

HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

Civil Revision Petition No.5413 of 2016 & 1119 of 2017 and

C.M.A.No.163 of 2017

ORDER:

In a suit for partition filed by the sister against the brothers, the 2nd defendant was set *ex parte*. Though the other defendants entered appearance, they did not file written statement. Therefore, an *ex parte* preliminary decree for partition was passed by the Court below.

2. Thereafter, the 2nd defendant filed two applications, one for setting aside the *ex parte* decree and another for condoning the delay of 174 days in seeking to set aside the *ex parte* decree.

3. On the ground that without disposing of the applications, the Court below was proceeding with the final decree proceedings, the 2nd defendant first came up with C.R.P.No.5413 of 2016 seeking a direction to the trial Court to dispose of the application for condonation of delay and the application for setting aside the *ex parte* decree.

4. During the pendency of C.R.P.No.5413 of 2016, the trial Court dismissed the application for condonation of delay and the application for setting aside the *ex parte* decree. Therefore, the 2nd defendant came up with C.R.P.No.1119 of 2017 as against the dismissal of the application for condonation of delay and C.M.A.No.163 of 2017 as against the dismissal of the application for setting aside the *ex parte* decree. Therefore, both the revisions as well as C.M.A. were taken up together for hearing.

5. Heard Mr. P. Prabhakara Rao, learned counsel appearing for the petitioner/appellant and Sri V.V.L.N. Sarma, learned counsel appearing for the 1st respondent/plaintiff.

6. C.R.P.No.5413 of 2016 has become infructuous, in view of the disposal of the applications for condonation of delay and for setting aside the ex parte decree. Hence, C.R.P.No.5413 of 2016 is dismissed as infructuous.

7. In so far as the other revision and the C.M.A. are concerned, the crucial question is as to whether there was sufficient cause for the condonation of delay of 174 days in seeking to set aside the ex parte preliminary decree.

8. In the affidavit in support of the application for condonation of delay, the petitioner/2nd defendant stated the following reasons:

“After receiving of the suit summons, I engaged a counsel and filed a vakalat and not followed up due to their family personal inconvenience. Recently, on 28.8.2015, I enquired about the suit proceedings and came to know that the preliminary decree was passed by this Court 10.2.2015. Due to my serious ill-health and bedridden due to severe knee and joint pain and I was unable to move from the bed.”

9. The 1st respondent/plaintiff filed a counter affidavit denying the fact that the petitioner ever engaged a counsel. According to the 1st respondent/plaintiff, the petitioner never engaged a counsel, but came up with a false statement in the affidavit. Therefore, it is contended by Mr. V.V.L.N. Sarma, learned counsel for the 1st respondent that a person, who has sworn to a false affidavit, cannot walk away with the discretion of getting his delay condoned. It is not a question of the quantum of delay, but the question of bonafides

and a truthful pleading that is more important in a case of this nature.

10. However, it is argued by Mr. P. Prabhakara Rao, learned counsel for the petitioner that he had actually engaged a counsel by name P.L. Narasimha Rao and that only after receipt of summons in the final decree proceedings, he came to know that he was set *ex parte*. Therefore, the petitioner, according to the learned counsel, went back to the same counsel, who prepared the affidavit. But, after the truth was out, the counsel gave no objection for a change of vakalat. It is in such circumstances that the learned counsel for the petitioner contends that the petitioner cannot be accused of making a false statement deliberately.

11. I have carefully considered the rival contentions. It is true that more than the quantum of delay, the conduct of parties is important for considering the applications for condonation of delay. Even if there was a delay of just one day, but the party comes up with a false affidavit, the delay cannot be condoned.

12. But, unfortunately, in this case, something fishy seems to have appeared between the petitioner and his previous counsel. The story now weaved by the learned counsel for the petitioner appears to be more probable. If the counsel whom he engaged had not filed vakalat, he would not have said so when the client went to him for filing an application for setting aside the *ex parte* decree. Therefore, the benefit of doubt, I am inclined to grant to the petitioner.

13. In view of the above, C.R.P.No.1119 of 2017 and C.M.A.No.163 of 2017 are allowed, the delay is condoned and the ex parte decree is set aside on condition that the petitioner files a written statement on or before 06-11-2017. Thereafter, the petitioner should cooperate at every hearing of the suit. The petitioner shall pay costs of Rs.10,000/- (Rupees ten thousand only) directly to the 1st respondent/plaintiff on or before 06-11-2017. The trial Court shall endeavour to dispose of the suit by the end of December, 2017, in view of the fact that all the parties to the proceedings are senior citizens. It is open to the 1st respondent to file appropriate applications for interim measures.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

Date: 13-10-2017

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V. RAMASUBRAMANIAN, J