

HON' BLE Dr. JUSTICE B. SIVA SANKARA RAO

Civil Revision Petition No.3182 of 2017

ORDER

The revision petitioner is the 2nd defendant, no other than the brother of 1st defendant and plaintiff, in O.S.No.822 of 2014 on the file of the Addl.Judge-cum-VI Senior Civil Judge, Hyderabad, filed for partition and separate possession of the plaint schedule property bearing M.No.5-3-602, ground floor, admeasuring 540 sq.ft. situated at Osmangunj, Hyderabad and declaring that the plaintiff is entitled to 1/3rd share therefrom along with other two defendants and also to award mesne profits at the rate of Rs.15,000/- to the plaintiff from the date of filing of suit till date of actual delivery of 1/3rd share in the suit schedule property. During the trial, for non-appearance of the petitioner/ D.2, for the trial Court passed judgment and decree, dt. 13.06.2017, the D.2 filed a petition I.A.No.67 of 2016 u/ sec.5 of the Limitation Act seeking to condone delay of 108 days in filing the application to set aside the *ex parte* decree passed in the suit supra with the averments in the affidavit that in the above suit he filed written statement and when the matter was posted for his evidence, due to Advocates' boycott on account of bifurcation sought of the High Court between the period from 6th June to 30th July, 2016, his counsel neither appeared nor filed his evidence and proceeded with the case. After call off of the boycott, since he was hospitalized and underwent operation for ulcer problem at Sunshine Hospital, he could not contact his counsel. Even after discharge he underwent post-operation treatment and also due to his old age and multiple ailments, he could not contact his counsel in time but after some recovery, he contacted his counsel and knew that an *ex parte* decree was passed against him for non-appearance

which is not willful nor wanton. He further averred that he has fair chances of winning the case if opportunity is given to contest. Hence sought for condoning the delay of 108 days in filing the petition for setting aside the exparte decree.

The 1st respondent/plaintiff in the condone delay application on the other side filed counter denying the averments of the affidavit of the petitioner/ D.2 submits that the petition is filed by the D.2 without any explanation for the delay and only to drag on the matter without filing any documents, only after the plaintiff filed final decree petition in I.A.No.7 of 2017 and also appointment of Advocate Commissioner to sell the suit schedule property in I.A.No.6 of 2017 and the same were pending. The petitioner/ D.2 has cross-examined the P.W.1 and D.W.1 and he failed to adduce evidence in spite of the Court granted several adjournments. The petitioner has to file appeal only against the judgment and decree and the present petition is not maintainable. The petitioner/ D.2 after expiry of father of the parties herein, illegally occupied the suit schedule property and carrying the business of their father and even after passing of judgment and decree neither came to division of the property nor settled the dispute and intentionally without giving share to the respondents i.e. plaintiff and D.1. Hence, to dismiss the petition. The D.1 also filed counter with the similar averments that of plaintiff.

The trial Court held that on perusing the docket proceedings, during the course of trial, the P.W.1's evidence was closed and the D.W.1's evidence was in progress and the petitioner also cross-examined both the P.W.1 and D.W.1 and for his absence, the evidence was closed on 03.06.2016. Even after closure of the evidence, the petitioner/ D.2 was present on 08.06.2016 and 17.06.2016, but could not take steps for

production of any evidence and to explain the earlier absence. In fact, he was never set *exparte* and the decree is not an *exparte* decree. Even after closure of the evidence on 03.06.2016, the matter underwent ten adjournments before pronouncement of judgment even prior to his admission in the hospital and after discharge from the hospital for a considerable long period but no reasons were given by the petitioner/ D.2 for his inaction. The further contention of the petitioner is that there was boycott of advocates from 03.06.2016 to 30.07.2016, when the matter was posted for his evidence and so his counsel could not appear before the Court but no explanation is offered as to why petitioner/ D.2 was not present on 03.06.2016 on which date his evidence was closed and thus, the boycott of the advocates has no role. In fact though the plaintiff also had the same problem during said period and his counsel did not appear before the court between 24.06.2016 to 02.08.2016, he appeared on 03.08.2016 and argued the matter. From the above, the trial Court dismissed the petition holding that the petitioner/ D.2 failed to show sufficient cause for his failure to make the application in time and further failed to show that the decree passed on 29.08.2016 was an *exparte* decree.

Impugning the said order, dt.13.06.2017 in I.A.No.67 of 2016, the D.2 filed the revision with the grounds in the revision that the order of the trial Court *per se* illegal and contrary to law. The trial Court failed to advert itself to the defence set forth by the revision petitioner that the plaintiff and D.1 sailing together, ought not have found that the decree is one passed u/ O.17 Rules 2 and 3 of CPC. The findings of the Court below in the absence of an issue of estoppel by conduct and *res judicata* are perverse and bad in law and purely on surmises and conjunctures. The trial Court failed to consider that the decree passed

by it is not on merits by recording his evidence. Hence, to set aside the order impugned herein by allowing the revision.

Heard the learned counsel for the revision petitioner/ D.2 who reiterated the contentions in the revision grounds and the learned counsel for the revision 1st respondent/plaintiff and the revision 2nd respondent/ D.1 is only a proforma party and perused the material on record.

Undisputedly, from the petition averments covered by the impugned order of the lower Court, shows that the in the above suit he filed written statement he was hospitalized and underwent operation and even after discharge he underwent post-operation treatment and thus he could not contact his counsel in time but after recovery when he knew that an ex parte decree was passed against him for non-appearance, he filed condone delay petition to set aside the ex parte decree and also filed medical certificate.

In fact, from perusal of the order, the lower Court not believing the medical certificate produced by the D.2, held that sufficient cause for his failure not shown to condone the delay and dismissed the petition. It is a fundamental thing to be kept in mind in adopting a pragmatic approach in considering the application for condoning delay u/ sec.5 of the Limitation Act or under Order XLI Rule 3(A) CPC, as the case may be, that once delay is explained for the whole period, there is no requirement of the same to be explained for each day's delay, if the delay is one and the same that too when medical certificate is filed saying he could not attend all through for the reason covered by the medical certificate of ulcer problem but for to cover the entire period to condone delay or not within the meaning of sufficient cause for

existence from the pragmatic approach to decide the suit on merits that point was not adverted to by the lower Court, leave about the plaintiff and the D.1 came to understanding to settle the issue. Hence, the impugned order is liable to be set aside. However, the fact remains that the very application under O.IX Rule 13 CPC which is stated still pending will not lie but for remedy of appeal for the reason it is not an exparte decree since there is evidence on record from written statement contest, that of P.W.1 and D.W.1 merely because this petitioner (D.2) for whatever the reason did not come to witness box, the same cannot be called exparte decree, but decree on merits. As such for any delay in filing of appeal, this period can be sought to consider under Section 14 of the Indian Limitation Act, apart from till date of filing Order IX Rule 13 CPC application, to seek for condoning under Order XLI Rule 3(A) CPC r/w Sec.5 of the Limitation Act.

Having regard to the above and in the result, the Civil Revision Petition is disposed of. Consequently, miscellaneous petitions, if any, pending in this revision, shall stand closed.

JUSTICE Dr. B.SIVA SANKARA RAO

Date:21.12.2017

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