

THE HON'BLE SRI JUSTICE N.BALAYOGI

C.R.P. No.6942 of 2017

JUDGMENT :

This revision under Article 227 of constitution of India is filed seeking to set aside the order dated 12.10.2017 dismissing I.A.No.719 of 2017 in O.S.No.254 of 2010 on the file of Senior Civil Judge, Vizianagaram.

2. The contention of the petitioner is that he is the defendant in the suit filed by the respondent herein for recovery of earnest money of Rs.3,94,366/- basing on an agreement of sale dated 27.4.2007. Pending the suit, the petitioner herein filed I.A.No.118 of 2016 under Section 45 of the Indian Evidence Act to send the suit agreement to handwriting expert and the same was allowed on 20.04.2017 with a default class imposing certain conditions. Ultimately, the said I.A. was dismissed for default on 16.08.2017. Seeking to set aside the same, the petitioner filed I.A.No.719 of 2017 under Order 9 Rule 9 r/w Section 151 C.P.C. By the impugned order, the said I.A. was dismissed.

3. It is contended by the counsel for the petitioner that the trial Court dismissed I.A.No.118 of 2016 without considering the explanation offered by the petitioner. Originally, O.S.No.254 of 2010 was filed before the Senior Civil Judge, Vizianagaram, but subsequently, the same was transferred to the Court of Senior Civil

Judge at Parvathipuram. Later on, again, the said suit was transferred to Senior Civil Judge, Vizianagaram. In the intervening period, the date of listing of suit could not be noted as 'A' diary was not updated by the ministerial staff and as a result, the I.A. was dismissed for default.

4. It is further contended that the respondent-plaintiff filed a memo before the Court to stop implementation of the order dated 20.04.2017 in I.A.No.118 of 2016 for preferring C.R.P. before this Court and on such memo, the matter was adjourned and the Court below erred in dismissing the I.A.No.118 of 2016 for default. It is further contended that the counsel for the petitioner was present in the Court on 16.08.2017 and filed Demand Draft for Rs.3,000/- drawn in favour of Forensic Science Laboratory along with a memo and also produced the Service Record which contains the signature of the petitioner and in spite of the same, the Court below wrongly observed that the petitioner has not submitted his contemporary signatures even at the time of enquiry.

5. On the other hand, the learned counsel for the respondent contended that the alleged memo and Demand Draft were not filed into the Court below and in spite of taking time for filing the revision, the same was not filed and hence, the petitioner did not come to the Court with clean hands.

6. Now the point for determination is 'whether the impugned order of the trial Court suffers from legal infirmities warranting interference by this Court?

7. The petitioner herein is the defendant in the suit in O.S.No.254 of 2010 filed by the respondent herein for recovery of earnest money basing on agreement of sale dated 27.04.2007. In the suit, the evidence of plaintiff was closed and on behalf of defendant, D.Ws.1 and 2 were examined on 25.1.2017. At that stage, the defendant, who is the petitioner herein filed I.A.No.118 of 2016 under Section 45 of the Indian Evidence Act to send the suit agreement to handwriting expert and the same was allowed on 20.04.2017 with a direction to the petitioner herein to produce contemporaneous signatures and also to deposit Rs.3,000/- towards expert fee, failing which, it was made clear that the petition shall stand dismissed and the matter was adjourned to 15.6.2017. Admittedly, the petitioner did not comply with the said conditions within the stipulated time and as a result, the said petition stood dismissed.

8. To substantiate the readiness of the petitioner, it is stated that on the last date of hearing, the petitioner filed a memo along with demand draft for Rs.3,000/- drawn in favour of Director of Andhra Pradesh Forensic Science Laboratory dated 10.10.2017 and filed in the Court, but during the arguments, the petitioner's counsel stated that he was not aware whether the same is filed into the Court or not. As the matter

stood thus, the memo and demand draft and contemporary signatures of the petitioner were not on record.

9. The petitioner herein clearly explained the reasons for non-compliance of the conditional order dated 20.4.2017 stating that on 19.7.2017 counsel for the respondent-plaintiff filed a memo stating that he wants to prefer a revision against the orders dated 20.4.2017 and requested the Court to stop further implementation of the order dated 20.4.2017. Hence, the matter was posted to 02.08.2017 and lastly adjourned to 16.08.2017. The office of the Court did not note down the postings of the case in the diary on 09.08.2017 and hence, the date of adjournment to 16.8.2017 was not noted down by the clerk of the advocate. It was also stated that the petitioner is 65 years old suffering with cancer and was admitted at Basavatarakam Cancer Research Institute at Hyderabad and is undergoing treatment including Chemotherapy. Due to the said ailment, he neither attended the office of his advocate nor present in the Court. As such on 16.08.2017 the Court dismissed I.A.No.118 of 2016 for default. In fact, the counsel for the petitioner expressed his readiness to deposit the amount as per the order of the Court on 19.06.2017, but the Court informed the counsel to comply with the formalities as per the letter of the Forensic Laboratory. It is only on 28.9.2017, on return from Hyderabad, the petitioner could receive the telephonic information from the advocate about the dismissal of the I.A. for default on 16.08.2017.

10. The above circumstances and reasons explained by the petitioner clearly show that the absence of the petitioner on the specific date is neither wilful nor wanton. Further, as the petitioner-defendant wants to compare his signatures along with contemporary signatures, to arrive at a just and right conclusion and also taken demand draft for the said amount, no prejudice or loss to the respondent herein will be caused if the C.R.P. is allowed. The balance of convenience lies in favour of the petitioner.

11. Accordingly, the revision is allowed and the impugned order is set aside I.A.No.719 of 2017 shall stand allowed. The petitioner is directed to produce the original demand draft along with original contemporary signatures that are relevant for comparing with the signatures on the suit agreement before the trial Court within 3 weeks from the date of receipt of a copy of the order by the trial Court. No costs.

Consequently, Miscellaneous Petitions pending, if any, shall stand closed.

JUSTICE N.BALAYOGI

29th December, 2017

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