

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION Nos.7317 and 7318 of 2017

COMMON ORDER:

The revision petitioner Nos.1 to 3 are defendant Nos.4, 3 and 7 respectively, among sixteen defendants, in O.S.No.74 of 2000 on the file of the Senior Civil Judge, Nizamabad, which is a suit for partition of the plaint schedule properties described therein, filed by eleven plaintiffs of whom plaintiff Nos.1 and 2 died and among some other plaintiffs are brought on record and plaintiff No.3 died and stated no legal representatives to her. There was a partition preliminary decree, dated 18.12.2008. Impugning the partition preliminary decree, the revision petitioners supra filed A.S.No.30 of 2009 on the file of the I Additional District Judge, Nizamabad. While so, the said appeal was dismissed for default on 08.07.2013 and according to revision petitioner No.1, on came to know, he filed a petition in I.A.No.183 of 2017 in A.S.No.30 of 2009 to set aside the default dismissal order with a delay condonation of 1331 days and to restore the appeal is thus pending to consider.

2. After passing of the preliminary decree, I.A.No.424 of 2009 in O.S.No.74 of 2000 filed for passing of final decree by the plaintiffs against the defendants, there Advocate Commissioner was appointed and commissioner filed report and the final decree was passed on 13.12.2011 in terms of the preliminary decree. The plaintiffs and defendant Nos.8 and 10 to 15, shall have in respect of their shares worked out in preliminary decree, have to pay stamp duty for

engrossing the decree of half of the share allotted of red colour to them and another half of share of blue colour allotted to defendants and against that order, dated 13.12.2011, unnumbered appeal in A.S.CFR.No.3971 of 2014 is filed by defendant Nos.4, 3 and 7 ie., the revision petitioners herein with delay condonation application in I.A.No.1519 of 2014 of delay of 51 days. The delay condonation affidavit in support of the petition referring as 166 days (51 days delay) filed under Order XLI Rule 3A C.P.C. and Section 5 of the Limitation Act speaks that the final decree was passed on 13.12.2011, but the plaintiffs did not deposit the stamp duty till 19.02.2014 and the final decree was prepared on 19.02.2014 and the copy application was filed on 01.04.2014 and there is a delay of 39 days in filing copy application, the copy was made ready on 10.07.2014 and there is a delay of 40 days from 10.07.2014 to the date of appeal filed on 20.08.2014 and there is also delay of nearly 11 days to the filing of the copy application made on 01.04.2014 from the decree prepared on 19.02.2014 and thereby the total delay of 51 days to be condoned and otherwise for the 166 days from the date of passing of the final decree to the date of filing of the appeal. That I.A.No.1519 of 2014 is under contest. While so, the self same defendant Nos.4, 3 and 7 supra, the appellants of the unnumbered appeal with delay condonation petition in I.A.No.1519 of 2014 supra, filed I.A.C.F.R.No.4580 of 2017 in I.A.No.1519 of 2014 seeking withdrawal of the I.A.No.1519 of 2014. Apart from it, another fresh application in IA.CFR.No.4581 of 2017 to condone the delay of 880 days in filing the appeal saying final decree

passed on 13.12.2011 and the delay till the appeal filed against the final decree on 20.08.2014 comes to 880 days and from 21.08.2014 to 16.09.2017 is 1123 days, total 2003 days, to be condoned till filing of this petition since I.A.No.1519 of 2014 is seeking to withdraw with liberty to file the present petition in I.A.C.F.R.No.4580 and 4581 of 2017. These petitions were returned on maintainability including on resubmission and impugning the said returns, the present revisions are filed.

3. Heard both sides and perused the grounds urged in the revisions and the other material on record.

4. So far as the preliminary decree passed that was subject matter of the appeal A.S.No.30 of 2009 concerned, that appeal later dismissed for default and restoration application pending is different to the consideration of the present revision petitions against the return of the unnumbered appeal against the final decree with delay condonation sought in I.A.No.1519 of 2014 and withdrawal of that petition with liberty to file fresh petition that is enclosed covered by two revisions supra.

5. The bar under Section 97 C.P.C. applies to maintain appeal against a final decree, if no appeal filed against preliminary decree is different from the appeal against preliminary decree filed and even it was dismissed since restoration application is stated pending without final disposal of the same. Thereby, technically the unnumbered appeal against the final decree petition is maintainable, but for to decide on merits along with if at all the petition to restore the

dismissal appeal against the preliminary decree, if any if before same Court.

6. Coming to the I.A.No.1519 of 2014, the application to condone the delay in filing the unnumbered appeal against the final decree, there is another application filed seeking to reject the application to condone the delay sought for. Withdrawal of an application for any technical objection or defect with leave to file a fresh petition can be permitted and same equally applies from reading of Section 144 C.P.C. to interlocutory application also in relation to the defect in filing of the final decree application with delay condonation since the delay condonation application is stated defectively filed instead of asking the total correct period to be condoned in filing with delay, incomplete period mentioned wrongly in I.A.No.1519 of 2014. Once such is the case, it is then to consider the limitation starts in a partition suit preliminary decree is from the date of engrossing the final decree on non-judicial stamps or from the passing of the order in a final decree application. This Court another Single Judge expression in **G.Subramanyam (died) rep. by his L.Rs. and others v. B.Raghunath (died) rep. by his L.Rs. and others**¹ referred to the earlier expressions of the Apex Court and this Court, held the limitation to file an appeal against a final decree commenced form the date of passing of preliminary decree and not from the date of engrossment of the final decree. If such is the case, in filing an appeal against the final decree, the total period right from passing of the

¹ 2017 (3) HLT 227

preliminary decree orders till filing of the unnumbered appeal is sought to be condoned and it is wrongly earlier sought the period as if 51 days or 166 days, as the case may be, instead of total period from 880 days commencing from 13.12.2011 to 20.08.2014. So far as the subsequent period from 21.08.2014 till filing of the fresh petition subject to permission to withdraw I.A.No.1519 of 2014 referred supra is under Section 14 of the Limitation Act sought of 1123 days. A condone petition under both the provisions is even maintainable under Section 5 of the Limitation Act read with Section 14 of the Limitation Act in view of such contingency. Undisputedly, an amendment of the petition in I.A.No.1519 of 2014 itself can be sought for correction of the period 51/166 days mentioned to 880 days at best, however, the petitioners want to withdraw that petition and file fresh petition. Once such is the case, the repeated return of these applications by the lower Court, which are subject matter of the two revisions, is not sustainable, but for to pass orders in entertaining or rejecting on own merits.

7. Accordingly and in the result, the two revisions are allowed to the extent by directing the lower Court to hear the parties and pass a detailed order in respect of the impugned applications, within one month from the date of receipt of a copy of this order.

Miscellaneous petitions pending, if any, shall stand closed. No costs.

Dr. B. SIVA SANKARA RAO, J

22nd January 2018.
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