of this Court in *G. Krimana Murthy v. Hemalatha Chit Funds Pvt. Ltd.*¹ wherein, after considering Rules 48, 54 and 59 of the Andhra Pradesh Civil Rules of Practice and Circular Orders, 1990, the Division Bench held as under:

“From a bare perusal of the abovementioned provisions, it is absolutely clear that there is no postulation anywhere to the effect that the affidavit shall be signed only by the person who made the application, but, on the contrary, Rule 54 of the Civil Rules of Practice envisages that an application can be signed either by the applicant or by the Advocate. When an application is permitted to be signed either by the party himself or by the Advocate, by necessary implication, the affidavit, which is filed in support of such an application, can also be signed by the party himself or by the Advocate.”

¹ 2006 (3) ALT 416 (DB)

In the instant case, the reason assigned for non-appearance of the petitioner/plaintiff on 09.2.2011 was that the date of the posting of the suit was wrongly noted as 19.2.2011 instead of 09.2.2011 by the counsel and that therefore neither the party, nor his counsel was present at the hearing. This reason being exclusively within the knowledge of the counsel, it is he who is competent to file an affidavit speaking to this fact. Of course, it is desirable that the petitioner also should have filed a supporting affidavit. In my opinion, the Court below was not justified in dismissing the application on the ground that the Advocate for the party was not competent to file such an affidavit. The approach of the Court below is contrary to the Division Bench judgment referred to above, apart from being harsh and iniquitous. After all, the intendment of the law is to decide the cases on merits rather than on technicalities, more so, when the suit is for partition of properties involving substantive rights of the parties.

For the aforementioned reasons, the order of the lower Court suffers from jurisdictional error and the same is accordingly set aside. The delay in filing I.A. No.761 of 2011 is condoned and I.A. No.760 of 2011 is accordingly allowed. The civil revision petition is accordingly allowed.

C.V. NAGARJUNA REDDY, J

16-06-2017

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