

THE HON'BLE SRI JUSTICE N.BALAYOGI

CRP.NO.1164 OF 2009

ORDER

This revision under Section 115 of C.P.C. is filed by the plaintiffs against the order and decree dated 21.01.2009 passed by the court of Senior Civil Judge, Pithapuram in I.A.No.271/2008 in O.S.No.173 of 2004, in dismissing the petition filed under Section 5 of the Limitation Act to condone the delay of 159 days in filing the petition to restore the suit.

2. The contention of the petitioners is that they are not aware of the transfer of O.S.No.230/2003 from the file of Principal Senior Civil Judge, Kakinada to the court of Senior Civil Judge, Pithapuram and renumbering as O.S.No.173 of 2004 and that they have not received the letters written by their counsel regarding the date of hearing of the suit and that they have properly explained the delay for their non payment of adjournments costs and also delay in filing restoration petition under Order 9, Rule 9 of CPC.

3. On the other hand, the learned counsel for respondents 2 and 3 contended that on 22.03.2006, the respondents 2 and 3 filed memo in the court intimating that defendant No.1 died on 26.11.2005. Plaintiffs 2 and 3 requested time for filing counter and suit was adjourned to 17.4.2006 and thereafter to 27.4.2006, but they have not taken steps. When the matter was posted for trial to 21.7.2006 and 1.9.2006, plaintiffs were not present, therefore, on costs, the suit was adjourned to 13.9.2006, on which date, it was dismissed for default. It is further contended that as the judgment was pronounced under Order 17, Rules 2 and 3 of CPC, petition under Order 9, Rule 9 of CPC, is not maintainable. Petitioners have not properly explained the reasons for condoning the delay.

4. The undisputed facts on record are that the petitioners are the plaintiffs and they filed the suit for declaration of title and for permanent injunction. The respondents 2 and 3 herein are defendants 2 and 3 in the suit. While the matter

stood thus, the defendant No.1 filed written statement and defendants 2 and 3 filed memo adopting the same. Issues were framed and suit was posted for trial. Meanwhile, the defendant No.1 died. To that effect, defendant 2 and 3 filed memo into the court on 22.03.2006, reporting that defendant No.1 died on 26.11.2005. Thereafter, the suit was adjourned for taking steps due to the death of defendant No.1. The suit was adjourned to 17.4.2006 and from there, to 27.4.2006. But as no steps were taken, the court adjourned the matter to 21.7.2006 and to 1.9.2006, and on costs, adjourned to 13.9.2006, on which date, the suit was dismissed for default for non-payment of costs.

5. The cause shown by the petitioners for non-payment of adjournment costs and for their non-appearance was that, the petitioners were under the impression that their counsel would intimate the date of trial. But so far they have not received any communication from their counsel. Only in the 2nd week of March, 2007, when the respondents 2 and 3 herein trespassed into the schedule property stating that their suit was dismissed, they came to know and approached their counsel on 17.3.2007, on which date they came to know that the suit was dismissed for default on 13.09.2006. Their counsel further informed them that he has written three or four letters informing the date of hearing, but such letters were not received by them.

6. The reason explained by the petitioners for non-receipt of the letters addressed by their counsel is that at the time of filing the suit, they have given the then address. Subsequently, they changed their residence and by mistake, the changed residential address was not intimated to their counsel. That is the reason why, the letters addressed by their counsel could not reach them.

7. Immediately, on coming to know that their suit was dismissed for default, the plaintiffs/petitioners filed the present I.A.No.271/2008 in O.S.No.173/2004 under Section 5 of the Limitation Act along with an application under Order 9 Rule 9 CPC and the Senior Civil Judge, Pithapuram dismissed the

said application by the impugned order finding the reasons mentioned in the petition are not satisfactory to condone the delay of 159 days and moreover no reasons to restore the petition.

8. A reading of Order 9 Rule 9 of CPC goes to suggest that when the suit is dismissed for default under Rule 8, they can file an application for setting aside the said order.

9. A perusal of the order dated 13.09.2006 goes to suggest that the Senior Civil Judge, while dismissing the suit observed that *"Costs not paid. Plaintiffs are called absent. No representation to them. Hence the suit is dismissed for default with costs."* This order clearly connotes that since the plaintiff failed to pay the adjournment costs and also failed to appear and prosecute the suit, it was dismissed for default. Hence, I do not find any merit in the contention of the respondents that order passed by the lower court is an order under Order 17, Rules 2 and 3 and that application under Order 9 Rule 9 of CPC is not maintainable.

10. The petitioners in the affidavit in I.A.No.271/2009 specifically stated that there is a communication gap between them and their counsel and that they failed to inform their counsel the changed address. Moro so, in civil suit, the appearance of parties is not necessary when they are being represented through an advocate. As per their case, they are awaiting communication from their counsel to appear and prosecute the suit. Due to change of address, letters addressed by their counsel, could not reach them. Therefore, the petitioners could not pay the adjournment costs and also appear on 13.09.2006, on which date, the suit was posted for trial. In my considered view, the petitioners have shown sufficient cause for their non-appearance and for non-payment of adjournment costs. The Senior Civil Judge, Pithapuram, went wrong in holding that sufficient cause is not shown for the delay. I am satisfied with the cause shown by the petitioner.

11. Accordingly, the order dated 21.1.2009 passed in I.A.No.271/2008 in O.S.No.173 of 2004 is set aside, by condoning the delay of 159 days in filing the application under Order 9, Rule 9 of CPC, subject to payment of adjournment costs.

On such payment of costs, the Senior Civil Judge, Pithapuram is directed to number the application filed under Order 9, Rule 9 of CPC and dispose of the same in accordance with law within a month, from the date of numbering, after giving respondents opportunity of filing counter affidavit and to advance their arguments.

12. The civil revision petition is accordingly allowed. No costs.

13. Miscellaneous petitions pending if any, shall stand closed.

DATE:01—11—2017

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N.BALAYOGI,J