

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Miscellaneous Appeal No.796 of 2017

JUDGMENT:

This civil miscellaneous appeal, under Order LXIII Rule 1 of the Code of Civil Procedure, 1908, ['the Code', for short] by the appellant-petitioner-2nd defendant is directed against the orders, dated 02.06.2017, of the learned XII Additional Chief Judge, City Civil Court, Secunderabad, passed in IA.No.1156 of 2016 in OS.No.142 of 2007.

2. I have heard the submissions of Sri G. Srinivas, learned counsel for the appellant-2nd defendant ('the 2nd defendant', hereinafter), and of Sri K. Narsi Reddy, learned counsel for the respondents 1 to 9-plaintiffs ('the plaintiffs', hereinafter). Respondents 10 to 17, who are the defendants 1 and 3 to 9, are stated to not necessary parties. I have perused the material record.

3. The facts, which are necessary to be stated as a prelude to this order, in brief, are as follows:

The plaintiffs brought a suit for partition against the defendants. The 2nd defendant having entered appearance filed a written statement resisting the suit. However, during the course of trial, he remained *ex parte* and eventually an *ex parte* decree has come to be passed in the suit on 12.12.2014. Thereafter, the 2nd defendant filed two applications: IA.No.872 of 2015 for condonation of delay of 243 days in seeking to set aside the *ex parte* decree passed in the suit; and, IA.No.1156 of 2016 for setting aside the *ex parte* decree and judgment passed in the suit. The trial Court has first taken up IA.No.872 of 2015 which is filed for condonation of delay for hearing and disposal. The plaintiffs filed a counter resisting the said application. However, by orders, dated 24.08.2016, the trial court allowed that petition and condoned the delay subject to certain conditions. It is not in dispute that the said conditions have been complied with. Thereafter the trial Court has taken up IA.No.1156 of 2016, which is filed for setting aside the *ex parte* decree and

judgment passed in the suit. The said application is also resisted by the plaintiffs by filing a counter. On merits and by the orders impugned in this revision, the trial Court dismissed the said application and refused to grant the request of the 2nd defendant for setting aside the *ex parte* decree and judgment passed in the suit. Therefore, the 2nd defendant is before this Court.

4. The case of the 2nd defendant and the submissions made on his behalf in support of the request for setting aside the *ex parte* decree, in brief, are as follows:

His wife suffered from right side paralysis of her entire body besides other ailments like high blood pressure, diabetes and thyroid and she was bed ridden since 04.11.2013 till the date of filing of the applications for condonation of delay and setting aside the *ex parte* decree. As there was no other person to take care and as his wife was entirely dependant upon him, the 2nd defendant was assisting her. He was attending to all the duties as his son and daughter are residing in United Kingdom. In the said circumstances, he was unable to move out of the house. The 1st plaintiff is no other than his elder sister. She is aware of the condition of the wife of the 2nd defendant. However, knowing fully well about the condition of the wife of the 2nd defendant, she proceeded with the proceedings in the suit and finally an *ex parte* decree was obtained by her. The 2nd defendant came to know about the proceedings after receiving the notices in the final decree petition. The 2nd defendant could not prosecute his defence only for the stated reasons and not due to any deliberate and wanton reasons on his part.

5. The case of the plaintiffs as per the averments in the counter and the submissions now made before this Court, in brief, are as follows:

The material averments in the affidavit filed in support of the petition are false. The same are invented. Several opportunities were granted to the 2nd defendant before the *ex parte* decree came to be passed. He is enjoying

the properties as well as the rents from the properties involved in the suit and is trying to drag on the suit proceedings in all possible ways. Earlier occasions also the 2nd defendant filed several applications questioning the jurisdiction of the Court and the Court fee that was paid on the value of the reliefs claimed in the suit. Knowing fully well that the suit properties are liable for partition, the 2nd defendant intentionally remained *ex parte* and has now filed these petitions with false allegations only to gain sympathy of the Court. The petition is frivolous in nature and is liable to be dismissed.

6. As already noted, in the application filed for condonation of delay also, the 2nd defendant urged the same grounds and gave the same explanation for his remaining *ex parte* in the suit and for condonation of the delay. The Court below having accepted the said explanation as sufficient cause for condonation of delay, condoned the delay. In the said circumstances, learned counsel for the 2nd defendant would submit that since the explanation given in the affidavit of the 2nd defendant was once accepted by the trial Court, the trial Court ought to have accepted the same explanation, which is offered in the application seeking to set aside the *ex parte* decree and that on the same analogy the trial Court ought to have allowed the application filed seeking to set aside the *ex parte* decree. Per contra, learned counsel for the plaintiffs forcefully contended that no explanation is offered as to why the defendant's counsel was also not present in the Court below when the matter was called and that as rightly observed in the orders impugned, there is no whisper or explanation as to why the counsel for the 2nd defendant could not represent the matter even if the 2nd defendant was really not in a position to attend before the Court and prosecute his defence. He would further submit that the presence of the 2nd defendant in a suit for partition is not necessary on the date of every adjournment and therefore, the 2nd defendant ought to have instructed his counsel and prosecuted his defence and hence, for the absence of explanation in that regard, the petition is liable to be dismissed.

7. I have given earnest consideration to the facts and submissions. Having regard to the peculiar facts and circumstances of the case and the further fact that the application for condonation of delay is already allowed by the trial court after considering the similar set of facts and contentions and after accepting the cause shown by the 2nd defendant as sufficient cause, the dismissal of the application to set aside the *ex parte* decree, which was filed offering the self same explanation, without considering the fact that the said explanation was earlier accepted by the Court, is not just, fair and equitable. In the well considered view of this Court, when once the explanation offered by the 2nd defendant was accepted by the Court while allowing the application filed for condonation delay, taking a different view while considering the application to set aside the *ex parte* decree, is impermissible. Therefore, this Court finds itself in agreement with the contention of the learned counsel for the 2nd defendant that the application seeking to set aside the *ex parte* decree deserves to be allowed on the same analogy on which the application seeking condonation of delay was allowed by the trial Court.

8. On the above analysis, this Court finds that the order impugned brooks interference.

9. In the result, the Civil Miscellaneous Appeal is allowed and the order, dated 02.06.2017, of the learned XII Additional Chief Judge, City Civil Court, Secunderabad, passed in IA.No.1156 of 2016 in OS.No.142 of 2007 is set aside. As a sequel, the said petition is allowed and the *ex parte* decree, dated 12.12.2014, passed in the above said suit is set aside. However, considering the fact that the suit is of the year 2007 and it is already part heard as on the date the suit was decreed *ex parte*, the trial Court is directed to proceed with the trial of the suit from the same stage at which it was decreed *ex parte* and dispose of the suit on merits and as expeditiously as possible and preferably within one month from the date of receipt of a copy of this judgment.

There shall be no order as to costs.

Miscellaneous petitions pending if any shall stand closed.

JUSTICE M. SEETHARAMA MURTI

22.08.2017
Vjl

