

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN

Civil Revision Petition Nos.7330 and 7528 of 2017

ORDER:

Aggrieved by the dismissal of the applications under Section 5 of the Limitation Act, 1963 seeking to set aside an *ex parte* decrees, the 2nd defendant in a suit for declaration and consequential injunction, has come up with the above revision petitions.

2. Heard Mr. VSRMV Prasad Sanaka, learned counsel for the revision petitioner and Sri Narasimha Rao Gudiseva, learned counsel for the 1st respondent/plaintiff.

3. Though the Civil Revision Petitions arise out of two different suits, O.S.Nos.133 of 2011 and 135 of 2011, the revision petitions have been taken up together for disposal on account of the fact that the parties to the litigation are one and the same. The 2nd defendant in both the suits, who is the petitioner in both the revisions, is one and the same person. The 1st respondent in these revisions, who was the plaintiff in both the suits, is the one and the same person. The number of days of delay and the reasons for the delay are also the same.

4. The positive case with which the petitioner sought condonation of delay was that he did not receive suit summons and that the 1st respondent managed the endorsement as though the suit summons were received by his wife. It was the case of the petitioner that only after receipt of notice in the Execution Petition, he rushed to Machilipatnam and found out that the suit had been decreed *ex parte* on the basis of an endorsement as though one Lakshmi

had received summons. The petitioner pleaded fraud and also contended that after he was set *ex parte* in the suit, the plaint itself got amended including the change of survey number etc. According to the petitioner, when major amendments were sought, the Court was obliged to order notice despite the defendant having been set *ex parte* in the suit.

5. The application for condonation of delay was opposed by the 1st respondent/plaintiff contending that the suit summons were properly served and that the delay was not properly explained. Curiously, the 1st respondent/plaintiff did not contest the claim of the petitioner that the plaint underwent major amendments ordered without notice.

6. In the light of the reasons stated for the delay, the Court ought to have seen the original records to find out the person on whom suit summons were served and whether the person, who allegedly received the suit summons, had anything to do with the petitioner at all. Instead of doing all that, the trial Court dismissed the condone delay petition by a curious reasoning, found in paragraph 6 of the impugned order.

7. Paragraph 6 of the impugned order in both these cases, which alone contains the reasons for refusing to condone the delay, reads as follows:

"It is the main contention of the petitioner that he came to know about the filing of the suit against him and passing of the *ex parte* decree when he received the copies in E.P.No.71 of 2015 in O.S.No.135 of 2011. However, the petitioner not stated in his affidavit when he received the copies in E.P.No.71 of 2015. Unless the petitioner established about the date of notice of passing of exparte decree, this Court cannot ascertain whether the said delay is normal or abnormal and the cause shown by the

petitioner is sufficient to condone the said delay. Whereas the petitioner not stated the date when he came to know about the passing of exparte decree against him, it has to be presumed that the petitioner has knowledge about the passing of the exparte decree against him since the date of exparte decree i.e. dated 16.11.2012. The affidavit of the petitioner does not disclose the sufficient cause for condonation of abnormal delay of 930 days.”

8. It is seen from the portion extracted above, that the core issue whether suit summons were served and if so, upon whom and as to whether the person upon whom it was served was connected to the petitioner, was not even addressed by the Court below. Therefore, the impugned orders are liable to be set aside for total non-application of mind.

9. If the impugned orders are set aside on the ground of non-application of mind to the core issues, then the course of action normally open to this Court is to remit the matter back. But I do not wish to do so for the simple reason that the suit is of the year 2011. The claim of the petitioner that the suit summons were not served on him, is not even contested by the 1st respondent/plaintiff seriously. Therefore, the averments have gone unchallenged and hence, they are liable to be accepted.

10. In view of the above, the Civil Revision Petitions are allowed, the impugned orders are set aside and the applications for condonation of delay shall stand allowed.

The trial Court is now directed to take up the applications for setting aside the *ex parte* decrees and dispose them of in accordance with law, within a period of two (2) months from the date of receipt of a copy of this order.

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

V. RAMASUBRAMANIAN, J

Date: 27-04-2018

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